No. 85548

IN THE
MISSOURI SUPREME COURT

BRANDON HUTCHISON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Lawrence County, Missouri
The Honorable David Darnold, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a Supreme Court Rule 29.15 Motion to Vacate Judgment and Sentence in the Circuit Court of Lawrence County, Missouri. The convictions sought to be vacated were for two counts of murder in the first degree, §565.020, RSMo 2000, for which the sentence was death. Because of the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Brandon Hutchison, was convicted of two counts of first degree murder and sentenced to death in Lawrence County, Missouri (L.F.116,117).

The evidence was stated by this Court as follows:

> On December 31, 1995, Freddie Lopez and his wife, Kerry Lopez, threw a small New Year's Eve party in the garage adjacent to their house. Ronald and Brian Yates arrived at the party shortly after midnight. They were looking for their brother, Tim Yates, who had already left. Freddie Lopez invited them to stay for a few beers.
>
> During the party several of the guests became intoxicated, including appellant, Brandon Hutchison. Freddie Lopez and Ronald Yates shared a line of methamphetamine. Hutchison caused a minor disturbance when he punched another guest, Jeremy Andrews, for no apparent reason. Andrews also observed Hutchison make shooting motions with his hand towards the Yates brothers.
>
> At about 4:00 a.m., Freddie and Kerry Lopez went into the house to continue an argument that they had started in the garage about how much alcohol Kerry was drinking. Several of the party-goers went home, leaving only Hutchison, Michael Salazar, and Ronald and Brian Yates in the garage.
>
> About twenty minutes later, Hutchison ran into the house and pounded on the Lopez's bedroom door, saying that "something bad had happened in the shop." Salazar called for Freddie Lopez from the porch. When Lopez came out, Salazar was holding a .25 caliber revolver. He told Lopez that he had shot someone. Lopez entered the garage and saw both Yates brothers lying on the floor. Salazar told Lopez that one of the brothers had tried to stab him.

Autopsies of the brothers showed that they had been shot at point blank range with a .25 caliber gun. The bullet that hit Ronald Yates lodged in his spinal cord, paralyzing him from the waist down. Brian Yates sustained a relatively minor bullet wound to the chest and a more serious one to the stomach. Medical evidence established that both brothers were still alive, however, when Lopez found them on the garage floor. Lopez testified that he saw Ronald Yates gasp.

Hutchison insisted that nobody call an ambulance and that Ronald Yates was already dead. He then suggested that they remove Ronald and Brian Yates from the garage in Lopez's white Honda Accord. Hutchison and Salazar put Ronald Yates in the trunk first, then Hutchison put Brian Yates in the trunk on top of Ronald after dragging him by his shoulders, dropping him on the floor, and kicking him in the upper body. Meanwhile, Salazar went into the house to fetch a drug scale and a .22 caliber handgun, which he also put in the Honda. The three men took off in the car with Hutchison driving.

After driving ten to fifteen minutes, Hutchison pulled over on the side of a dirt road. He and Salazar got out and walked to the back of the car. Lopez testified that as Hutchison climbed out of the car, he held the .22 caliber pistol and said, "we got to kill them, we got to kill them." Lopez heard several gunshots and then Hutchison and Salazar got back into the car. Lopez testified that Hutchison was still clutching the gun when he returned to his seat.

They proceeded to a nearby creek bed where Lopez dropped bullet casings in the water and Hutchison buried both the .25 and the .22 caliber guns, which he had wrapped in his tee-shirt. Then they drove to the trailer home of a mutual friend, Troy Evans. Hutchison pounded on Evans' door until Evans let

them inside. Evans' girlfriend, Frankie Young, noticed Lopez's white Honda parked in front of the trailer. Hutchison begged Evans for permission to take a shower because he had blood on one of his hands. Lopez and Salazar made several phone calls. One call was to a girlfriend of Salazar who lived in Yuma, Arizona.

The three men returned to the Lopez's house. Shortly thereafter, Kerry Lopez noticed a significant amount of blood on the Honda's back bumper. Hutchison and Salazar left in the Yates brothers' car and drove to a girlfriend's house. She gave them a ride to the Joplin bus station where they bought two tickets to Yuma, Arizona.

At around 8:00 a.m., Ronald and Brian Yates's dead bodies were found on the side of the road. Both had died of execution-style gunshot wounds to the head from .22 caliber bullets. Ronald Yates had sustained a shot in each eye and one to the back of the head, and Brian Yates had sustained one shot in the right eye and one in the right ear. The Yates brothers' hair and blood were found on a piece of carpet that was found with the bodies. Fiber analysis determined that the carpet came from the trunk of Lopez's car.

Hutchison and Salazar were apprehended several days later in California. State v. Hutchison, 957 S.W.2d 757,759-760 (Mo.banc1997). This Court affirmed appellant's convictions on November 25, 1997. Id.

On March 20, 1998, appellant filed his pro-se motion for post-conviction relief, and following appointment of counsel, appellant's amended motion was filed on July 13, 1998 (PCR.L.F.1). Following an evidentiary hearing on some claims, the motion court, the Honorable J. Edward Sweeney, denied appellant's motion on October 10, 2000 (PCR.L.F.7).

On November 20, 2001, this Court reversed the denial of appellant's motion and remanded for an evidentiary hearing on the issue of whether one of appellant's co-defendant's had a plea agreement with the State and if a plea agreement was present, whether that evidence was material.[1] Hutchison v. State, 59 S.W.3d 494, 496 (Mo.banc2001). This Court did not address any other claims raised by appellant. Id.

On remand, appellant successfully moved to disqualify Judge Sweeney from the remand post-conviction hearing; Senior Judge David Darnold was appointed to preside over the remainder of the proceeding (Remand.PCR.L.F.34-42,49).

An evidentiary hearing was held on multiple dates between August 2002 and December 2002, including testimony via deposition (Remand.PCR.L.F.11-13).

On July 21, 2003, the motion court issued its findings of fact and conclusions of law, denying appellant's claims (Remand PCR.L.F.108-126).

On July 28, 2003, appellant filed a motion to reopen the cause for additional evidence; the motion court denied appellant's motion (Remand PCR.L.F.14-15).

[1]Appellant has since abandoned his claim that the prosecutor had a deal prior to trial with Freddy Lopez that he failed to disclose to the defense.

ARGUMENT

I.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT THE PROSECUTOR ENGAGED IN MISCONDUCT AND THAT APPELLANT WAS DENIED EQUAL PROTECTION UNDER THE LAW BY THE PROSECUTOR OFFERING APPELLANT'S CO-DEFENDANT, FREDDY LOPEZ, A LIGHTER SENTENCE ALLEGEDLY ON THE GROUND THAT LOPEZ WAS ABLE TO PAY THE VICTIM'S FAMILY MONEY BECAUSE APPELLANT HAS FAILED TO PROVE HIS CLAIM IN THAT THE MONEY PAID BY LOPEZ WAS PART OF A WRONGFUL DEATH CIVIL SETTLEMENT NOT A PART OF THE CRIMINAL PROSECUTION, THE PROSECUTOR MADE THE REQUEST FOR THE LIGHTER SENTENCE FOR LOPEZ DUE TO HIS LESSER CULPABILITY AND THE VICTIM'S FAMILY'S REQUEST, AND THE PROSECUTOR DID NOT SEEK THE DEATH PENALTY AGAINST APPELLANT BECAUSE HE WAS INDIGENT.

Appellant claims that the prosecutor engaged in misconduct and appellant was denied equal protection under the law by the prosecutor making a plea agreement with appellant's co-defendant Freddy Lopez, which allegedly included a lighter sentence if Lopez paid the victim's family $200,000 (App.Br.41). Appellant alleges that he received the death penalty because he was indigent and could not pay the victim's families (App.Br.41). Appellant claims that wealth is an arbitrary classification, that the prosecutor engaged in disparate treatment, and that appellant was denied due process, equal protection, and freedom from arbitrary and capricious sentencing (App.Br.41).

Relevant Facts

In January of 1996, appellant, Freddy Lopez, and Michael Salazar were charged with two counts of first degree murder for the deaths of Tim and Brian Yates (Supp.L.F.1; Movant's Exhibits 64,66-69). Due to scheduling and court dockets, appellant went to trial first (George Depo.Tr.9). Lopez testified for the State at appellant's trial (Tr.1068-1252). Although Lopez, who at that time was represented by Dean Price, and the prosecutor had been in discussions about a plea agreement for Lopez, no agreement had been reached at the time Lopez testified (Tr.141-143,1068-1252;RemandPCR.Tr. 152,207,209,220,230,233-234; George Depo.Tr.17-21). Appellant was convicted of both counts of first degree murder and received the death penalty for both convictions (Tr.1956,1985).

Following appellant's trial, Lopez hired different counsel, Dee Wampler and Shawn Askinosie (Remand PCR Tr. 130). Wampler was contacted by Lopez's family in California; the family informed Wampler that they had won the California lottery and would be able to pay his fee (Remand PCR.Tr.130). Lopez then refused to cooperate any further with the State and the prosecutor's office started to prepare for Lopez's trial, including filing their intent to seek the death penalty (Remand PCR.Tr.243).

In the meantime, Michael Salazar was the next co-defendant to proceed to trial (Movant's Exhibit 62A). Freddy Lopez did not testify during Salazar's trial (Remand PCR.Tr.243; Movant's Exhibit 62E). Salazar was convicted of both counts of first degree murder and was sentenced to life on both counts; the jury rejected the prosecutor's request for death (Movant's Exhibit 62J at 1747).

Following Salazar's trial, Lopez's attorney Dee Wampler contacted a civil attorney, Dan Sivils, to represent Lopez in a civil suit with the victims' families (Remand PCR.Tr.47,84). Sivils and the Yates family attorney, Stephen Hayes, worked out a settlement agreement in a

"friendly suit" where Lopez would pay the family $200,000 plus $30,000 for attorney's fees if the family would recommend to the prosecutor that Lopez only receive ten years for each count of murder (Remand PCR.Tr.48-49). The other stipulation for the settlement was that Lopez would actually have to receive ten years on each count of murder (Remand PCR.Tr.48-51; Movant's Exhibit 85).

The family agreed to the settlement terms and met with the prosecutor, Bob George, asking him to recommend two concurrent ten year sentences to the judge if Lopez pled guilty (George Depo.Tr.48-49). Although the family informed the prosecutor that there had been a civil suit and that their recommendation was based in part because of the settlement, the prosecutor told the family that he did not want to know the terms of the suit; the family did not tell the prosecutor any other information about the settlement (George Depo.Tr.47-49). The prosecutor believed that Lopez should receive a greater sentence, but also believed that he was not as culpable as the other defendants because he had cooperated with law enforcement and the prosecution (Movant's Exhibit 79 at 26-29).

Lopez made a non-binding open plea of guilty (Remand PCR.Tr.157). The prosecutor, at the family's request, recommended to the judge that Lopez receive ten years on each count, stating at the Lopez sentencing that:

> But the State would comment that in this particular case that we've made a recommendation of 10 years in this case and it's based on a request from the victims in this case. We believe that this case could have went forward and we have a position that we could have went forward on a first degree murder case.
>
> We don't want this plea and this recommendation in any way to be felt by this Court or any other Court that this defendant was not involved in this particular case in a serious matter. We, I know often times, as the Court is well

> aware of in this case, that the first defendant was tried and received the death penalty. The second defendant received life without parole. And we believe that this defendant would have been found of first degree murder had we went through. But it's at the request of the victims that we make this recommendation to the Court.

(Movant's Exhibit 79 at 27-28). Lopez was sentenced accordingly (Movant's Exhibit 79 at 48-49). The sentencing judge agreed to the sentence because it was the family's wishes (Movant's Exhibit 79 at 46-49). The sentencing judge, J. Edward Sweeney, was aware that there was a civil settlement but was not aware of any of the terms of the settlement (with the exception that the family requested the ten year sentence) until the time of his deposition in the above cause (Sweeney Depo.Tr.25-26,31-33).

The motion court denied appellant's claim, finding that although appellant had proven that Lopez reached a civil settlement with the victims' family, he proved nothing else; appellant failed to prove any involvement by the prosecutor or the court in the civil suit; he failed to prove any unethical behavior by the prosecutor or the trial court; he failed to prove "justice for sale"; the money received by the victims' family was not "restitution" as characterized by appellant but was part of a separate civil settlement; there was no evidence that the prosecutor or trial court had any knowledge or involvement in the civil suit; that wealth was not a suspect class and he failed to establish that he was indigent at the time of trial; he was not similarly situated to Lopez; and he failed to establish that he was subject to disparate treatment and denied equal protection (Remand PCR.L.F. 122-126).

Standard of Review

This Court's review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. State v.

Ervin, 835 S.W.2d 905,928 (Mo.banc1992). The motion court's findings are clearly erroneous if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. Id.

No "Justice for Sale"

The motion court was not clearly erroneous in denying appellant's claim. Appellant's first claim, that his constitutional rights were violated because "justice was for sale," is refuted by the evidentiary hearing evidence. Appellant's claim is based on the mistaken premise that the prosecutor and/or the trial court were involved in the civil agreement. Neither the prosecutor nor the trial court gained anything from either the plea agreement or the civil agreement. Lopez did not make any "behind doors" deal with the prosecutor or the trial court to receive the sentence he received. The facts reflect that Lopez pled guilty to a non-binding open plea of guilty, the prosecutor requested a ten year sentence because the victims' family asked him to do so, the sentencing judge gave Lopez a ten year sentence because the victims' family asked him to do so, the prosecutor and the sentencing judge were not aware the Lopez had to receive a ten year sentence for the family to get the settlement, and the prosecutor believed that Lopez deserved a lighter sentence (although not ten years) because he was less culpable, he had assisted the police in their investigation, and he had testified against appellant.

The prosecutor did not "sell justice" to Lopez. The motion court was not clearly erroneous in denying appellant's claim.

No Denial of Equal Protection

Appellant also claims that Lopez receiving a ten year sentence denied appellant equal protection (App.Br.48-52). Without authority, appellant alleges that wealth is a suspect class and that under strict scrutiny review, the unequal treatment that he received denied him equal protection and due process (App.Br.48-52). Alternatively, appellant alleges, now on appeal, that even if wealth is not a suspect class, he is entitled to strict scrutiny review because "if the unequal treatment impinges on a fundamental right of liberty, like freedom from physical restraint" strict scrutiny review applies (App.Br.49).

Equal protection does not require that all persons be dealt with identically. State v. Baker, 524 S.W.2d 122,130 (Mo.banc1975). Equal protection does require, however, all persons similarly situated be treated in like manner. Kennedy v. Missouri Attorney General, 922 S.W.2d 68,70 (Mo.App.W.D.1996). The Equal Protection Clause does not forbid the state the power to make classifications, as long as its classifications do not establish invidious discrimination or attack a fundamental interest. Id.

In the criminal justice system, the government has "broad discretion" as to whom to prosecute. United States v. Armstrong, 517 U.S. 456,116 S.Ct. 1480,134 L.Ed.2d 687 (1996); Wayte v. United States, 470 U.S. 598,105 S.Ct. 1524,84 L.Ed.2d 547 (1984). The guilty plea and the plea bargain are important components of this country's criminal justice system. Bordenkircher v. Hayes, 434 U.S. 357,98 S.Ct. 663,54 L.Ed.2d 604 (1978). Properly administered, they can benefit all concerned. Id. Plea bargaining is an integral part of the prosecutor's job. Id.; Ricketts v. Adamson, 483 U.S. 1,9,107 S.Ct. 2680,97 L.Ed.2d 1 (1987) (approving plea agreements as bargained-for exchanges,); Santobello v. New York, 404 U.S. 257,260, 92 S.Ct. 495 30 L.Ed.2d 427 (1971) (plea bargaining essential component of administration of justice); Brady v. United States, 397 U.S. 742,751-52, 90 S.Ct. 1463,25

L.Ed.2d 747 (1970) (plea bargaining mutually advantageous to defendant and prosecution); Whiskey Cases, 99 U.S. 594,599,25 L.Ed. 399 (1878) (well established that accomplice may achieve freedom from prosecution by testifying against associates).

In exchange for testimony or guilty pleas, the prosecutor has discretion to dismiss or lessen charges or choose not to file charges. See State v. Burson, 698 S.W.2d 557,561 (Mo.App.E.D.1985). The system enables a defendant to reduce his penal exposure and avoid the stress of trial while assuring the State that the wrongdoer will be punished and that scarce and vital judicial and prosecutorial resources will be conserved through a speedy resolution. See Brady, 397 U.S. at 752; Santobello, supra; Schellert v. State, 569 S.W.2d 735 (Mo.banc1978).

The prosecutor's discretion in charging decisions (including seeking the death penalty), plea bargain decisions, and other administration of justice decisions is based on the prosecutor's assessment of the strength of the case, the prosecution's general deterrence value, the enforcement priorities, caseload, desire for final disposition, statutory aggravating circumstances, type of crime, and the defendant's involvement in the crime as well as other factors. Armstrong, supra.; Santobello, supra; State v. Taylor, 18 S.W.3d 366 (Mo.banc2000).

Although prosecutorial discretion is broad, it is not unfettered and the selectivity in the enforcement of criminal laws is subject to constitutional restraints. Wayte, supra. The equal protection clause prohibits decisions in prosecution based on an unjustifiable standard such as race, religion, or other arbitrary classification, including exercise of protected statutory and constitutional rights. Armstrong, supra; Wayte, supra. A defendant must demonstrate that the administration of a criminal law is directed so exclusively against a particular class of persons with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of law. Armstrong, supra. There is a presumption that a prosecutor

has not violated equal protection; to overcome that presumption, a defendant must present "clear evidence to the contrary." Armstrong, supra; Wayte, supra; State v. Anderson, 79 S.W.3d 420 (Mo.banc2002).

In order to establish an equal protection violation, the proponent bears the burden of showing not only a discriminatory effect, but also that it was motivated by a discriminatory purpose. Wayte, supra; Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252,264-265,97 S.Ct. 555,50 L.Ed.2d 450 (1977); Taylor, supra. In order to establish a discriminatory effect, the defendant must show that the government failed to prosecute others who are similarly situated to the defendant. Armstrong, 517 U.S. at 469. "'Discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." McCleskey v. Kemp, 481 U.S. 279,107 S.Ct. 1756 (1987). And, while a discriminatory impact may itself be a factor in establishing an improper purpose, the former does not prove the latter--rather, the trier may consider a number of possible indicators and must make a determination from the totality of the circumstances. Id. 429 U.S. at 265-268; Washington v. Davis, 426 U.S. 229,240-242,96 S.Ct. 2040,48 L.Ed.2d 597 (1976).

A defendant who alleges discrimination in administration of criminal laws by the prosecutor must first present a prima facie case of discriminatory effect and purpose. Wayte 470 U.S. at 608; Castaneda v. Partida, 430 U.S. 482,493-495,97 S.Ct. 1272,51 L.Ed.2d 498 (1977); Davis, 426 U.S. at 241. Only if a prima facie case of prosecutorial discrimination is made out by the defendant does the state have any obligation to rebut his charges. See Castaneda, 430 U.S. at 494-495; Davis, 426 U.S. at 241.

Where, as here, it is alleged that a defendant's sentence of death violated the Equal Protection Clause, the controlling authority is McCleskey, supra. In McCleskey, a death-sentenced defendant adduced a statistical study which purported to show that prosecutors tended to seek death sentences more frequently when the victim of the homicide was white, and juries returned sentences of death more frequently in such cases. Id. 481 U.S. at 286-287. Affirming the decision of lower courts that this evidence failed to establish a prima facie case of racial discrimination, the United States Supreme Court held:

> [T]o prevail under the Equal Protection Clause, McCleskey must prove that the decision-makers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.

Id. 481 U.S. at 292-293. The decision of a prosecutor to seek a death sentence--like the decision of a juror to impose it--may rest upon an almost infinite number of variables involving the facts of the crime, the character of the defendant, and the quantum and nature of the proof of these facts. Id. 481 U.S. at 294-295. Accordingly, the court declined to rely upon "an inference drawn from the general statistics to a specific decision in a trial and sentencing," and found the statistical evidence offered by McCleskey to be "clearly insufficient" to establish a prima facie case of discrimination. Id. The court placed a particularly high threshold of proof where it is claimed that a sentence of death was sought or imposed for discriminatory reasons:

> Implementation of [criminal laws punishing murder] necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.

Id. 481 U.S. at 297. Moreover, a defendant "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty" because of prosecutorial discretion. McCleskey, 481 U.S. at 306-07; Gregg v. Georgia, 428 U.S. 153,199,96 S.Ct. 2909,2937,49 L.Ed.2d 859 (1976).

In the case at bar, appellant failed to prove that the prosecutor's actions were in violation of the Equal Protection Clause. First, appellant failed to establish a discriminatory effect. In other words, appellant failed to establish that similarly situated defendants were not being prosecuted or the prosecutor did not seek the death penalty because they were not indigent. Although appellant established that his co-defendant received a plea bargain, appellant's co-defendant was not similarly situated. As the motion court found:

> although both were charged with first degree murder in connection with the killings of the Yates brothers, Lopez did not actually shoot the Yates brothers; movant did. Lopez talked to the police; movant did not. Lopez confessed to his involvement; movant did not. Lopez was less culpable and more cooperative with law enforcement than movant; therefore, the two are not similarly situated.

(Remand PCR.L.F.125). Thus, merely because appellant and Lopez were associated with the same crime, they were not similarly situated. Moreover, appellant failed to adduce any evidence that the prosecutor sought the death penalty against indigent people more than wealthy people or that there were any "similarly situated" people that the prosecutor failed to seek death on. Appellant failed to show any discriminatory effect.

Second, appellant adduced no evidence that the prosecutor had a discriminatory purpose. There is absolutely no evidence that the prosecutor sought the death sentence against appellant because he was indigent and sought a lighter sentence for Lopez because he was wealthy.[2] Not

[2]In fact, it was not Lopez who had any wealth or came up with the money to pay the civil

one witness testified that the prosecutor sought the death sentence against appellant for any inappropriate reason or that the prosecutor decided to plea bargain with Freddy Lopez for any inappropriate reason. The prosecutor did not take his actions "because of.....its adverse effects upon" indigent people. McCleskey, supra. Appellant does not even allege that the prosecutor had ill-feelings or had a discriminatory purpose towards indigent people or that he preferred the wealthy. Finally, appellant failed to produce any evidence that the prosecutor sought the death penalty against appellant because appellant, himself, was indigent. Appellant offered no evidence to support his claim.

In fact, the evidence and testimony established that the prosecutor sought the death penalty for appellant because he brutally killed two men, leaving them on the side of a road, after appellant had beaten the men, and stuffed the injured men into the trunk of a car, not to mention the other aggravating factors. The evidence also established that the prosecutor sought a lesser sentence for Lopez because he did not shoot either of the victims, he assisted law enforcement in their investigation, he assisted the prosecution by testifying against appellant, and the family requested a lesser sentence for Lopez. The prosecutor even stated on the record of Lopez's plea hearing that he believed Lopez should receive a lengthier sentence, but it was the family's request that Lopez receive a 10 year sentence. The motion court was not clearly erroneous in finding the hearing testimony credible. State v. Chambers, 891 S.W.2d 93,110 (Mo.banc1994) (Credibility determinations are for the motion court).

Appellant argues that this Court should ignore the hearing testimony and conclude that appellant was denied equal protection merely because one of his co-defendants received a lighter sentence. However, there is a presumption that a prosecutor has not violated equal

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settlement. Lopez's family in California won the California lottery and paid the civil settlement (Remand PCR.Tr.130). Freddy Lopez was not "wealthy."

protection and by failing to present "clear evidence to the contrary," appellant fails to establish an equal protection violation. Armstrong, supra; Wayte, supra. Absent any proof that the prosecutor had a discriminatory intent in his decision to prosecute appellant and seek the death penalty, the presumption remains that the prosecutor sought death because he committed a crime in which the United States Constitution and the laws of Missouri deem punishable by death. McCleskey, 481 U.S. at 296-297. ("[A]bsent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.").

Moreover, appellant has failed to establish that he is in a suspect class warranting strict scrutiny review. Poverty is not a suspect class requiring strict scrutiny. San Antonio Independent School District v. Rodriguez, 411 U.S. 1,93 S.Ct. 1278,36 L.Ed.2d 16 (1973); State v. Whitfield 837 S.W.2d 503,510 (Mo.banc1992). Therefore, as long as the prosecutor had a rational basis for his prosecutorial decisions, there is no constitutional violation. The prosecutor explained that he sought the death penalty against appellant because appellant had violently killed two men and Lopez made an open non-binding plea with the victims' family's recommendation of a sentence for ten years because the prosecutor abided by the family's wishes and because he believed Lopez was less culpable and had assisted the State. There is no constitutional violation where the State considers the wishes of the victim's family in deciding whether to seek the death penalty. McKenzie v. Risley, 842 F.2d 1525,1536,1537-38 (9thCir.1988)(no impropriety in state's refusal to go through with a proposed plea bargain when the contingency of obtaining the approval of the victim's family was not satisfied); Townsend v. State, 533 N.E.2d 1215,1222 (Ind.1989) (concluding that considering the feelings of the victim's family, among other things, does not make the decision to seek the death

penalty arbitrary); Huffington v. State, 500 A.2d 272,284-85 (Md.1985) (concluding that consulting with the victim's family after the State had already decided to seek the death penalty does not make the decision arbitrary); State v. Wilson, 316 S.E.2d 46,51 (N.C.1984) (rejecting defendant's due process and equal protection challenge and finding nothing impermissible about the prosecutor's consideration of the family's wishes as one factor in determining which defendants will be prosecuted for first degree murder and subjected to the death penalty). Moreover, the Missouri Constitution specifically allows the victims the opportunity to be heard. Article I, Section 32.1(2) of the Missouri Constitution.

Appellant claims now, for the first time on appeal, that he was denied equal protection and strict scrutiny applies because "the unequal treatment impinges on a fundamental right of liberty, like freedom from physical restraint" (App.Br.49). However, this claim was not raised in appellant's amended motion and should not be considered. State v. Johnson, 968 S.W.2d 686 (Mo.banc1998).

Even assuming that strict scrutiny review applies, the prosecutor's actions were justified by a compelling state interest. The prosecutor sought the death penalty against a man who violently killed two men–a crime by which the State and Federal Constitutions provide for that sentence. The prosecutor plea bargained with a man who was less culpable as he did not kill either of the men and who assisted law enforcement and the State with the apprehension, investigation, and prosecution of the two men who killed the Yates brothers. Plea bargaining and charging decisions are important part of the prosecutor's job and the administration of justice. Bordenkircher, supra.; Wayte, supra. These decisions assist in the deterrence in crimes, the desire for final disposition of cases, the saving of judicial resources, and the protection of society. Brady, supra; Armstrong, supra. The prosecutor's decisions were justified.

Finally, the fact that Lopez ultimately pled guilty to second degree murder and was sentenced to ten years is immaterial as it does not show that appellant's trial was somehow unfair, that appellant was not guilty of the crime charged or that the sentence, allowed by law, was not warranted in appellant's case. See Chambers v. State, 554 S.W.2d 112,114 (Mo.App.Sp.D.1977).

As for appellant's claim that the prosecutor's actions resulted in a denial of due process and freedom from the arbitrary imposition of death, it must also fail. The United States Supreme Court has held that a prosecutor's discretion in determining whether to seek the death penalty in a particular case does not render the death penalty arbitrary. Gregg, 428 U.S. 153 at 199.

The motion court was not clearly erroneous in denying appellant's claim as appellant has failed to establish that "justice for sale," that the prosecutor or the trial court was involved in the civil settlement, that the prosecutor engaged in misconduct, or that the prosecutor's actions were a violation of equal protection, due process, or arbitrary.

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

II.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT THE PROSECUTOR MISLED THE JURY BY ALLOWING THE JURY TO CONSIDER FREDDY LOPEZ'S ALLEGEDLY FALSE TESTIMONY THAT THE PROSECUTOR WAS NOT "GIVING DEALS" AND BY ARGUING TO THE JURY THAT LOPEZ WAS STILL CHARGED WITH FIRST DEGREE MURDER AND BECAUSE THE TESTIMONY AND ARGUMENT WERE NOT FALSE OR MISLEADING IN THAT ALTHOUGH LOPEZ AND THE PROSECUTOR HAD DISCUSSED THE POSSIBILITY OF A PLEA AGREEMENT, THE PROSECUTOR HAD NOT OFFERED LOPEZ A PLEA AGREEMENT, THE PROSECUTOR HAD NOT MADE ANY DECISION ABOUT WHETHER TO OFFER LOPEZ A PLEA BARGAIN, LOPEZ WAS TESTIFYING IN THE HOPES OF LENIENCY, AND LOPEZ WAS STILL CHARGED WITH FIRST DEGREE MURDER.

Appellant claims that the motion court was clearly erroneous in denying his claim that the prosecutor misled the jury by allowing the jury to "consider Lopez's false testimony that George [the prosecutor] was giving no deals and argued that Lopez convicted himself of first-degree murder and would be held responsible" (App.Br.53). Appellant alleges that prior to trial the prosecutor had agreed that if Lopez was a good state witness and testified truthfully, he would reduce charges from first-degree to second-degree murder and probably recommend a thirty year sentence and thus Lopez's testimony and the prosecutor's argument was false and misleading (App.Br.53).

Appellant misconstrues the facts adduced at trial and at the evidentiary hearing. Prior to trial, during a pre-trial hearing, the prosecutor, stated that:

We've had discussions with Mr. Lopez's attorney, Mr. Price, as to what we would recommend if Mr. Lopez testifies truthfully, but we haven't struck the final deal.

I want to see how Mr. Lopez is going to do on his depositions that we've got scheduled tomorrow. We had these scheduled through no fault of either the plaintiff or defense, Judge, we had to reschedule this past today's date. I would have been in a better position to answer that question today had that deposition taken place last week.

I don't know if we put Mr. Lopez on, if we do put him on and this would be my intentions, but I haven't made a formal deal with Mr. Lopez. If he testifies truthfully in this case based on his–the statements that we have and based on what we talk about tomorrow, if he does a good job as far as a witness and we think we're going to use him, we're probably going to recommend second degree murder on him with a range of punishment and term of years of thirty years. And that's–plus, he's going to have to plead guilty to a drug charge that's pending.

Now, that's all–I have discussed that with Mr. Price, but there's no formal written agreement and until I find out what kind of witness Mr. Lopez is going to make,–You know, his isn't a final deal yet. Now, they've agreed to pass their trial and he's agreed to testify for the State and we've so noted to the defense that he's a possible witness.

We may not even put Mr. Lopez on, but if we do strike a deal with him, I agree that they're entitled to receive notice of that. And as soon as we arrange something, I'll be glad to give them notice because I think it is a valid

impeachment issue on cross-examination. We wouldn't try to hold that back, but we have no formal agreement at this time. That's my understanding.

(Tr.141-143). During trial, Lopez testified during cross-examination, in relevant part:

Q. If I could have a second, Judge. Mr. Salazar, since you are still charged do you currently have any plea agreements with the prosecutors here in return for your testimony today?

A. It's Mr. Lopez.

Q. I'm sorry.

A. And no, I don't have no agreements with Mr. George as far as I know.

Q. Has any agreement been conveyed to you through your attorney in return for your testimony here today?

A. I've only–my lawyer only has told me what he wanted to ask for but no we have no deals being made right now. My lawyer has told me that the prosecutor has no-is not giving no deals.

Q. So your testimony here today is out of the goodness of your own heart?

A. To clear my conscious.

Q. Do you hope to get a deal?

A. I pray that I do.

Q. You hope that your testimony here today will avoid you getting a conviction for first degree murder?

A. I pray that it does.

(Tr.1242-1243).

During closing argument, the prosecutor argued:

> But we have an eyewitness that says he went along and he could have continued to lie about it if he'd wanted to. But remember this, ladies and gentlemen, Freddy Lopez is charged with murder in the first degree too. He didn't get out of anything. If anything, he convicted himself on the stand because he is responsible also. He went along also.

(Tr.1820).

During the evidentiary hearing, Dean Price, Freddy Lopez's first defense counsel, testified that, during his representation of Lopez, he had repeatedly gone to the prosecutor to ask for a plea bargain, that the prosecutor was not willing, prior to appellant's trial, to make a plea offer although they did have discussions of plea bargains, that Lopez wanted to testify at appellant's trial, and that the prosecutor was not offering a deal to get Lopez to testify but rather, Lopez was offering to testify in hopes that he would get a plea offer (Remand PCR.Tr.207-230).

Matt Selby, the former Assistant Lawrence County Prosecutor, testified that the prosecutor's office did not extend and was not willing to extend any plea offers to Lopez prior to appellant's trial (Remand PCR.Tr.233-234). Selby testified that they did not feel they needed Lopez's testimony to obtain a conviction against appellant so they were not willing to offer any plea agreements (Remand PCR.Tr.246). According to Selby, several months after appellant's trial, they offered Lopez a plea offer of second degree murder with a thirty year sentence; this offer was rejected by Lopez who counter-offered with second degree murder with a twenty year sentence (Remand PCR.Tr.236-237). The prosecutor's office decided to withdraw the plea offer (Remand PCR.Tr.239-240). The office then began preparing for trial, including filing their Intent to Seek the Death Penalty (Remand PCR.Tr.243).

Bob George, the Lawrence County prosecutor, testified that he did not extend any plea offers to Lopez prior to appellant's trial even though Lopez's attorney continued to ask George for a deal (George Depo.Tr.16-18). According to George, he did not decide whether he was actually going to use Lopez as a witness in the Hutchison trial until the day Lopez testified (George Depo.Tr.16). George testified that he told Lopez that he had an opportunity to testify in the Hutchison trial and that, if he was truthful in the case, the prosecutor's office might consider as to whether or not they would plea bargain (George Depo.Tr.24). According to George, after Lopez fired Price and hired new counsel, Shawn Askinosie and Dee Wampler, Lopez decided not to cooperate any further and George decided that they were forward with trial and would seek the death penalty (George Depo.Tr.38-39). Following Salazar's trial, the victim's family approached George about a plea agreement with Lopez and told George that they had received a monetary settlement if the family recommended ten year sentence for Lopez (George Depo.Tr.46-48). George agreed to make the recommendation to the trial court on the family's behalf but refused to know about or be a part of any negotiation of the civil agreement between Lopez and the victims' family (George Depo.Tr.48-50).

The motion court denied appellant's claim, finding that there was no deal prior to Lopez's testimony in appellant's trial and that Price, Lopez's attorney, was still trying to negotiate a plea agreement for Lopez months after trial (Remand PCR.L.F.114).

The motion court was not clearly erroneous in denying appellant's claim because the prosecutor did not mislead the jury. As the evidentiary hearing testimony reveals, Lopez had not received any deal from the prosecutor, the prosecutor was not willing to make any deals with Lopez at the time, the prosecutor did not know if he even wanted Lopez to testify at appellant's trial, and when the prosecutor made the closing argument, Lopez was still charged with first degree murder, he was going to be punished for his crimes, and that fact did not

change until months after appellant's trial. Lopez's testimony was not false-the prosecutor was not giving any plea agreements for his testimony. Lopez did inform the jury that he was hoping to get a deal and he hoped that the testimony that he gave in appellant's trial would help him get a deal. Lopez testified truthfully. The prosecutor's argument was not false or misleading—Lopez was still charged with first degree murder and there was no deal based on how Lopez testified. The prosecutor still had not decided whether to offer Lopez a plea bargain or not.

The cases relied upon by appellant, such as Napue v. Illinois, 360 U.S. 264,79 S.Ct. 1173,3 L.Ed.2d 1217 (1959), Banks v. Dretke, __ U.S. __,124 S.Ct. 1256,157 L.Ed.2d 1166 (2004), Giglio v. United States, 405 U.S. 150,92 S.Ct. 763,31 L.Ed.2d 104 (1972), Hayes v. State, 711 S.W.2d 876 (Mo.banc1986), and Commonwealth v. Strong, 761 A.2d 1167 (Pa.2000), where the State failed to disclose exculpatory evidence to the defense or failed to correct false testimony at trial, do not apply in the case at bar. As discussed above, the State disclosed to the defense that Lopez and the State had discussed potential plea bargains and Lopez testified truthfully. The jury was informed of Lopez's continuing interest in pleasing the State–Lopez informed the jury that he hoped to get leniency by testifying for the State. The fact that several months after appellant's trial the prosecutor decided to make a plea bargain with his co-defendant is of no consequence. The motion court did not clearly err in denying appellant's claim.

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

III.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIMS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT VARIOUS EVIDENCE AND WITNESSES REGARDING HIS BACKGROUND FOR MITIGATING EVIDENCE BECAUSE COUNSEL WAS NOT INEFFECTIVE IN THAT COUNSEL ACTED BASED UPON REASONABLE TRIAL STRATEGY; MUCH OF THIS EVIDENCE WAS CUMULATIVE TO EVIDENCE PRESENTED AT THE PENALTY PHASE; AND APPELLANT WOULD HAVE BEEN PREJUDICED BY THE EVIDENCE AS IT WAS DAMAGING TO HIS THEORY AT TRIAL.

Appellant raises several allegations of ineffective assistance of counsel for failure to investigate and present mitigating evidence of appellant's "background," including school, medical, mental health, and jail records, and his childhood psychiatrist (App.Br.64).

During appellant's penalty phase, trial counsel presented four witnesses on appellant's behalf. Appellant's parents, Bill and Lorraine Hutchison, testified about their love for appellant, appellant's difficult childhood, his problem with hyperactivity as a child, his problems with special education, his problems with drugs and alcohol, the move to Missouri from California, and appellant's work in construction (Tr.1918-1935). Dr. Bland, a psychologist, testified regarding appellant's special education as a child, appellant's borderline intellectual functioning, attention deficit disorder, and bipolar disorder, discussed appellant's version of the murders, and presented his report containing information about appellant's alleged sexual abuse (Tr.1876-1906). Frankie Young, appellant's friend, testified about appellant's willingness to help her family and appellant's respect for her family (Tr.1907-1913).

Appellant now alleges that this evidence was not sufficient and that trial counsel was ineffective for failing to present a myriad of other allegedly mitigating evidence (App.Br.47-48).

1) Dr. Parrish

Appellant pled that counsel was ineffective for failing to investigate and call Dr. Jerrold Parrish, appellant's childhood psychiatrist when he lived in California (PCR.L.F.80-82,134).

Parrish testified, via deposition for the evidentiary hearing, that he treated appellant from 1989 to 1993, ending when appellant was about sixteen years old, almost three years prior to the murders and that he diagnosed appellant with conduct disorder, solitary type, attention deficit hyperactivity disorder, alcoholism, and bipolar disorder (Movant's Exhibit 53 at 7,11). Parrish also stated that appellant had experienced episodes of depression (Movant's Exhibit 53 at 12). Parrish prescribed an antidepressant, lithium and Ritalin (Movant's Exhibit 53 at 15-16,26). Parrish testified that according to appellant, throughout treatment, he continued to use drugs including alcohol, speed, crystal methamphetamine, and crack (Movant's Exhibit 53 at 16). Parrish also testified that appellant told him that he had been subjected to sexual abuse as a child (Movant's Exhibit 53 at 17). Parrish testified that appellant was a follower, but admitted, that by his definition, approximately half the population are followers (Movant's Exhibit 53 at 19, 29).

Parrish admitted that he had no knowledge of appellant's current criminal case and when presented with hypotheticals regarding the facts of appellant's crimes, he refused to offer an opinion on whether appellant's actions in the murders were relatively minor or that appellant was under the domination of the co-defendants (Movant's Exhibit 53 at 42-49). Trial counsel, Shane Cantin, testified that although he knew that appellant had seen a psychiatrist while he lived in California, he was not familiar with the identity of the psychiatrist and had not

contacted him prior to trial (PCR.Tr.979). Cantin was aware, however, that the psychiatrist had diagnosed appellant with bipolar disorder (PCR.Tr.979-980). Trial counsel, William Crosby, testified that he was not personally aware of Dr. Parrish (PCR.Tr.1073).

In denying appellant's claim, the motion court held that Dr. Parrish was unfamiliar with the facts of movant's case which the State could have brought out at trial; that his testimony was too remote; that he either could not or would not offer any opinion regarding the prosecutor's hypotheticals; that appellant's family did not want the details of sexual abuse to be disclosed; that the medical records were virtually illegible and would not have been beneficial; and part of the treatment notes would have been detrimental to appellant (PCR.L.F.799-800).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or a death sentence has two components. Strickland v. Washington, 466 U.S. 668,687,104 S.Ct. 2052,2064,80 L.Ed.2d 674 (1984). Appellant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. 466 U.S. at 694. Appellant must also demonstrate that counsel failed in his duty to make a reasonable investigation or in his duty to make a reasonable decision that makes a particular investigation unnecessary. Id. 466 U.S. at 690-691.

The motion court was not clearly erroneous in denying appellant's claim because appellant was not prejudiced. There are five reasons that Dr. Parrish's absence did not prejudice appellant.

First, much of the evidence Dr. Parrish would have testified to was presented during the penalty phase of the trial. Dr. Bland's report and trial testimony included evidence of appellant's diagnosis of Attention Deficit Hyperactivity Disorder and Bipolar Disorder, the

effects of his drug and alcohol abuse and even his sexual abuse by a male family member (Tr.1876-1907; Defendant's Exhibit A). In fact, Bland's report was not only admitted into evidence at trial, but the jury specifically asked for the exhibit during their deliberation (Tr.1890,1956). As much of Dr. Parrish's testimony was merely cumulative to evidence presented during the penalty phase, trial counsel cannot be held ineffective for failing to introduce his testimony. Skillicorn v. State, 22 S.W.3d 678,683 (Mo.banc2000); State v. Johnson, 957 S.W.2d 734,755 (Mo.banc1997).

Second, appellant was not prejudiced because Parrish's testimony would have added little, if anything, to the picture developed by trial counsel of appellant during the penalty phase. Trial counsel presented the jury with a complete picture of appellant's life, including testimony by his mother about his difficult childhood including his learning disabilities, his attention deficit disorder, his difficulty with his special education, and the move from Fillmore to Palmdale, California (Tr.1919-1921,1934-1936). Testimony was also presented showing appellant's loving family, the fact that he was engaged to be married, and his two young children (Tr.1916,1934-1936). Frankie Young testified about appellant's respect for other people, appellant babysitting her children, and appellant helping her family at any time (Tr.1910-1911). Finally, as discussed above, Dr. Bland testified extensively regarding appellant's borderline intellectual functioning, his substance abuse, his account of the night of the murders, and also presented his report which encompassed discussion of appellant's prior sexual abuse, his history of attention deficit disorder, bipolar disorder, and his learning problems (Tr.1882-1888; Defendant's Exhibit A). Based on the comprehensive picture painted by trial counsel during the penalty phase, Parrish's testimony would have added little, if anything to the penalty phase. See Skillicorn, supra (counsel not ineffective for failing to put

on cumulative evidence, where presented comprehensive portrait of defendant during penalty phase).

Third, appellant could not have been prejudiced by counsel's failure to call Dr. Parrish because, as the motion court properly found (PCR.L.F.799-800), the State could have extensively cross-examined Parrish about appellant's treatment sessions, including evidence that appellant had vandalized a car and showed little remorse for his actions, that he was suspended from school for threatening and being abusive to a teacher, that appellant continually "ditched" school, that appellant continued to fight, his defiance towards his parents, and his reluctance to complete treatment for his drug and alcohol addictions (Movant's Exhibit 15, Deposition Exhibit B,C). Given the damaging information about appellant's prior violence and criminal activity contained in Parrish's records and his testimony, appellant cannot show that he was prejudiced by counsel's alleged failure in investigating and calling Parrish. See Taylor v. State, 126 S.W.3d 755 (Mo.banc2004) (Not ineffective assistance for failing to introduce prison records which, although contained evidence of good conduct, would have opened door to substantial rebuttal evidence regarding defendant's misconduct); Rousan v. State, 48 S.W.3d 576 (Mo.banc2001) (not ineffective for failing to introduce past prison and other records which although showed defendant worked well while in prison, they contained damaging information which could have been prejudicial); State v. Simmons, 955 S.W.2d 729,749-750 (Mo.banc1997) (not ineffective for failing to present mental health mitigating evidence where report also contained damaging information).

Fourth, appellant was not prejudiced because Parrish would not or could not offer any opinion regarding appellant's involvement in the murders when presented with hypotheticals regarding appellant's case (Movant's Exhibit 15 at 42-49). Therefore, his discussion of appellant's childhood would have little relevance.

Fifth, in light of the evidence presented at trial, Dr. Parrish's testimony would not have changed the outcome. The evidence showed that the victims were rendered helpless by bullet wounds from Salazar's gun. State v. Hutchison, 957 S.W.2d 757,766 (Mo.banc1997). Ronald Yates would have been paralyzed from the initial wound and both brothers were most likely in shock. Id. Appellant failed to render them any aid, but instead, insisted that no one call the paramedics. Id. Appellant then dragged the brothers, kicking Ronald Yates, and shoved both of the victims into the trunk of Lopez's car. Id. Appellant drove the vehicle, looking for a place to dump the bodies. Id. After stopping the vehicle, appellant dragged the victims out of the car, and proceeded to murder the Yates brothers, execution style, by shooting multiple bullets into their eyes and ears and then fled the State with Salazar. Id. During the penalty phase, John Galvan testified about appellant stabbing him and threatening him (Tr.1852-1853). Brandy Kulow testified regarding appellant's possession of a gun and pointing the gun at her (Tr.1858-1859). Detective Aleshire testified regarding the size of the trunk that the victims were stuffed into before appellant killed them (Tr.1862-1870). It is likely that the victims were still alive and conscious after they were stuffed into the trunk (Tr.1871). The victims' mother testified regarding the effect that their deaths had on their family (Tr.1872-1875).

Even assuming that Dr. Parrish would have testified, there is no reasonable probability that the jury would have concluded that the balance of the aggravating and mitigating evidence did not warrant death considering the totality of the evidence presented. See State v. Kenley, 952 S.W.2d 250,266 (Mo.banc1997). The motion court did not err in denying appellant's claim.

2) School, Medical, Mental Health and Jail Records

Appellant also claims that his counsel was ineffective for failing to present various records during the penalty phase (App.Br.47). Appellant alleges that the school, medical,

mental health, and jail records would further document his troubled childhood, mental health problems, drug and alcohol addiction, sexual abuse, attention deficit disorder, learning disabilities, memory problems, and other social and emotional problems (App.Br.47).

a) School records

During the evidentiary hearing, appellant admitted approximately 104 pages of records from his schools (Movant's Exhibits 4,5,6A,8,9A,16,18,19,20,21,22,23,24,25, and 32). The school records included evidence of appellant's experience in special education, his low grades, his psychological reports, including evidence of low self-esteem, unhappiness with school, and learning disabilities (Movant's Exhibits 4,5,6A8,9A,16,18,19,20,21,22,23,24,25, and 32).

Trial counsel Cantin testified that he did not recall if he had obtained all of appellant's school records, although he did remember that he had obtained some grade reports from appellant's mother (PCR.Tr.974,976). Trial counsel Crosby testified that Cantin had run into difficulties obtaining records from California (PCR.Tr.1067-1068). A teacher had informed them that appellant had a propensity to be a follower and latch onto a group of people as opposed to doing things entirely on his own (PCR.Tr.1067-1068). Trial counsel testified that they made a conscious decision to exclude evidence of appellant's problems in school, drug use, and sexual abuse the best they could while presenting other evidence that they knew would be useful (PCR.Tr.1046-1047).

In rejecting appellant's claim that his trial counsel was ineffective for failing to obtain and admit these school records as mitigating evidence during the penalty phase, the motion court found that although the records contained some beneficial information, they also contained detrimental information; the information was too remote; and the documents contained inadmissible hearsay (PCR.L.F.800).

The motion court was not clearly erroneous in denying appellant's claim. As the motion court found, appellant was not prejudiced by counsel's failure to obtain these school records because many of these records contained inadmissible hearsay (PCR.L.F.800). In fact, appellant does not even attempt to dispute the finding that these records contained inadmissible hearsay.[3] For example, appellant cites to Movant's Exhibit 4 which contains a psychological report which discusses reports from teachers about appellant's behavior to the psychologist. These statements by the teachers in the reports would have been inadmissible hearsay in trial. Counsel is not ineffective for failing to introduce inadmissible evidence. State v. Twenter, 818 S.W.2d 628,638 (Mo.banc1991); State v. Chambers, 891 S.W.2d 93,110 (Mo.banc1994).

Moreover, to the extent that some of these records were admissible, appellant could not have been prejudiced by counsel's failure to present appellant's school records because the records contained detrimental information which would have been damaging to appellant's case. Many of the records contained evidence of appellant's continuing defiance towards authority, his altercations with other students, appellant's tendency to deny wrongdoing; his negative attitude toward school, his blatant uncooperativeness; his anger; his disregard for rules; and his explosive verbal reactions (Movant's Exhibit 4 at 2-3,22,32-33). One of the psychological reports described appellant's aggressive tendencies and discussed a test administered to appellant where he made stories up about pictures (Movant's Exhibit 4 at 32). Appellant's stories were violent including stories about setting a house on fire, a hit and run incident with an intent to commit murder, hanging a boy in a tree, and boys engaging in a fight

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[3]The fact that these records were offered as business records would not change the fact that much of the material and statements contained in the records are hearsay and would not be admissible. State v. Sutherland,939 S.W.2d 373 (Mo.banc1997); State v. Harry, 741 S.W.2d 743,744-745 (Mo.App.E.D.1987).

severe enough to require hospitalization (Movant's Exhibit 4 at 33). Another record contained a "discipline chronology" showing months of appellant's defiant, aggressive behavior at school including incidents where appellant slapped a student loud enough to be heard across the room, several fights, ditching school, wrestling in class, swinging his fist at a student, yelling, pushing chairs, kicking doors, trying to choke a student, and throwing objects at teachers (Movant's Exhibit 5).

Although it is true that the records contained information about appellant's ongoing problems with his learning disabilities, the overwhelming evidence of his ideation with violence, his violent tendencies, anger, and open defiance towards authority and rules would have outweighed any possible beneficial information the records entailed. It is difficult, if not impossible, to see how these records could have changed the result of appellant's sentence and appellant was not prejudiced.

b) Medical Records

Appellant also claims that his medical records should have been admitted in the penalty phase as mitigating evidence (App.Br.51).

Appellant admitted three medical records into evidence including the records from Dr. Parrish, discussed earlier (Movant's Exhibit 3A,7,10).[4]

In denying appellant's claim that trial counsel was ineffective for failing to investigate and introduce these records at the penalty phase, the motion court found that the records

[4]Appellant cites to Movant's Exhibit 11 in his brief, but this Exhibit was not admitted at the post-conviction hearing on the ground that it was hearsay (PCR.Tr.338). Therefore, it is improper for appellant to cite to this exhibit as he does not challenge the court's refusal of admittance.

contained inadmissible hearsay, many of the records were remote in time, and the records contained detrimental information that would have damaged appellant's defense and theory of his case (PCR.L.F.801).

Once again, appellant does not challenge the motion court's findings that much of the medical records contained inadmissible hearsay. As discussed above regarding appellant's school records, trial counsel cannot be ineffective for failing to attempt to introduce inadmissible evidence. Twenter, 818 S.W.2d at 636.

Moreover, appellant could not have been prejudiced as these records contained damaging information which could have been presented and accentuated by the prosecution, including information regarding behavior difficulties, appellant described as a bully, and his parents found him difficult to control (Movant's Exhibit 3A). Movant's Exhibit 10 contained medical records discussing appellant's three day methamphetamine binge and its effects (Movant's Exhibit 10).

Finally, much of the medical records contained completely irrelevant information. For example, Movant's Exhibit 3A mainly discussed appellant's asthma and his treatment thereof, only containing two brief discussions of his visits with the school psychologist, low school performance, and mention of his mother being inconsistent with her punishment (Movant's Exhibit 3A). Movant's Exhibit 10 included records relating to appellant slamming his hand in a door and a radiology report from that injury. These records contained completely irrelevant information that would have been no benefit to appellant had trial counsel attempted to admit these records at trial.

As the motion court found, appellant could not have been prejudiced by the absence of these records from the penalty phase because the records contained inadmissible, irrelevant, or damaging information.

c) Jail Records

Finally, appellant alleges in his brief on appeal that trial counsel should have obtained and admitted his jail records into evidence during the penalty phase (App.Br.47). Appellant did not plead in his post-conviction motion that his trial counsel failed to investigate his jail records[5]. Therefore, this claim is waived as appellant is limited to his pleadings. State v. Clay, 975 S.W.2d 121, 141-142 (Mo.banc1998).

Even assuming this issue was properly before this Court, appellant could not establish that he was prejudiced because the records only discuss that appellant was depressed and on medication, facts that were already presented in the penalty phase through Dr. Bland's report (Defendant's Exhibit A). This evidence would have been cumulative and counsel cannot be ineffective for failing to present cumulative evidence. Skillicorn, 22 S.W.2d at 683-686.

Finally, appellant cites to Williams v. Taylor, 529 U.S. 362,120 S.Ct. 1495,146 L.Ed.2d 389 (2000) and Wiggins v. Smith, 539 U.S. 510,123 S.Ct. 2527,156 L.Ed.2d 471 (2003), where the United States Supreme Court reversed the defendants' convictions because their counsel failed to conduct virtually any investigation into mitigating evidence. The defendants each had nightmarish pasts which would have been potentially mitigating evidence if presented at trial and their counsel were ineffective for failing to investigate and present the evidence at trial. Williams, supra; Wiggins, supra. Counsels' conduct in Williams, and Wiggins, are stark contrasts to the attorneys' conduct in the case at bar. See Lyons v. State, 39 S.W.3d 32 (Mo.banc2001). Counsel extensively investigated appellant's background, his social history,

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[5]Appellant's only mention of jail records is on page 92 of his amended motion where he alleges that Dr. Bland failed to use his correctional records in his evaluation of appellant; appellant makes no allegation that counsel was ineffective for failing to investigate or introduce his jail records at trial in his amended motion.

and his mental condition and presented a complete picture of appellant during the penalty phase. Counsel were not ineffective in presenting appellant's family members and Dr. Bland during the penalty phase.

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

IV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THAT THE TRIAL COURT ERRED IN DENYING TRIAL COUNSEL'S CONTINUANCE REQUEST BECAUSE COUNSEL'S DECISION NOT TO RAISE THIS CLAIM WAS REASONABLE STRATEGY IN THAT THE CLAIM WAS NONMERITORIOUS. MOREOVER, APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED IN DENYING COUNSEL'S REQUEST FOR A CONTINUANCE IS NOT COGNIZABLE IN THIS PROCEEDING AND APPELLANT DOES NOT ALLEGE ANY EXTRAORDINARY CIRCUMSTANCES WARRANTING REVIEW.

Appellant claims that the motion court clearly erred in denying his claims that the trial court abused its discretion in failing to grant trial counsel's motion for continuance and that his appellate counsel was ineffective for failing to assert this issue on appeal (App.Br.76).

To the extent that appellant claims that the trial court erred in denying a continuance, his allegation of error is categorically unreviewable. Claims of trial court error are not cognizable in a Rule 29.15 proceeding. Onken v. State, 803 S.W.2d 139,142 (Mo.App.W.D.1991); State v. Redman, 916 S.W.2d 787,793 (Mo.banc1996). Such claims are only cognizable where fundamental fairness requires it and, then, only in rare and exceptional circumstances. Id. Appellant has alleged no rare and exceptional circumstances to warrant review here. He was aware of all of the facts prior to his direct appeal and has not alleged any circumstance which would have prohibited him from raising that issue there. Therefore, the motion court did not clearly err in denying his claim.

With regard to appellant's claim that appellate counsel was ineffective for failing to assert this claim, appellate counsel testified that although he could not recall what was contained in the transcript, he would not have raised this issue as it did not have a likelihood of success (PCR.L.F.628-629).

In denying appellant's claim, the motion court found that appellant failed to show that counsel was ineffective as it was reasonable strategy to "winnow" claims that have little chance of success (PCR.L.F.771).

To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that was so obvious from the record that a competent and effective appellate lawyer would have recognized and asserted it. State v. Moss, 10 S.W.3d 508,514 (Mo.banc2000). The right to relief from ineffective assistance of appellate counsel follows the plain error rule in that no relief may be granted unless the error that was not raised was so substantial as to amount to a manifest injustice. Id. at 515.

Here, counsel testified that he believed that he would not have raised the continuance issue because the abuse of discretion standard is a difficult standard to overcome (PCR.L.F.628-629). Counsel "winnowed" out this claim, as it had little chance of success. State v. Shive, 784 S.W.2d 326, 328 (Mo.App.S.D.1990). This was a reasonable strategy.

Moreover, appellant was not prejudiced. The decision to grant or deny a continuance is within the sound discretion of the trial court. State v. Middleton, 995 S.W.2d 443,464-465 (Mo.banc1999). To receive relief on this issue, appellant must make "a very strong showing of abuse and prejudice." Id. Inadequate preparation does not justify a continuance where counsel had ample opportunity to prepare. Id.; Chambers, 891 S.W.2d at 100-101.

Here, appellant's trial began on October 7, 1996 (L.F.147), almost nine months from the time counsel began their representation (PCR.L.F.769). The motion for continuance only alleged that they needed more time to investigate for trial (PCR.Supp.L.F.2-3). The motion did not allege what evidence they needed to procure or what benefit additional time would serve.

As the record shows, appellant had ample opportunity to investigate and did not point to any facts which would necessitate a continuance. See Chambers, supra. (counsel had approximately ten months to prepare); Middleton, supra. (counsel had approximately sixteen months to prepare); State v. Griffin, 848 S.W.2d 464,468 (Mo.banc1993) (counsel had eight months to prepare). Because the trial court did not abuse its discretion in denying the continuance, appellate counsel was not ineffective for failing to brief this issue.

Appellant cites various cases in which a trial court abused its discretion in failing to grant a continuance (App.Br.97). However, those cases are distinguishable. This is not a case where the state failed to disclose key evidence to the defense the morning of trial. Middleton, supra.

Appellant asserts that the facts supported the giving of a continuance. The facts to which appellant points are his various assertions that trial counsel was ineffective for failing to present additional evidence (App.Br.79). As discussed, these claims have no merit. These facts were neither before the trial court or appellate counsel when they made their decisions. The facts that were before the trial court, appellate counsel, and the facts that would have been before this Court had the issue been raised did not establish prejudice to appellant. Trial counsel had adequate time to prepare for trial and appellate counsel was not ineffective for failing to raise this nonmeritorious issue.

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

V.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIMS THAT TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT TESTIMONY FROM VARIOUS EXPERTS INSTEAD OF DR. LESTER BLAND, THE DEFENSE EXPERT CALLED AT TRIAL, BECAUSE COUNSEL'S ACTIONS WERE REASONABLE IN THAT DR. BLAND CONDUCTED A THOROUGH EVALUATION AND TESTIFIED ABOUT APPELLANT'S LIFE HISTORY, APPELLANT'S LIMITED FUNCTIONING, AND APPELLANT'S VERSION OF THE NIGHT OF THE MURDERS AND APPELLANT WAS NOT PREJUDICED IN THAT THE OTHER EXPERTS WERE NOT CREDIBLE, THEIR TESTIMONY MIRRORED THAT OF DR. BLAND'S, AND DR. BLAND PRESENTED A COMPLETE EVALUATION OF APPELLANT.

Appellant claims that the motion court clearly erred in denying, after an evidentiary hearing, his claim that trial counsel was ineffective for calling Dr. Lester Bland, a psychologist, as an expert witness for the penalty phase (App.Br.84-85). Appellant alleges that Dr. Bland's testimony was inadequate for mitigation and that trial counsel should have presented expert testimony for mitigation purposes from:

1) Dr. Peterson, a psychiatrist;

2) Dr. Cowan, a neuropsychologist;

3) Dr. James O'Donnell, a pharmacologist;

4) Ms. Teri Burns, a speech and language pathologist; and

5) Dr. Alice Vlietstra, a child development psychologist

(App.Br.84-85).

Trial counsel presented four witnesses during the punishment phase. Appellant's parents testified about their love for appellant, appellant's children, and appellant's childhood problems with hyperactivity and in special education (Tr.1918-1919). Appellant's mother discussed appellant's attention deficit disorder and the family's difficult moves to Palmdale, California and Missouri (Tr.1919-1920). Ms. Hutchison testified about appellant's problems with drug and alcohol abuse and appellant dropping out of school (Tr.1921). Ms. Hutchison stated that they did not have a lot of problems with appellant as a child, but rather "special problems" due to his hyperactivity (Tr.1924). Appellant's friend, Frankie Young, testified about appellant's respect for her family and his willingness to help her (Tr.1907-1912).

Finally, trial counsel called Dr. Lester Bland, a psychologist, who had evaluated appellant (Tr.1876). Dr. Bland testified that he had his undergraduate degree from Harding University in Sergi, Arkansas, had received his Master's degree in School Psychology from the University of Central Arkansas, and received his Doctoral degree in Clinical Psychology from Forest Institute in Springfield, Missouri (Tr.1876-1877). Dr. Bland's specialty, performing psychological evaluations, was based on his experience in evaluating prison inmates at the U.S. Medical Center for Federal Prisoners in Springfield (Tr.1877). At the time of trial, Dr. Bland had a private practice (Tr.1879).

Dr. Bland's evaluation of appellant took three hours (Tr.1891). Dr. Bland took a complete life history of appellant and evaluated him (Tr.1880). Dr. Bland testified that appellant was cooperative and, although slightly nervous, appellant answered every question posed (Tr.1881). Based on the educational background provided by appellant, Dr. Bland related that appellant had been in special education classes throughout elementary school and that appellant had dropped out of school in the tenth grade (Tr.1882). Based on various intellectual screening tests, he found that appellant had an IQ of 78 (Tr.1882). According to Dr. Bland,

appellant functioned in the bottom eight percent of the population (Tr.1883). Dr. Bland testified that appellant had some intellectual deficit (Tr.1882). He then administered the Wechsler Adult Intelligence Scale Revised, the verbal section, which revealed appellant's IQ to be 76 (Tr.1883). After administering another test, he found that appellant performed at the fourth-grade level for reading ability (Tr.1883). Dr. Bland testified that his personal, clinical observations of appellant were consistent with the test results (Tr.1884). He testified that appellant was competent to stand trial and that he did understand the charges against him (Tr.1885). Dr. Bland found that appellant suffered from borderline intellectual functioning and personality disorder, not otherwise specified (Tr.1887-1888). Dr. Bland testified about appellant's history with alcohol and drug use including an overdose of methamphetamine and appellant's use of alcohol and drugs the night of the murders (Tr.1894,1899). Dr. Bland also testified about appellant's version of the crime, including appellant's assertion that he did not kill the Yates, and appellant's fear of his co-defendants (Tr.1904-1905).

Dr. Bland's report, which was also admitted into evidence, discussed appellant's family life, including appellant's denial of any history of abuse or neglect by his family (Defendant's Exhibit A). The report contained appellant's report of being diagnosed with Attention Deficit Hyperactivity Disorder, his diagnosis of "manic depressant" and appellant's alcohol problem (Defendant's Exhibit A). The report discussed his time in special education, appellant dropping out in tenth grade and problems in school (Defendant's Exhibit A). Appellant also reported being sexually molested by a male family member at the age of 11 (Defendant's Exhibit A). Appellant reported that he had a son and he tried to get a job and reunite with his family (Defendant's Exhibit A). The report discussed appellant's addiction to drugs and alcohol and his treatment with a social worker and psychiatrist (Defendant's Exhibit A). Appellant also reported that he was not compliant with drug treatment (Defendant's Exhibit A). The report

also contained information about the move to Missouri and appellant's methamphetamine overdose (Defendant's Exhibit A). Appellant reported that while in jail, he was prescribed Zantac and Elavil due to problems with sleeping and nightmares (Defendant's Exhibit A). The report discussed appellant's two children and his common law wife (Defendant's Exhibit A).

At the evidentiary hearing, trial counsel Cantin testified that he had used Dr. Bland as an expert before in cases regarding mental disease or defect, and he was confident that Dr. Bland was knowledgeable and would be a good witness before a jury (PCR.Tr.1026-1027). Cantin knew of other attorneys, both for the state and defense, who had used Dr. Bland and these attorneys had recommended the doctor to him (PCR.Tr.1027). Likewise, Crosby testified that he called a neuropsychologist that he knew who recommended Dr. Bland (PCR.Tr.1069-1070). Crosby checked out Dr. Bland by calling other defense attorneys and prosecutors (PCR.Tr.1070). Cantin testified that after receiving Dr. Bland's report and having a conference with him, he did not feel a need to go further with other experts (PCR.Tr.1029-1030). He and Crosby discussed other experts and determined additional testing was not needed (PCR.Tr.1029-1030). Cantin further testified that he did not see any manifestations of brain damage in movant, so he did not seek out the services of a neuropsychologist (PCR.Tr.1027). Significantly, Dr. Bland did not suggest other psychiatric care or treatment (PCR.Tr.1030). Counsel testified that, by presenting Dr. Bland's testimony and his report, they were able to present appellant's "story" without putting appellant on the stand to be subject to cross-examination (PCR.Tr.1082).

In denying appellant's claims that trial counsel acted unreasonably in hiring Dr. Bland, rather than hiring five additional experts, the motion court stated that trial counsel conducted a reasonable investigation in obtaining Dr. Bland and that Dr. Bland had an excellent reputation

(PCR.L.F.788). Moreover, the motion court stated that trial counsel should not be required to find out-of-town experts when local experts are used and recommended to them by other attorneys and experts (PCR.L.F.788). The motion court found that presenting an expert "far from home" only amplifies the perception by the jury that the expert is a "hired gun" (PCR.L.F.788). Finally, the motion court found that trial counsel could not be ineffective for failing to shop for a more favorable expert and since there was no suggestion that appellant was mentally unstable, counsel could not be ineffective for failing to investigate appellant's mental condition further (PCR.L.F.788).

Appellant's hindsight assertion, that counsel should be held ineffective for failing to call five expert witnesses, including a psychiatrist, a neuropsychologist, a speech and language pathologist, a pharmacologist, and a child development and sexual abuse expert violates fundamental precepts recognized in Strickland, supra.:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [citations omitted] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689.

As the motion court found, and is evident from the record, by looking at trial counsel's actions at the time of trial, counsel reasonably decided to hire Dr. Bland as an expert for appellant's trial. Counsel contacted a neuropsychologist that they knew, they had used Dr.

Bland in the past, and had consulted with attorneys who recommended Dr. Bland. In making these inquiries, counsel made a reasonable strategic decision to hire Dr. Bland. Following Dr. Bland's report, and based on their knowledge of appellant, counsel determined that additional testing was not necessary. Through Dr. Bland, counsel was able to put on appellant's life history, his borderline functioning, his IQ, his history of attention deficit disorder and bipolar disorder, his drug and alcohol problems and his version of the murders. Trial counsel's actions in presenting penalty-phase evidence was reasonable.

Even if it was proper to look in hindsight, appellant has not established that his counsel was ineffective. Respondent will address each expert separately.

1) Dr. Stephen Peterson

Dr. Peterson, psychiatrist, testified, via deposition at the evidentiary hearing, that he diagnosed movant with Learning Disorder, Attention Deficit Hyperactivity Disorder, bipolar Disorder -- Type I, Polysubstance Dependence, and Sexual Abuse as a child (PCR.Tr.341-342). Peterson also concluded that appellant suffered from a learning disability and attention deficit hyperactivity disorder since a child (PCR.Tr.348-350). Peterson believed that appellant's embarrassment of his special education made it more difficult for him to benefit from the program and that special education failed appellant (PCR.Tr.394).

Peterson felt that appellant's conduct violations in prison were minor and appellant's job as a prison cook gave him self-esteem (PCR.Tr.412). Appellant related several instances of sexual abuse as a child to Peterson (PCR.Tr.419-423). Peterson testified about appellant's use of various drugs since the age of ten and stated that his abuse was the result of his family's permissiveness (PCR.Tr.383,386,389,426). Peterson believed that appellant's methamphetamine habit was serious and led to problems with judgment and loss of reality (PCR.Tr.401-410,428-429).

Peterson believed that appellant was very intoxicated the night of the murders and believed that the evidence showed that appellant was under the control of Lopez (PCR.Tr.466-477). Peterson also stated that because of appellant's intoxication and his "lifelong" disability, appellant had diminished capacity and was not capable of deliberating (PCR.Tr.481-483).

Peterson also reviewed Dr. Bland's report, finding several deficiencies, including Bland's failure to mark the time of the interview, his failure to review other records, and his reliance on appellant's account of his history (PCR.Tr.485-494).

In denying appellant's claim, the motion court found that Dr. Peterson's testimony was not credible, that due to his lengthy and complicated testimony, the jury would not have grasped much of what the doctor testified to, that he reached many of the same conclusions as Dr. Bland, and that trial counsel could not be ineffective for failing to shop for a more favorable expert (PCR.L.F.781-789).

The motion court was not clearly erroneous in denying appellant's claim. In order to establish ineffective assistance of counsel, appellant must show that his counsel's performance was deficient and that he was thereby prejudiced by his counsel's errors. Strickland, supra. Appellant has failed to establish that his trial counsel's actions were deficient. As the motion court found, trial counsel had never heard of Dr. Peterson. Moreover, appellant does not establish what reasonable investigation trial counsel could have done to find Peterson. Trial counsel is not expected to be clairvoyant and cannot call a witness that they have no knowledge of. Twenter, 818 S.W.2d at 639. Trial counsel took reasonable investigation to find Bland, who was recommended to them by a neuropsychologist and other attorneys and who had been used by them in other cases (PCR.Tr.1027). Trial counsel reasonably believed that other experts were warranted and Bland did not recommend that appellant see any other specialists.

Moreover, trial counsel is not ineffective for failing to shop for a more favorable expert. Kenley, 952 S.W.2d at 268. Moreover, appellant was not prejudiced by trial counsel's actions. The motion court found Peterson not credible. Credibility determinations are for the motion court. Chambers, 891 S.W.2d at 109. Peterson would not consider other factors that may have contributed to appellant's behavior. He refused to consider the fact that information that appellant vandalized a vehicle was not criminal activity and although he continually criticized Bland's report, Peterson failed to make a report at all. Peterson also criticized Bland for only taking a personal history from appellant and failing to get information from other sources, and yet Peterson relied heavily on appellant's version of events and his account of his personal history. The motion court was not clearly erroneous in finding much of Peterson's testimony not credible.

Moreover, even though Peterson continually criticized Bland's evaluation of appellant, many of his diagnoses and findings were consistent with Bland's. For example, Peterson and Bland both discussed appellant's substance abuse, appellant's intellectual borderline functioning, and appellant's attention deficit hyperactivity disorder.

Finally, as the motion court found, Peterson's testimony was extremely complex. A lay jury would not have been able to understand or comprehend much of what Peterson testified. If the jury is unable to understand the testimony, the result of the proceeding would not have been different if Peterson had testified.

The motion court was not clearly erroneous in denying appellant's claim that trial counsel was ineffective for failing to call Peterson, as he was not credible, difficult to understand, and many of his diagnoses mirrored Bland's. Finally, trial counsel had never heard of Peterson and could not call a witness that they have no knowledge of.

2) Dr. Dennis Cowan

Appellant also alleges that trial counsel was ineffective for failing to call Dr. Cowan, a neuropsychologist, to testify about appellant's alleged brain damage and impairment (App.Br.69).

Dr. Cowan, a neuropsychologist, testified that in many tests, appellant showed between mild to moderate level of impairment and a mild degree of brain damage (PCR.Tr.679-688,693-697). Cowan found that appellant's IQ was 76 (PCR.Tr.697). In summary, Cowan found that appellant had mild brain damage, mild to moderate memory deficits and significant problems with abstract reasoning (PCR.Tr.679-697).

In denying appellant's claim, the motion court found that trial counsel was not ineffective for failing to shop for a more favorable expert, that Dr. Cowan's opinions had little to no relation to the facts of the case, that his conclusions were similar to Dr. Bland's, and that the State could have exploited at trial that , while, on average, appellant might have tested out at an impaired range on the tests that Dr. Cowan administered, on many of the tests, appellant scored in the normal range (PCR.L.F.792-793).

The motion court was not clearly erroneous in denying appellant's claim as appellant has not established that trial counsel's actions were deficient or that he was prejudiced by his counsel's inactions. Strickland, supra. First, trial counsel was not ineffective for failing to investigate Cowan. Trial counsel had not heard of Cowan and trial counsel also stated that there was no evidence that appellant suffered from any brain damage that would warrant further evaluation (PCR.Tr.1040,1099). Trial counsel had obtained a highly recommended expert who testified regarding appellant's functioning and trial counsel did not have any indicators that further evaluation was necessary. Ringo v. State, 120 S.W.3d 743,749 (Mo.banc2003) (Where trial counsel has made reasonable efforts to investigate the mental status of defendant and has concluded that there is no basis in pursuing a particular line of defense, counsel should not be

held ineffective for not shopping for another expert to testify in a particular way); State v. Roll, 942 S.W.2d 370,376 (Mo.banc1997) (absent some suggestion of mental instability, counsel has no duty to initiate an investigation of accused's mental condition). Moreover, as the motion court found, trial counsel is not ineffective for failing to shop for a more favorable expert. Kenley, supra.

Second, appellant cannot establish that he was prejudiced by Cowan's absence during the penalty phase. Cowan's assessment of appellant's functioning mirrored Bland's. They both assessed appellant's IQ at approximately the same range. Bland assessed the IQ at 78, while Cowan's assessment was an IQ of 76. Moreover, although Cowan found that appellant did function at below average range in some areas, the State would have effectively cross-examined Cowan regarding the tests that appellant performed in the normal range and that Cowan did not consider appellant's level of functioning comparative to his actions the night of the crime. Finally, appellant's actions the night of the murders show that appellant did function at an normal range: he made the decision to kill the Yates brothers, he made the decision to flee the area, and he destroyed incriminating evidence. The State could have successfully diminished Cowan's assessment of appellant's alleged lower functioning. There is no reasonable probability that the result of the proceeding would have been different and therefore, the motion court was not clearly erroneous in denying appellant's claim.

3) Dr. O'Donnell

Appellant claims that counsel was ineffective for failing to investigate and call Dr. O'Donnell, a pharmacologist, to present evidence regarding appellant's drug use (App.Br.70).

Dr. O'Donnell testified about appellant's use of alcohol and methamphetamine as chronic, continuous and excessive and characterized appellant's drug use as a serious addiction (PCR.Tr.748-751). According to O'Donnell, because of the seriousness of appellant's addiction, from a pharmalogical perspective, appellant's use of drugs was "involuntary" (PCR.Tr.752-754).O'Donnell believed that the amount of drugs and alcohol that appellant consumed the night of the murder would have made movant severely intoxicated, impairing his judgment and would have made appellant violent (PCR.Tr.761). O'Donnell also believed that appellant was "in a diminished capacity," was under extreme mental or emotional disturbance and could not deliberate (PCR.Tr.76-763). He did admit, however, that appellant would have burned off some of the alcohol that he consumed the night of the murder (PCR.Tr.760-770). When O'Donnell was presented with the facts of the murder, he stated that it was necessary to look at when the drugs and alcohol wore off to determine if appellant was able to deliberate at certain times of the night (PCR.Tr.778-784). In denying appellant's claim, the motion court found that O'Donnell's definition of "deliberation" had no basis in Missouri law, that the facts of the case refute his conclusions, and that Dr. O'Donnell's mere conclusion that appellant's drug and alcohol use caused him to be under extreme mental or emotional disturbance would not have changed the result of the penalty phase because the jurors heard that movant was using alcohol and methamphetamine on the night in question and could determine for themselves whether this was a mitigating circumstance (PCR.L.F.789-792).

The motion court's findings were not clearly erroneous. Appellant has failed to establish that he was prejudiced by O'Donnell's absence from the penalty phase. First, the

essence of O'Donnell's testimony related to appellant's drug and alcohol abuse. Trial counsel was not ineffective for failing to put evidence of appellant's drug and alcohol abuse as mitigating evidence. Skillicorn, 22 S.W.3d at 685 ("Even if offered as mitigating evidence, counsel cannot be ineffective for not putting such evidence on, as many jurors find that chemical abuse is an aggravating factor engendering no sympathy for the defendant").

Moreover, the jury already heard that appellant was addicted to drugs and alcohol and furthermore, that appellant was drunk and used drugs the night of the murders (Tr. 1918-1935,1876-1906). This would have been cumulative to evidence already before the jury and therefore, counsel was not ineffective for failing to investigate and call O'Donnell. Johnson, 957 S.W.2d at 755. O'Donnell's opinion that, in a pharmalogical sense, appellant had diminished capacity and could not deliberate the night of the murders is, as the motion court found, not credible. O'Donnell continually waivered when confronted with the facts of the case when appellant could deliberate and when he could not (PCR.Tr.760-770,778-784). The motion court found this to be non-credible and this Court defers to the motion court's findings of credibility. Simmons, 955 S.W.2d at 773. Finally, O'Donnell's statement that appellant was emotionally disturbed because of his drug and alcohol use the night of the murders is merely a conclusion. O'Donnell offered nothing in support of this conclusion. O'Donnell's testimony would have added nothing to the penalty phase and would not have changed the outcome of the sentence. The motion court was not clearly erroneous in denying appellant's claim.

4) Ms. Teri Burns

Appellant alleges that trial counsel should have investigated and called Ms. Burns, a speech and language pathologist, who would have testified about appellant's learning disability (App.Br.71).

Burns testified that she conducted a psychoeducational assessment of appellant and found that appellant had a limited ability and functioned between the age of eight and twelve years, depending on the various test (PCR.Tr.882-885,897-898). Burns also concluded that appellant had a learning disability that was present since birth (PCR.Tr.892-893).

The motion court denied appellant's claim, finding that counsel could not be ineffective for failing to shop for a more favorable expert, that she failed to relate her testimony to the facts of the case, that the State could have cross-examined her with the fact that most 8-12 year olds know right from wrong, and know that murder is unacceptable, and that whatever marginal benefit her testimony about appellant's difficulties with school subjects might have provided would have been vitiated wholly or in part by the cross-examination to which she would have been exposed (PCR.L.F.793-794).

Appellant has failed to establish that trial counsel's actions were deficient or that he was prejudiced regarding Burns. First, as the motion court found, trial counsel had no knowledge of Burns and trial counsel cannot be ineffective for failing to call a witness that they have no knowledge of. Twenter, 818 S.W.2d at 639. Appellant makes no allegation on what reasonable investigation would have uncovered Burns. Moreover, trial counsel cannot be ineffective for failing to shop for a more favorable expert. Kenley, supra.

Second, appellant was not prejudiced by trial counsel's actions. The State could have extensively cross-examined Burns regarding the facts of the case that show that appellant could function, fled the scene and jurisdiction, destroyed evidence, and made the decision to kill the

Yates brothers. Burns did not relate her findings to the facts of the case and the State could have destroyed any credibility or benefit that her testimony may have given. Moreover, the gist of Burns testimony was that appellant suffered from learning disabilities, the same evidence that appellant's mother and Bland provided during the penalty phase. Skillicorn, supra at 683 (Trial counsel cannot be ineffective for failing to introduce cumulative evidence). Burns testimony would not have changed the outcome of the penalty phase.

5) Dr. Alice Vlietstra

Appellant alleges that his trial counsel was ineffective for failing to call Dr. Vlietstra, a childhood development or sexual abuse expert, to testify about the effects of appellant's childhood (App.Br. 72).

Dr. Vlietstra testified that there was a history of alcoholism and sexual abuse in appellant's family and suggested that these led to shame and a denial of feelings in appellant's family (PCR.Tr.798-802). Vlietstra also testified that appellant was not close to his parents and there was a lack of discipline (PCR.Tr.799-802). Vlietstra also suggested that appellant's alcohol and drug abuse stemmed from appellant's "absent" father (PCR.Tr.801-806). Vlietstra found it significant that movant's mother was fearful of childbirth and that appellant's mother did not view appellant as a problem in his young years which differed from the schools' account (PCR.Tr.801-807). Vlietstra testified regarding the significance of appellant's alleged sexual abuse and his learning disabilities (PCR.Tr.812-814). Vlietstra believed that appellant's special education led him into substance abuse even though she stated that he benefitted from a one-to-one setting (PCR.Tr.813-816). Vlietstra stated that the move from Fillmore to Palmdale, California was difficult for appellant and that Palmdale had urban problems (PCR.Tr.822-823). Vlietstra testified that movant experienced only six out of forty developmental assets (PCR.Tr.826-827). She stated that children need thirty-two or more to

generally do well (PCR.Tr.827). According to Vlietstra, appellant's learning disability, attention disorder, and bipolar disorder affected his behavior and appellant could not make good decisions (PCR.Tr.827).

In denying appellant's claim, the motion court found that counsel could not be ineffective for failing to shop for a more favorable expert, that her testimony could have been viewed by the jury as "excuses" or attempts to blame others for appellant's conduct, and that her credibility was questionable as her conclusions lacked supporting facts (PCR.L.F.794-798).

The motion court's findings were not clearly erroneous. The motion court found much of Vlietstra's testimony uncredible and this Court defers to the motion court's finding of credibility. Simmons, 955 S.W.2d at 773. Moreover, much of Vlietstra's testimony mirrored Bland's testimony and report, including appellant's sexual abuse and his learning disabilities. Finally, trial counsel cannot be held ineffective for failing to shop for a more favorable expert. Kenley, supra.

In conclusion, trial counsel acted reasonably in their selection and presentation of punishment phase witnesses. Appellant has failed to establish that trial counsel was ineffective for failing to investigate and call these five experts or that trial counsel acted unreasonably or were ineffective for calling Dr. Bland.

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

VI.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIMS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE FROM HIS FAMILY REGARDING HIS BACKGROUND FOR MITIGATING EVIDENCE BECAUSE COUNSEL WAS NOT INEFFECTIVE IN THAT COUNSEL ACTED BASED UPON REASONABLE TRIAL STRATEGY; MUCH OF THIS EVIDENCE WAS CUMULATIVE TO EVIDENCE PRESENTED AT THE PENALTY PHASE; AND APPELLANT WOULD HAVE BEEN PREJUDICED BY THE EVIDENCE AS IT WAS DAMAGING TO HIS THEME OF MITIGATION.

Appellant claims that the motion court was clearly erroneous in denying his claims that counsel failed to investigate and present evidence of appellant's "background" from various family members during the penalty phase (App.Br.107).

During appellant's penalty phase, trial counsel presented four witnesses on appellant's behalf. Appellant's parents, Bill and Lorraine Hutchison, testified about their love for appellant, appellant's difficult childhood, his problem with hyperactivity as a child, his problems with special education, his problems with drugs and alcohol, the move to Missouri from California, and appellant's work in construction (Tr.1918-1935). Trial counsel presented Dr. Bland, a psychologist, hired by counsel to perform an evaluation of appellant (Tr.1876-1906). Dr. Bland testified regarding appellant's special education as a child, appellant's borderline intellectual functioning, attention deficit disorder, bipolar disorder, discussed appellant's version of the night of the murders, and presented his report containing information about appellant's alleged sexual abuse (Tr.1876-1906). Frankie Young, appellant's friend,

testified about appellant's willingness to help her family and appellant's respect for her and her family (Tr.1907-1913).

Appellant now alleges that this evidence was not sufficient and that trial counsel failed to investigate and present testimony from several family members (App.Br.107).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, movant must show 1) that trial counsel knew or should have known of the existence of the witness, 2) that the witness could be located through reasonable investigation, 3) that the witness would have testified, and 4) that the witness's testimony would have produced a viable defense. State v. Harris, 870 S.W.2d 798, 817 (Mo.banc1994). Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless appellant clearly establishes otherwise. Clay, supra, at 143. To prove Strickland prejudice in the context of death penalty sentencing, appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. Kenley, 952 S.W.2d at 266.

a) Lorraine Hutchison

Lorraine Hutchison, appellant's mother, testified during the penalty phase of the trial about appellant being on baseball teams while a child and that appellant was a "very loving little boy," had a "big heart," and was close to his family (Tr.1918). She testified that appellant was diagnosed with hyperactivity, attention deficit disorder, was prescribed Ritalin, and was placed in special education, although he had problems with it (Tr.1918-1920). Ms. Hutchison also discussed their move to Palmdale and that appellant dropped out of school because he was frustrated (Tr.1921). Appellant had problems with drug and alcohol abuse and the family attended counseling (Tr.1921). Ms. Hutchison testified that the family moved to Missouri

because Palmdale was a bad area (Tr.1923). She testified that appellant was in the apprentice program with his father for construction (Tr.1924). Ms. Hutchison stated that they did not have a lot of problems with appellant as a child, but rather "special problems" due to his hyperactivity (Tr.1924). Ms. Hutchison discussed appellant's problems with staying clean and sober (Tr.1926).

Appellant complains now that this evidence was insufficient and that trial counsel was ineffective for failing to present additional evidence from Ms. Hutchison (App.Br.48).

At the evidentiary hearing, Ms. Hutchison testified about anxiety attacks she suffered while pregnant with appellant and throughout her life and about her dependency on prescription drugs (PCR.Tr.246-2452). Ms. Hutchison described problems that various family members, including appellant, had with sexual abuse, mental illness, and alcoholism (PCR.Tr.248-250,254). Ms. Hutchison discussed appellant's childhood, problems with hyperactivity, drug and alcohol abuse, attention deficit disorder, appellant's problems with special education and the move to Palmdale, California (PCR.Tr.257-269). Ms. Hutchison discussed their move to Missouri and appellant's subsequent drug problems and overdose (PCR.Tr.272-277). Ms. Hutchsion believed that appellant "catered" to Lopez (PCR.Tr.277). Ms. Hutchison admitted that she had discussed many of these topics in her penalty-phase testimony and that, at trial, she denied having a lot of problems with appellant as a child (PCR.Tr.283-284). Ms. Hutchison also admitted that she did not testify about the sexual abuse at trial because she was in a courtroom full of people and reporters (PCR.Tr.286).

Trial counsel Cantin stated that they had met with the family on numerous occasions prior to the trial (PCR.Tr.1002). Cantin testified that when the family and appellant were questioned about the sexual abuse, they were not willing to talk about it (PCR.Tr.986). Moreover, the family gave trial counsel the impression that the sexual abuse was a one time

incident and that appellant was removed from the situation (PCR.Tr.986). Cantin discussed with Ms. Hutchison appellant's learning disabilities, his employment, his sexual abuse, and other details about appellant's life (PCR.Tr.1003). Cantin and Crosby also expressed their feeling that the family and appellant were not forthcoming with information that may have been beneficial for the penalty phase (PCR.Tr.1003,1095,1109-1110).

In denying appellant's claim regarding trial counsel's failure to elicit certain mitigating evidence from Ms. Hutchison, the motion court found that her testimony would not have changed the outcome of the penalty phase because testimony about her and her extended family members' struggles would not have been relevant at appellant's penalty phase; that her testimony duplicated what she said during the penalty phase; that evidence that Palmdale had inner-city problems would not have changed the outcome as many people live in cities, but not all commit murders; that the family's financial setbacks did not cause appellant to kill the Yates brothers and any such suggestion would likely have been rejected by the jury as an attempt to unfairly shift blame; and that Ms. Hutchison did not want evidence that appellant was sexually abused to be aired in a public courtroom. (PCR.L.F.806). The motion court also found that appellant's attorneys could not be deemed ineffective for failing to have Ms. Hutchison testify about movant's sexual abuse history where she did not want to disclose such information at that time (PCR.L.F.806).

The motion court was not clearly erroneous in denying appellant's claim. Ms. Hutchison and her family were not willing to provide trial counsel this information and did not want to testify about it. Trial counsel cannot be ineffective for failing to elicit testimony that the witness is not willing to provide. Walls v. State, 779 S.W.2d 560,562-563 (Mo.banc.1989) (counsel's decision not to force reluctant witnesses to testify, where reasonable efforts showed that witnesses were opposed to testifying, is not unreasonable). Moreover, defense

counsel presented much of appellant's life and problems through appellant's mother in the penalty phase. Trial counsel's actions were reasonable.

Much of what Ms. Hutchison testified to at the evidentiary hearing was cumulative to evidence and testimony presented at trial. As the motion court found (PCR.L.F.806), Ms. Hutchison's trial testimony consisted of evidence that movant was diagnosed with hyperactivity, that he was placed on Ritalin, that he was diagnosed with learning disabilities, that he had drug and alcohol problems, and that he was in special education classes (Tr.1921-1926), essentially the same items she testified to at the evidentiary hearing. Moreover, as discussed previously, evidence of appellant's sexual abuse and drug and alcohol abuse was also presented to the jury through Dr. Bland (Tr.1893-1894; Defendant's Exhibit A). Trial counsel was not ineffective for failing to present cumulative evidence. Skillicorn, 22 S.W.2d at 683.

Finally, Ms. Hutchison's testimony that appellant had difficulty living in Palmdale because of inner-city problems would have no effect on the jury's determination of appellant's sentence because many people live in such conditions. This would not explain why appellant committed murder. This testimony would not have changed the verdict and trial counsel was not ineffective for failing to present this additional testimony.

b) Bill Hutchison

Bill Hutchison, appellant's father, testified at the penalty phase regarding his love for his son, that he had listened to his wife's testimony about appellant's background, that he and his wife were caring for appellant's children and that he visited his son at the prison when he could (PCR.Tr.1932-1935).

Appellant complains that this testimony was not sufficient and that trial counsel was ineffective for failing to elicit additional testimony from Mr. Hutchison (App.Br.48).

At the evidentiary hearing, Mr. Hutchison testified that there was a family history of alcoholism, that appellant had problems making friends, that appellant's behavior changed after he had allegedly been sexually abused in Iowa, that the family had problems following the move to Palmdale due to their house being condemned and Palmdale had drugs and gangs (PCR.Tr.182-185). Mr. Hutchison testified that appellant had problems with drugs and alcohol and appellant was not able to get a job with the union because he had not been able to get a high school diploma or GED (PCR.Tr 182,187). He knew the co-defendants, Salazar and Lopez, that they carried guns, and they were not welcome in the Hutchison home (PCR.Tr.188). During cross-examination, Mr. Hutchison admitted that he did not know about his son carrying a gun or about an incident where appellant had hid a gun on someone's property (PCR.Tr.189). He also admitted that appellant did not succeed in his drug and alcohol treatment programs and that appellant continued to have problems with drugs after their move to Missouri (PCR.Tr.193-194).

Although trial counsel remembered discussing many topics regarding appellant and his childhood with the family members, they could not specifically remember what specific conversations they had with Mr. Hutchison (PCR.Tr.1001).

In denying appellant's claim, the motion court found that the State could have cross-examined Mr. Hutchison similarly if he had testified more at the penalty phase of the trial and that Mr. Hutchison's additional testimony would not have changed the outcome of the penalty phase (PCR.L.F.804-805).

The motion court was not clearly erroneous in denying appellant's claim. Although appellant asked trial counsel if they had discussed these issues with Mr. Hutchison, not once did appellant inquire about why trial counsel did not present Mr. Hutchison's testimony about

these items during the penalty phase or if trial counsel had strategic reasons for presenting Mr. Hutchison's selected testimony at the penalty phase.

"Trial counsel's actions are presumed to be trial strategy and appellant has the burden of overcoming the presumption that, under the circumstances, the challenged action was not 'sound trial strategy.'" Strickland, 466 U.S. at 689. By refusing to inquire of counsel why they did not elicit the additional testimony from Mr. Hutchison, appellant, in effect, seeks to create a presumption of ineffectiveness. However, as recognized in State v. Tokar, 918 S.W.2d 753,768 (Mo.banc1996) and State v. Kreutzer, 928 S.W.2d 854,874-75 (Mo.banc1996), failure to make this inquiry signifies failure to meet his burden of proof. By failing to make this inquiry, appellant has failed to show that trial counsel's actions were not strategic. See also Taylor, 126 S.W.3d at 758.

As the motion court found, Mr. Hutchison's testimony would have added little, if anything to appellant's case. The State could have extensively cross-examined him regarding appellant's failure at drug rehabilitation and his drug and alcohol abuse, and Mr. Hutchison's lack of knowledge of his son's possession of weapons. Moreover, his testimony regarding the sexual abuse and the learning disabilities was cumulative to evidence already presented during the penalty phase (Tr.1921-1926,1893-1894; Defendant's Exhibit A). The additional testimony would not have shifted the balance of the aggravating and mitigating circumstances. The motion court was not clearly erroneous in finding that appellant was not prejudiced.

c) Matt Hutchison

Matt Hutchison, appellant's older brother, was not a witness at trial. During the evidentiary hearing, Matt Hutchison testified that other children treated appellant like he was retarded while he was in special education (PCR.Tr.197). Appellant did not fit in with the other children in special education because they were "more special ed. than Brandon" (PCR.Tr.199).

Matt Hutchison testified that appellant did not like special education and once they moved to Palmdale, the children teased appellant more than when they lived in Fillmore (PCR.Tr.198). He testified that, when they were young, appellant did not have many friends, but rather hung out with Matt's friends (PCR.Tr.198). Matt Hutchison testified that he had been in special education as well (PCR.Tr.199).

According to Matt Hutchison, appellant told him about the alleged sexual abuse in Iowa (PCR.Tr.201-202). He testified that the move from Fillmore to Palmdale was not beneficial to the family (PCR.Tr.203-204). Palmdale school district was larger than Fillmore and the brothers did not like the new school (PCR.Tr.206-207). Matt Hutchison testified he was also involved with the drugs and alcohol and also attended drug and alcohol treatment (PCR.Tr. 208-209). Matt Hutchison stated that appellant was the one to get the beer, put the beer in the trunk, break the ice, and that Lopez would order appellant around (PCR.Tr.213).

During cross-examination, Matt Hutchison admitted that he had gotten drugs from Lopez just as appellant had (PCR.Tr.222). Matt Hutchison also stated that appellant got "mouthy" when he was drunk and that he had seen appellant drunk on many occasions (PCR.Tr.229).

Trial counsel testified that they had discussed both the night of the murder and the family background with Matt Hutchison (PCR.Tr.995-997,1070-1071). They decided, as a matter of trial strategy, not to call Matt Hutchison, because they concluded that he was not a very believable person (PCR.Tr.1071).

In denying appellant's claim, the motion court found that trial counsel had strategic reasons not to call him as a witness; counsel was not ineffective for failing to call him to testify about the sexual abuse as the family wanted to keep it private; evidence of appellant's alcohol and drug use would have been cumulative; and testimony that appellant and his brother

had many of the same experiences growing up and yet appellant turned to crime while his brother did not could have been exploited by the State (PCR.L.F.803-804).

The motion court was not clearly erroneous in denying appellant's claim. In the context of counsel's performance, the selection of witnesses and the presentation of evidence are matters of trial strategy. Leisure v. State, 828 S.W.2d 872,874 (Mo.banc1992). To demonstrate ineffectiveness for failing to present evidence, a movant must establish at the evidentiary hearing, among other things, that the attorney's failure to present the evidence was something other than reasonable trial strategy. State v. Pounders, 913 S.W.2d 901,908 (Mo.App.S.D.1996). Appellant has failed to prove that trial counsel's failure to present Matt Hutchison was anything other than trial strategy. As the motion court found (PCR.L.F.803-804), trial counsel had strategic reasons not to present Matt Hutchison as a witness because he was not a believable witness. Trial counsel's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness. Walls, 779 S.W.2d at 562. It was reasonable strategy not to present a witness that trial counsel felt was not believable.

Moreover, appellant was not prejudiced by Matt Hutchison's absence from the penalty phase. Much of his testimony about appellant's use of alcohol and drugs was cumulative to appellant's mother and Bland's testimony already presented during the penalty phase (Tr.1921-1926;1893-1894). Bland's report, admitted into evidence, discussed not only appellant's alcohol and drug problems but also his alleged sexual abuse (Defendant's Exhibit A). Appellant was not prejudiced and trial counsel cannot be held ineffective for failing to introduce cumulative evidence. Skillicorn, supra. Moreover, as discussed previously regarding appellant's mother and father, the family did not want the sexual abuse to be discussed at the trial and were not willing to discuss that information at trial.

Finally, his testimony could well have been detrimental to appellant and his theory during the penalty phase. The fact that appellant and his brother had similar upbringings, were both involved in special education and both were addicted to alcohol and drugs, and yet his brother had not committed a double murder, unlike appellant, could have been exploited by the State. See State v. Simmons, 955 S.W.2d 752,776 (Mo.banc1997) (for similar facts). If trial counsel had called Matt Hutchison during the penalty phase, the State could have highlighted the fact that Matt Hutchison had become a productive citizen while his brother had become a murderer. Appellant was not prejudiced by his brother's absence and the motion court was not clearly erroneous in denying his claim.

d) Marilyn Williamson

Appellant's aunt, Marilyn Williamson, did not testify at trial. At the evidentiary hearing, Williamson testified that appellant was a sweet little boy who was a little hyperactive, did not want to hurt anyone, and other children would "pick on him" (PCR.Tr.136-138). Williamson stated that appellant was a follower and Lopez took advantage of him, however, she admitted that she had only been around Lopez with appellant on two occasions (PCR.Tr.141-143). Williamson also testified that although she had met with appellant's trial attorneys, she did not tell them any information that she had about appellant (PCR.Tr.147-149). During cross-examination, Williamson admitted that she had no knowledge of appellant's drug dealing or his stabbing of Mr. Galvan (PCR.Tr.144).

Trial counsel Cantin testified that he did not recall Marilyn Williamson's name (PCR.Tr.999). No further questions were elicited from either trial counsel about Marilyn Williamson.

In denying appellant's claim, the motion court found that her testimony would not have changed the outcome, that she seemed to know very little about appellant and that the State would have been able to bring out unflattering evidence of appellant's drug use (PCR.L.F.802).

As discussed previously, appellant has failed to establish that it was not trial strategy not to present Williamson as a witness. Trial counsel stated that he did not recall Williamson but appellant chose not to delve any further into the subject to determine why trial counsel did not call Williamson during the penalty phase (PCR.Tr.999). Appellant had the burden of establishing that trial counsel's alleged failure to call Williamson was not trial strategy. By failing to question trial counsel, appellant has not overcome the presumption of trial strategy. See Tokar, 918 S.W.2d at 768. Appellant has failed to prove his claim.

Moreover, appellant was not prejudiced by Williamson's absence from the penalty phase. Her evidence of appellant's hyperactivity as well as the fact that appellant was a "sweet boy" was cumulative to appellant's mother testimony at the penalty phase (Tr.1918). Williamson knew little, if anything, about appellant since he moved to Missouri and the State successfully cross-examined her about appellant's drug involvement and stabbing. The State could have exploited Williamson's lack of knowledge about her nephew during cross-examination just as the State did during the evidentiary hearing. Appellant was not prejudiced, as her testimony would have had no effect on the jury's determination of appellant's sentence.

e) Shawna Alvery

Shawna Alvery did not testify at trial. During the evidentiary hearing, Alvery, appellant's cousin, testified that appellant had been molested by his uncle in Iowa, that appellant was teased by others because he was overweight, and that she allowed appellant to babysit her children (PCR.Tr.169-172). During cross-examination, Alvery admitted that she did not know how old appellant was, where his children lived, that he had committed violent acts in the past, that he

had stabbed someone, that he sold drugs, and she admitted that she had not been around Brandon for awhile prior to the murders (PCR.Tr.175).

Trial counsel, Mr. Cantin, testified that he briefly recalled that he had spoken to Alvery about appellant babysitting her children, and although he could not recall for sure why he did not call her, he remembered that many of the penalty witnesses had not only potentially beneficial information but also harmful information that they did not want to come out during cross-examination (PCR.Tr.1008).

In denying appellant's claim regarding trial counsel's alleged ineffectiveness for failing to call Alvery, the motion court found that her lack of knowledge about appellant's activities could have been exploited by the State and diminished her credibility, that counsel was not ineffective for failing to call a witness they had no knowledge of, and that her testimony was relatively minor or cumulative and thus, appellant was not prejudiced (PCR.L.F.802).

The motion court was not clearly erroneous in denying appellant's claim. Appellant was not prejudiced by counsel's alleged failure to call this witness as her testimony would have added little, if anything, to the penalty phase. The fact that appellant was teased about his weight and that he babysat for her children was relatively minor. This evidence would not have affected the jury's determination of appellant's sentence. Moreover, appellant's case may have been damaged if Alvery would have testified because the State exploited Alvery's lack of knowledge about appellant's life and once again elicited evidence of appellant's prior stabbing and drug dealing. Appellant was not prejudiced by her absence during the penalty phase.

f) Jeff Beall

Jeff Beall did not testify at the trial. Beall, appellant's uncle, testified during the evidentiary hearing that he had attended special education just as appellant and he was also an alcoholic and methamphetamine user (PCR.Tr.156,162). He also testified about the family's

move from Fillmore to Palmdale, California and that he had moved to the area himself (PCR.Tr.160). Beall testified that Palmdale was different than Fillmore because it was an urban area (PCR.Tr.160). He classified appellant as a follower (PCR.Tr.161). Beall admitted that he only knew appellant "a little bit" while growing up (PCR.Tr.159).

Trial counsel, Cantin, testified that he did not recall Jeff Beall's name (PCR.Tr.999). Crosby testified that they investigated all witnesses who were revealed to them (PCR.Tr.1112).

In denying appellant's claim regarding Jeff Beall as a mitigation witness, the motion court found that his testimony was irrelevant and/or cumulative to other evidence (PCR.L.F.802-803).

The motion court was not clearly erroneous in denying this claim. First, trial counsel was not familiar with Jeff Beall's name and testified that they had investigated all witnesses that were revealed to them (PCR.Tr.1112). Trial counsel is not expected to be clairvoyant and cannot investigate and call a witness that they have no knowledge of. Twenter, 818 S.W.2d at 639. (Defense counsel necessarily relies on his client to identify witnesses and is not required to be clairvoyant).

Second, appellant was not prejudiced by his counsel's alleged inaction. Jeff Beall's testimony that appellant was in special education had been presented in the penalty phase through appellant's mother (Tr.1919-1921). This evidence would have been merely cumulative. Johnson, 957 S.W.2d at 755. Moreover, just as with appellant's brother, the State would have been able to exploit the fact that Beall experienced many of the same things, including alcoholism, drug abuse, and special education, along with children making fun of him, as did appellant, however Mr. Beall did not commit a double murder. See Simmons, 955 S.W.2d at 776. Finally, Mr. Beall acknowledged that he hardly knew appellant (PCR.Tr.159).

His testimony would have added little, if anything, to appellant's penalty phase and would not have changed the verdict.

Appellant faults the motion court for looking at each family member's testimony separately and determining that their testimony would not have affected the outcome (App.Br.114). Appellant alleges that in deciding prejudice from counsel's failure to investigate a client's life history, the court must evaluate "the totality of the evidence," citing Wiggins v. Smith, 539 U.S. at 510. In Wiggins, the defendant's claim was that his counsel was ineffective for failing to investigate his life history and thus, the court did look at all the evidence to determine whether he was prejudiced. However, here, appellant's claims in the motion were separate for each family member (PCR.L.F.86,88,89,91). Appellant's claim was that he was prejudiced by the absence of each member from the penalty phase. Appellant did not claim, unlike Wiggins, that his counsel was ineffective for failing to investigate his life history. Thus, the motion court properly considered each claim separately.

In any event, even viewing these witnesses' testimony cumulatively, appellant was not prejudiced by the absence of their testimony at trial. There is no reasonable probability that had his mother testified a little longer, or his brother testified, or his aunt that hardly knew him testified, that the jury would have determined that the mitigating circumstances outweighed the aggravating factors. The motion court was not clearly erroneous in denying appellant's claims.

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

VII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF A CO-DEFENDANT'S CONTROL AND DOMINATION OVER HIM BECAUSE APPELLANT HAS FAILED TO ESTABLISH THAT IT WAS NOT REASONABLE TRIAL STRATEGY NOT TO PRESENT MUCH OF THIS EVIDENCE IN THAT APPELLANT DID NOT ASK TRIAL COUNSEL IF THEY HAD A STRATEGIC REASON NOT TO PRESENT SOME OF THIS EVIDENCE AND APPELLANT WAS NOT PREJUDICED IN THAT MUCH OF THIS EVIDENCE WAS IRRELEVANT OR DAMAGING TO HIS THEORY AT TRIAL.

Appellant claims that the motion court was clearly erroneous in denying, after an evidentiary hearing, his claim that his trial counsel was ineffective for failing to investigate and call as witnesses during the penalty phase, Frankie Young, Terry Farris, Brandy Kulow, Marcella Hillhouse and Phillip Reidle to testify about Freddy Lopez's alleged domination and control over appellant (App.Br.117). Appellant contends that this evidence would have refuted the State's theory that appellant was in charge and made the decision to kill the Yates, which would have supported a life sentence (App.Br.117).

1) Frankie Young

Frankie Young testified during the penalty phase of the trial for appellant and also testified as a State's witness during the guilt phase (Tr.1907). During the penalty phase, Young testified that appellant and she were close friends, she had known him for about 3½ years and that appellant had stayed at her residence on occasion (Tr.1907-1909). Young stated that appellant helped her by babysitting her children and doing household chores (Tr.1910-1911).

Young stated that appellant was part of the family, he never treated her with disrespect, and she never felt threatened to have appellant with her family (Tr.1910-1911).

Appellant alleges that her testimony was not sufficient and that trial counsel was ineffective for failing to elicit testimony from Young about Lopez's domination of appellant (PCR.L.F.21-23,80-81).

During the evidentiary hearing, Young testified that she had seen Lopez a few times and that when Lopez and appellant were together, Lopez would make the decisions about where to go and what they would do and appellant would get "cocky" when he was with Lopez (PCR.Tr.51-53). Young also stated, however, that whoever appellant was with, the other person would make the decisions (PCR.Tr.52). On cross-examination, Young stated that the kind of decisions that Lopez would make for appellant was whether to leave or stay wherever they were at because they were in Lopez's vehicle and appellant did not have transportation (PCR.Tr.59). Young also admitted that besides minor decisions such as when they should leave, Young was not aware of Lopez making any other decisions for appellant (PCR.Tr.60). Young also stated that appellant made decisions on his own (PCR.Tr.63).

Trial counsel Cantin testified that he recalled speaking with Young, but that without looking at the file he was unable to recall what information they obtained from her (PCR.Tr.937). Cantin also testified that while speaking with all the witnesses he and Crosby kept both phases of the trial in mind (PCR.Tr.937). Crosby testified that he recalled Young, that they had taken a deposition of her, and that the deposition reflected the information that they had received from her (PCR.Tr.1072). Appellant did not inquire about why trial counsel failed to present evidence of Lopez's alleged domination from Young at the penalty phase.

In denying appellant's claim that trial counsel was ineffective for failing to investigate and question Young, the motion court found that appellant was not prejudiced by the absence

of Young's testimony and that appellant failed to establish that the failure to call Young was not reasonable trial strategy (PCR.L.F.756).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, movant must show 1) that trial counsel knew or should have known of the existence of the witness, 2) that the witness could be located through reasonable investigation, 3) that the witness would testify, and 4) that the witness's testimony would have produced a viable defense. Harris, 870 S.W.2d at 817. Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless appellant clearly establishes otherwise. Clay, 975 S.W.2d at143.

Appellant has failed to establish that trial counsel's actions were not reasonable. Appellant did not ask trial counsel to review Young's deposition to see if they recalled what information they had obtained from her. Appellant did not ask trial counsel if the information provided by Young during the evidentiary hearing may have been beneficial to present during the penalty phase. In fact, appellant failed to ask trial counsel whether there would be any strategic reason for not presenting the testimony that Young provided. By failing to even inquire about why trial counsel did not ask these questions of Young, appellant has failed to meet his burden of showing that counsel's actions were not strategic. Tokar, 918 S.W.2d at 768.

Here, there were reasonable strategic grounds not to present the testimony of Young as provided in the evidentiary hearing. Although appellant alleges that Young's testimony would establish that appellant was under the domination and control of Lopez, her testimony only established that because appellant relied on rides from Lopez, Lopez would decide when they would leave in Lopez's car. Moreover, the State cross-examined Young extensively, revealing that appellant, in fact, could make his own decisions and Young was unaware of any

decisions that Lopez made for appellant other than when they would leave in Lopez's car. The fact that Lopez decided when appellant would ride in his car is not mitigating evidence and does not establish that appellant was under the control of Lopez. In fact, her testimony that appellant made his own decisions would benefit the State's theory that appellant was the one who decided to kill the Yates brothers. The motion court was not clearly erroneous in denying this claim because it was reasonable strategy not to elicit this testimony.

2) Terry Farris

Terry Farris did not testify at trial. He testified at the evidentiary hearing that he had known Lopez and appellant for less than a year prior to the murders and that he had bought drugs from Lopez and also sold drugs for him (PCR.Tr.78). Farris testified that when appellant and Lopez were together, Lopez would make the decisions on where to go and what to do (PCR.Tr.81). During cross-examination, Farris testified that he had seen appellant without Lopez and that appellant had "stiffed [his] old lady for some money" (PCR.Tr.84). Farr testified that appellant was a courier for Lopez (PCR.Tr.85). Farris also stated that Lopez did not have complete control over appellant and appellant would make decisions for himself (PCR.Tr.86).

Cantin testified that he recalled speaking with Farris but could not exactly remember whether or not they had discussed Farris selling drugs for Lopez or Farris selling drugs to the Yates brothers (PCR.Tr.938). Crosby testified that he remembered interviewing Farris and recalled that Farris had sold drugs for Lopez (PCR.Tr.1072). Crosby did not recall whether he had a trial strategy for not asking Farris about Farris selling drugs at trial (PCR.Tr.1072).

In denying appellant's claim that Terry Farris should have been called, the motion court found that Farris's testimony that Lopez sold drugs would have been cumulative to testimony provided at trial by Lopez and trial counsel cannot be ineffective for failing to present

cumulative evidence and that appellant failed to prove by a preponderance of the evidence that he was prejudiced by the failure to call Farris (PCR.L.F.757).

As stated above, appellant has not established that counsel's strategy was not reasonable not to call Farris as a witness regarding domination by Lopez. Although appellant asked trial counsel if they had a trial strategy for not calling Farris as a witness regarding drug selling, appellant failed to inquire about whether trial counsel was aware that Farris could testify about Lopez's alleged domination over appellant or if they had a trial strategy for not calling him in this regard. Appellant has not overcome the presumption that not calling Farris regarding Lopez's alleged domination over appellant was reasonable trial strategy. Tokar, supra.

Moreover, there were reasonable strategic reasons not to call Farris. First, Farris's testimony that Lopez sold drugs was cumulative to Lopez's own testimony at trial, as the motion court found (PCR.L.F.757). Second, Farris's testimony as elicited on cross-examination would have actually prejudiced appellant's theory that he was under the control of Lopez. Farris stated that Lopez did not have complete control over appellant and appellant made his own decisions. This testimony would have benefitted the State's theory that appellant made the decision to kill the Yates. Finally, the mere fact that Lopez made the decisions of what appellant and Lopez would do and where they would go would have added nothing to the theory that appellant was under the domination and control of Lopez. This would not have changed the balance of the aggravating and mitigating circumstances. Kenley, supra. Appellant has not established that it was not reasonable strategy not to call Farris as a witness, nor has he established that he was prejudiced by Farris's absence.

3) Brandy Kulow

With the exception of threats and violence by Salazar, nothing from Kulow's testimony at the evidentiary hearing was pled in appellant's post-conviction motion (PCR.L.F.25-26,103). As recognized repeatedly by this Court, post-conviction pleadings cannot be amended by evidence presented during the evidentiary hearing. Harris, 870 S.W.2d at 815; State v. Shafer, 969 S.W.2d 719,738 (Mo.banc1998). Appellant's post-conviction motion only alleged that Kulow would testify that Salazar came to her house and threatened to shoot people (PCR.L.F.25-26). Appellant never alleged that Kulow would testify regarding Lopez, her fear or lack thereof of appellant, or as appellant now alleges on appeal, that appellant was dominated by Lopez. Appellant cannot now change his theory on appeal regarding Kulow's testimony and the information she should have provided to defense counsel. State v. Perry, 820 S.W.2d 570, 575 (Mo.App.E.D.1991) (where issue is not raised in motion, evidence relating to claim now raised on appeal is irrelevant).

Even if appellant's theory on appeal had been properly before this Court, nothing in Kulow's testimony suggests domination and control over appellant by Lopez (Tr.906-912). Appellant offers no hint or explanation how the fact that appellant displayed a weapon to her and she was not threatened by him, that she was scared of Lopez and that Salazar had a weapon, has any relevance to his point on appeal, that he was dominated by Lopez.

Appellant cannot change is theory on appeal and in any event, Kulow's testimony at the evidentiary hearing does not support appellant's theory of domination.

4) Marcella Hillhouse

Hillhouse testified at the evidentiary hearing that she had known appellant for approximately a year prior to the murders (PCR.Tr.97). Hillhouse testified about appellant and Lopez taking her to Hoberg bridge where they had an argument about some money that was

taken from appellant's wallet (PCR.Tr.100). At the bridge, Lopez got out of the car on three occasions, wanting to know if Hillhouse took the money (PCR.Tr.101). Lopez told appellant to shoot her three different times (PCR.Tr.101,119). Appellant refused, gave the gun back to Lopez, and then they got in the car and drove Hillhouse home (PCR.Tr.101). Hillhouse stated that she had told her mother about the incident at the bridge but had not told anyone else until she was questioned for the post-conviction proceeding (PCR.Tr.120-121). Defense counsel testified that they had never heard of Hillhouse's name prior to seeing the pleadings in the post-conviction motion (PCR.Tr.1015,1065). Cantin was also unaware of an incident where Lopez told appellant to shoot Hillhouse (PCR.Tr.1017). Cantin admitted that incident could have been another piece of evidence showing appellant with a weapon (PCR.Tr.1018). Cantin also stated that the incident could have shown that appellant was making his own decisions and was not under the control of Lopez (PCR.Tr.1018). Crosby stated that if he had known about the incident at the bridge, he would have wanted to investigate it, but he did not know if he would have wanted to present the evidence because it had "haunting similarities" to the case that was tried (PCR.Tr.1067). Crosby stated that the information could have hurt or helped them (PCR.Tr.1067).

In denying appellant's claim regarding trial counsel's failure to call Hillhouse, the motion court found that trial counsel were not ineffective for failing to investigate a witness that was not disclosed to them and that appellant was not prejudiced as her testimony would have been damaging to appellant at trial (PCR.L.F.757-758).

The motion court was not clearly erroneous in denying appellant's claim. First, trial counsel testified that they had no knowledge of Hillhouse. Trial counsel cannot be deemed ineffective for failing to call a witness that they have no knowledge of. Twenter, 818 S.W.2d at 639. Attorneys are not expected to be clairvoyant and cannot investigate something that they

have no knowledge of. McDonald v. State, 758 S.W.2d 101,105 (Mo.App.E.D.1988). Moreover, appellant has failed to allege or prove how reasonable investigation would have uncovered Hillhouse and her testimony. Appellant never told his counsel about the incident and according to Hillhouse she only told her mother and the investigator for the post-conviction hearing. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691. Trial counsel cannot be clairvoyant and could not possibly have asked appellant to identify witnesses to testify about an event that they had no knowledge of.

Moreover, appellant cannot establish that he was prejudiced by Hillhouse's absence. As the motion court found (PCR.L.F.757-758), Hillhouse's testimony actually would have destroyed the defense's theory. The Hoberg incident showed that appellant had control and made decisions for himself, even when Lopez asked appellant to shoot Hillhouse three times. Contrary to appellant's assertion, this evidence would not have aided the defense. Appellant was not dominated by Lopez. Hillhouse's testimony was not mitigating evidence but rather disproved the defense's theory.

5) Philip Reidle

Reidle testified at the evidentiary hearing that he had known the Yates brothers for several years prior to their murder and that both Yates brothers did drugs (PCR.Tr.90-91). During cross-examination, Reidle admitted that he had not seen or "partied" with the Yates since 1992, nearly three years before they were killed (PCR.Tr.93).

Trial counsel testified that he had never heard of Reidle's name and that they "possibly" would have wanted to present the information that the Yates' brothers used drugs during the trial, had they known that information (PCR.Tr.941,1069).

In denying appellant's claim that trial counsel was ineffective for failing to investigate and call Reidle, the motion court found, in relevant part, that Reidle's testimony that the Yates' used drugs was cumulative to the pathologist's testimony that they had drugs in their bodies at the time of death (Tr. 1397-1398) and the testimony likely would have inflamed the jury (PCR.L.F.760). Moreover, Reidle was not disclosed to counsel and therefore, they could not be ineffective for failing to call an unknown witness (PCR.L.F.760).

The motion court's findings are not clearly erroneous. First, trial counsel cannot be ineffective for failing to present testimony that they have no knowledge of. Appellant fails to plead or make any showing of how a reasonable investigation would have uncovered Reidle or what further investigation trial counsel should have done. Morrow v. State, 21 S.W.3d 819,824 (Mo.banc2000). Moreover, the pathologist testified at trial that the Yates' had drugs in their systems. Trial counsel cannot be held ineffective for failing to present cumulative evidence. Skillicorn, 22 S.W.3d at 683-686.

Second, appellant was not prejudiced by Reidle's absence. Reidle's testimony consisted merely of the fact that the Yates used drugs (PCR.Tr.90-93). He knew nothing of the murder and nothing about the Yates after 1992 (PCR.Tr.90-93). His testimony would not have had any effect on the jury's sentence determination.

Appellant alleges that Reidle's testimony establishes that the Yates' were not just innocent bystanders, but rather were drug users who happened to get in a violent altercation with Salazar (App.Br.114). Appellant's contention that the Yates' past drug use somehow made them liable or blameworthy for their own murder is absurd. The motion court properly found that this evidence would have inflamed the jury, thereby harming the defense.

Finally, appellant alleges on appeal that Reidle's testimony would have supported his theory that Lopez dominated appellant. How Reidle's testimony that the Yates' drug use

establishes Lopez's domination over appellant is beyond comprehension. Appellant cites to several pages of Reidle's testimony, which he alleges states that Lopez was the Yates' drug dealer. However, nowhere in Reidle's testimony is Lopez mentioned. Moreover, as stated above, this has absolutely nothing to do with whether Lopez dominated appellant. Appellant was not prejudiced by Reidle's absence and trial counsel is not ineffective for failing to call a witness that they had no knowledge of.

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

VIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIMS THAT TRIAL COUNSEL FAILED TO PRESERVE ISSUES FOR REVIEW BECAUSE THESE CLAIMS ARE NOT COGNIZABLE IN A RULE 29.15 PROCEEDING. MOREOVER, THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO VARIOUS ALLEGEDLY IMPROPER COMMENTS BY THE PROSECUTOR AND BY FAILING TO REQUEST A CONTINUANCE FOR A LATE PENALTY PHASE WITNESS ENDORSEMENT BECAUSE COUNSEL'S ACTIONS WERE NOT DEFICIENT IN THAT THESE CLAIMS ARE MERITLESS.

Appellant claims that the motion court was clearly erroneous in denying appellant's claim that his trial counsel was ineffective for failing to object and preserve various issues for appeal (App.Br.127).

"It is well settled that claims for post-conviction relief based on trial counsel's failure to adequately preserve issues for appeal are not cognizable under Rule 29.15." State v. Beckerman, 914 S.W.2d 861 (Mo.App.E.D.1996). Relief predicated on ineffective assistance of counsel is limited to errors prejudicing a movant's right to a fair trial. State v. Lay, 896 S.W.2d 693,702-703 (Mo.App.W.D.1995). Therefore, to the extent that appellant claims that his trial counsel was ineffective for failing to properly preserve these issues on appeal, his claim must fail, as failure to preserve issues for appeal is not cognizable in a 29.15 proceeding. Id.

Since appellant also alleges that trial counsel was ineffective for failing to object to the allegedly improper evidence and allegedly improper comments by the prosecution, on the

theory that such objections would have been sustained had they been made, these claims are discussed below (App.Br.127).

1) Opening Statement

Appellant alleges that trial counsel was ineffective for failing to object during the State's opening statement when the prosecutor stated that "Ronald Yates was sprawled out like Christ crucified on the cross on that roadway" (App.Br.129; PCR.L.F.14).

On direct appeal, appellant raised this claim as trial court error. State v. Hutchison, 957 S.W.2d 757 (Mo.banc1997). This Court found no manifest injustice or miscarriage of justice from this statement and held that:

> We find no manifest injustice or miscarriage of justice resulted from these opening statements[6]. This is especially true because the prosecutor's comments were supported by the evidence at trial, White v. State, 939 S.W.2d 887,902 (Mo.banc1997), cert. denied, 522 U.S. 948,118 S.Ct. 365,139 L.Ed.2d 284 (1997); the trial court instructed the jury at the outset of trial that opening statements were not to be considered evidence, State v. George, 921 S.W.2d 638,644 (Mo.App.1996); and in light of the fact that the impact of an opening statement diminishes after introduction of evidence, instructions, and closing argument. Although the reference to Ronald Yates as "sprawled out there like Christ crucified on the cross" is offensive, it is inconceivable that the jury would have confused the victim with Jesus Christ or would have been unduly affected by this statement.

Id. at 765.

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[6]Appellant raised several claims of error regarding opening statement. This Court addressed these alleged errors together.

In denying appellant's claim, the motion court found that appellant's claim could not be relitigated as it had already been litigated on direct appeal and that trial counsel had reasonable strategy not to object to the statement (PCR.L.F.762).

The motion court was not clearly erroneous in denying appellant's claim as counsel had strategic reasons not to object to this statement. During the evidentiary hearing, trial counsel Cantin testified that he did not generally object during the State's opening statement unless it got too far out of line, and that he did not want to give more attention to the statement by objecting (PCR.Tr.944). Cantin stated that it was just the beginning of the trial, only five minutes in, and he did not want to engender sympathy for the prosecutor and victim (PCR.Tr.946). These are all reasonable strategic reasons for not objecting to this statement.

Moreover, appellant was not prejudiced by admission of this statement. As this Court found on direct appeal, because this statement was made during opening statement, it would not have had an impact on the jury and the jury would not have confused the victims with Jesus, there is no reasonable probability that had counsel objected the result of the proceeding would have been different. The motion court was not clearly erroneous in denying appellant's claim.

2) Closing Argument–Destroying the Shoes

Appellant alleges that trial counsel was ineffective for failing to object during the prosecutor's closing argument. Specifically, appellant alleges that trial counsel should have objected to the following statements:

> The shoes that were found in Michael Salazar's bag when he was arrested, are not the shoes that made this print. Why don't the officers have the shoes? They were burned. You heard the testimony. They were burned. The one man that could link all three defendants to this crime scene was destroyed. Not by

the State, but by the three defendants. Had to get rid of those shoes; the thing that linked them there.

(Tr.1815). Appellant alleges that the above statements by prosecutor referred to Troy Evans, who was dead at the time of trial, and that the State implied that appellant had "destroyed" Troy Evans (App.Br.131;PCR.L.F.41).

Appellant did not present any evidence regarding this claim at the evidentiary hearing. In denying appellant's claim, the motion court found that appellant had failed to prove his burden as he did not question trial counsel regarding this claim (PCR.L.F.768).

The motion court was not clearly erroneous in denying appellant's claim. Review of a Rule 29.15 judgment begins with the strong presumption that counsel is competent and movant has the "heavy burden" of proving counsel's ineffectiveness by a preponderance of the evidence. Leisure, 828 S.W.2d at 874; Amrine v. State, 785 S.W.2d 531,534 (Mo.banc1990). To make a valid ineffective assistance of counsel claim, defendant must show both that his counsel failed to use the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, and that the defendant was thereby prejudiced. White v. State, 939 S.W.2d 887,893 (Mo.banc1997); Strickland, 466 U.S. at 687. Counsel's failure to make a useless or meritless objection is not grounds for an ineffective assistance of counsel claim. Id. There is a presumption that the failure to object was a strategic choice by competent counsel. Tokar, 918 S.W.2d at 768.

It is presumed that it was reasonable trial strategy for trial counsel to not object to the State's closing argument. Appellant did not question his trial counsel on why he did not object to the statement[7]. In order to overcome the presumption of reasonable trial strategy, evidence

[7]Appellant claims that the motion court incorrectly found that he did not question trial counsel regarding this claim. Appellant cites to page 966 of the evidentiary hearing. However,

must be presented. Without presenting any evidence on this claim, appellant cannot overcome that presumption. Id.

Moreover, in looking at the statement in context, it is evident that the prosecutor was not saying that appellant murdered Troy Evans. The prosecutor merely misspoke. First, if speaking about a person being killed, someone would not say that the person was "destroyed." Second, it is obvious that the prosecutor was speaking about the shoes being destroyed, not a man. This was not an objectionable argument. The prosecutor was stating that appellant and his co-defendant's destroyed the shoes and that the shoes were what would link all the defendants to the crime scene.

Appellant has failed to overcome the presumption that the failure to object was reasonable trial strategy. Moreover, it was a proper argument as the prosecutor merely misspoke. Appellant's claim must fail.

3) Closing Argument--Lopez Had No Deal[8]

Appellant alleges that trial counsel was ineffective for failing to object during the State's closing argument when the prosecutor stated that Freddy Lopez did not have an agreement with the State and was still charged with two counts of first degree murder (App.Br.131). Relying on his allegation in his motion that the State had a plea agreement with Freddy Lopez for his testimony, appellant alleges that trial counsel knew or should have known about the alleged deal and therefore, the State improperly argued to the jury that there was no plea agreement (App.Br.131).

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upon inspection of this cite, there is no questioning about this statement in closing argument.

[8]A similar claim is raised in Point II, supra. A more extensive discussion is included there.

As discussed more fully in Point II, supra, the evidence presented at trial and the evidentiary hearing established that Lopez did not have a plea agreement with prosecutors prior to appellant's trial (Tr.141-142;Remand PCR Tr. 207-230,233-234; George Depo. Tr. 16-18).

During the evidentiary hearing, via an offer of proof, trial counsel testified that they were unaware of any deal that had been made with Lopez although it would have been important to know if a deal had been made (PCR.Tr.993). Appellant never inquired about why trial counsel did not object to the closing statement (PCR.Tr.993).

The motion court denied appellant's claim stating that he did not present any evidence regarding why trial counsel did not object to the closing argument statement (PCR.L.F.768).

The motion court was not clearly erroneous in denying appellant's claim because appellant presented no evidence from counsel. Appellant has failed to show that the failure to object was not reasonable strategy. Tokar, supra, at 768. Moreover, there was no deal with Lopez prior to appellant's trial. Counsel cannot be ineffective for failing to make a meritless objection. Strickland, supra. Even assuming that there was some deal, trial counsel cannot object to an allegedly improper statement that they had no knowledge was incorrect. Trial counsel is not expected to be clairvoyant. Twenter, 818 S.W.2d at 639. Appellant does not allege how trial counsel should have found out about this so-called alleged deal or how counsel could have known about it. The prosecution stated that there was no deal. Lopez during his cross-examination stated that there was no deal, although he was hoping for one (Tr.1243). Trial counsel cannot be ineffective for failing to object to something that is a proper statement or that he has no knowledge of being untrue.

4) John Galvan, State Penalty Witness

Appellant alleged in his amended motion, in relevant part, that:

> In the alternative, movant's counsel were ineffective in failing to object on the grounds that they needed to interview other witnesses regarding what Mr. Galvin [sic] had told the other witnesses about how he received the stab wounds. In particular, movant's counsel should have requested a continuance to talk to Kerry Lopez, Sandra Roe, and any other persons Mr. Galvin [sic] named as having discussed the injury he received from the alleged stabbing.

(PCR.L.F.38).

Only a few days before trial, after hearing a "rumor" that appellant had stabbed John Galvan in the summer of 1995, the prosecution interviewed Galvan and filed a motion to endorse Galvan as a witness for the penalty phase (L.F.66-68). On the first day of trial, the trial court allowed the State to endorse Galvan and during an evening recess, the court took testimony from Galvan to determine if he should be allowed to testify during the penalty phase (Tr.1473,1482). The trial court allowed Galvan to testify.

During the penalty phase, Galvan testified that on September 10, 1995, after returning from the hospital for treatment of an asthma attack, he was lying in bed at his home when he was stabbed in the abdomen by appellant (Tr.1469,1853-1854). The stabbing resulted in a punctured colon which had to be surgically repaired (Tr.1470-1471,1853). Galvan also testified that he had not reported the incident to authorities until he was approached on October 2, 1996, because he was on probation at the time, was concerned that the incident might affect his probation, and because he had been threatened by appellant (Tr.1469,1472,1853). Galvan stated that he had not gone to the hospital until approximately two days after the incident and at that time he did not report that he had been stabbed, instead telling hospital personnel that

he had fallen against a sharp object (Tr.1471,1854). On cross-examination, appellant attempted to establish that he had stabbed Galvan because Galvan was beating up his girlfriend, Sandra Rowe (Tr.1855-1858).

At the evidentiary hearing, Galvan testified that he remembered that "Sondra" and a few other people were at the house the day of the stabbing, however he did not recall who was there (PCR.Tr.131). He did not recall that Hillhouse was present at the time of the stabbing but did recall that she helped him after he was stabbed (PCR.Tr.133). He did not recall anyone else helping him after the stabbing (PCR.Tr.133). Galvan stated that he did not tell anyone prior to trial that other people were present because no one asked him (PCR.Tr.134).

Trial counsel testified at the evidentiary hearing that they thought they had requested a continuance to investigate Galvan and his allegation (PCR.Tr.653,1064). Crosby stated that they discussed the incident with appellant (PCR.Tr.1064). Crosby stated that even assuming they had information that Hillhouse would testify that appellant did not stab Galvan until Lopez told him to and that he helped nurse Galvan after he was stabbed, he did not know whether or not they would present that information to the jury (PCR.Tr.1066-1067).

In denying appellant's claim that trial counsel was ineffective for failing to ask for a continuance to investigate Galvan, the motion court found that appellant had failed to prove prejudice because he failed to call Roe and Kerry Lopez at the evidentiary hearing and thus, it was impossible to know what information these witnesses may have provided (PCR.L.F.766-767).

The 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.banc1995). "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." Id.

Appellant failed to present the testimony of Roe and Kerry Lopez. It is impossible for the motion court to find prejudice when appellant fails to elicit testimony from the witnesses. See State v. Patterson, 826 S.W.2d 38,40 (Mo.App.W.D.1992) (movant's failure to establish what testimony of witness would have been is fatal to ineffective assistance claim). Appellant failed to present any evidence from these witnesses. The motion court was not clearly erroneous in denying appellant's claim as he has not established by a preponderance of the evidence that he was prejudiced by counsel's failure to request a continuance.

Now, on appeal, appellant alleges that Hillhouse's testimony in an offer of proof established the prejudice that he suffered from trial counsel's failure to request a continuance to investigate the Galvan stabbing (App.Br.132). During an offer of proof, Hillhouse testified that she was present during the stabbing and that appellant stabbed Galvan after Lopez told him to do so (PCR.Tr.104-105). Hillhouse also stated that appellant felt bad and stayed to help nurse Galvan's wound (PCR.Tr.106).

Appellant failed to plead that trial counsel should have investigated Hillhouse in his motion, only identifying Roe and Lopez as potential witnesses to the stabbing. Therefore, appellant's claim is waived regarding Hillhouse as it is beyond the scope of his motion and should not be considered by this Court. Clay, 975 S.W.2d at 141-142; Twenter, 818 S.W.2d at 641.

Gratuitously, respondent notes that even if Hillhouse's testimony could be considered, appellant has not established that he was prejudiced by counsel's failure to request a continuance and investigate the stabbing. As this Court stated in the direct appeal, "[t]he level of aggravating circumstances in this case overcomes any reasonable probability that the

outcome of the sentencing phase would have been any different had Galvan's testimony been kept out." Hutchison, 957 S.W.2d at 764. Therefore, if the aggravating circumstances were so overwhelming that the sentencing would have been the same had Galvan not testified at all, it follows that any investigation and presentation of witnesses to "soften the blow" of appellant stabbing Galvan would not have shifted the balance of the aggravating and mitigating circumstances, thereby warranting a life sentence. Therefore, appellant's claim must fail.

5) Cross-examination of Dr. Bland

Finally, appellant alleges that his trial counsel was ineffective for failing to object to the state's cross-examination of Dr. Bland during the penalty phase regarding questions of appellant's competence to stand trial (App.Br.125; PCR.L.F.66). Appellant alleges that these questions were irrelevant to the determination of the sentence and misled the jury about the mental health evidence and encouraged the jury to ignore the mitigation (App.Br.125).

During the penalty phase, defense counsel called Dr. Bland to testify (Tr.1876). Bland testified during direct examination that he had been hired by defense counsel to evaluate issues such as competency, responsibility, presence of mental disease or defect, and mental status (Tr.1880). Defense counsel asked Dr. Bland about his evaluation of appellant to determine competency and whether appellant was, in fact, competent to stand trial and understand the charges against him (Tr.1884-1885). Dr. Bland's report was also admitted into evidence (Tr.1890).

During cross-examination, the State asked Dr. Bland if the results of any of the tests performed on appellant would lead him to believe that appellant was legally relieved of his responsibility for his actions (Tr.1902). Dr. Bland stated that based on the tests, appellant could not be legally relieved of his responsibility for his actions and that in his opinion,

appellant understood the charges against him, appellant was aware and understood what he was doing on January 1, 1996, and he was capable and competent to stand trial (Tr.1903).

During the evidentiary hearing, counsel stated that he did not object to the questions about appellant's ability to stand trial because that would allow the prosecution to take more time talking about how competent appellant was (PCR.Tr.1082). Moreover, counsel did not want to object since Dr. Bland was his witness and it would be objecting to the report that he prepared for the defense (PCR.Tr.1082). By objecting during the questioning, counsel believed that it would appear that Bland did not "know what he's talking about" (PCR.Tr.1082).

In denying appellant's claim, the motion court found that the prosecutor was entitled to cross-examine Bland regarding his conclusions in his report and trial counsel's actions were reasonable as counsel did not want to object as it would appear that he was discrediting his own witness (PCR.L.F.788-789).

Counsel's failure to make a useless or meritless objection is not grounds for an ineffective assistance of counsel claim. Strickland, supra, at 687. Strategic choices by trial counsel are virtually unchallengeable. Id. at 690-691.

Trial counsel was reasonable in his decision not to object to this cross-examination. First, he had already presented evidence regarding the fact that Dr. Bland had determined that appellant was competent. Second, counsel did not want to appear to discredit his own witness. Third, it would not have been a meritorious objection as counsel had elicited the same testimony regarding appellant's competency and the prosecution had a right to cross-examine Bland about his report. Counsel was not ineffective as it was reasonable trial strategy and the objection would not have been meritorious. The motion court was not clearly erroneous in denying appellant's claim.

Based on the foregoing, appellant's must fail.

IX.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT THIS COURT'S PROPORTIONALITY REVIEW IS UNCONSTITUTIONAL ON VARIOUS GROUNDS BECAUSE THIS COURT HAS REPEATEDLY DENIED THESE CLAIMS AND HAS FOUND THAT PROPORTIONALITY REVIEW DOES NOT VIOLATE DUE PROCESS RIGHTS, RIGHT TO FAIR TRIAL OR RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Appellant claims that the motion court clearly erred in denying his claim that this Court's proportionality review is unconstitutional and appellant's sentence is disproportionate (App.Br.137). Specifically, appellant alleges that this Court fails to consider codefendants' sentences; that this Court's database does not comply with §565.035.6, RSMo. 1994; that this Court fails to consider all similar cases as required by §565.035.3(3), RSMo. 1994; and that appellant did not have adequate notice and opportunity to be heard (App.Br.137).

In denying appellant's claim, the motion court found that this Court had already rejected appellant's claim, citing to Clay, 975 S.W.2d at 146 (PCR.L.F.768).

The motion court was not clearly erroneous in denying this claim. First, appellant argues that this Court fails to consider co-defendant's sentences when determining proportionality. This Court has repeatedly held that co-defendant's pleas, convictions for other crimes other than first degree murder, and sentences are not considered in proportionality review. State v. Edwards, 116 S.W.3d 511 (Mo.banc2003); Clay, 975 S.W.2d at 146; State v. Rousan, 961 S.W.2d 831,854 (Mo.banc1998).

Second, appellant claims that this Court's database does not comply with §565.035.6 and is inadequate to properly conduct proportionality review (App.Br.137-138). This claim

has been rejected as well. State v. Parker, 886 S.W.2d 908,933 (Mo.banc1994). Appellant also argues that this Court's proportionality review denies him his due process right to meaningful notice of the procedures to be followed and a meaningful opportunity to be heard (App.Br.137). This claim has also been rejected. State v. Weaver, 912 S.W.2d 499,522 (Mo.banc1995); Clay, supra; State v. Smith, 32 S.W.3d 532,559 (Mo.banc2000). In sum, "[t]he Court's method of proportionality review does not violate [appellant's] due process rights, his right to a fair trial or his right to be free from cruel and unusual punishment under the state or federal constitutions." Weaver, supra.; see also Lyons v. State, 39 S.W.3d 32 (Mo.banc2001).

The motion court was not clearly erroneous in denying appellant's claim that Missouri's proportionality review is unconstitutional because his assertions have been repeatedly denied by this Court. Therefore, appellant's claim must fail.

X.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE OF A STUDY REGARDING JURY COMPREHENSION OF INSTRUCTIONS TO SUPPORT THEIR MOTIONS REGARDING PENALTY PHASE INSTRUCTIONS BECAUSE IT WAS A NON-MERITORIOUS MOTION IN THAT DR. WIENER'S STUDY HAS BEEN DISCOUNTED BY THIS COURT.

Appellant claims that the motion court was clearly erroneous in denying his claim that trial counsel was ineffective for failing to provide to the trial court, Dr. Wiener's study regarding jury comprehension of penalty phase instructions in their objections regarding penalty phase instructions (App.Br.141). Appellant alleges that it was necessary for trial counsel to include Dr. Wiener's study which allegedly proves that jurors' comprehension is low, the instructions are redundant, complex, and ambiguous (App.Br.141).

Trial counsel Cantin testified that he was aware of Dr. Wiener's name and that he had conducted a study, however, he was not aware of the extent of the study and that is why he did not introduce the study in support of his motion against the jury instructions (PCR.Tr.994). Crosby testified that he had never heard of Dr. Wiener (PCR.Tr.1069).

In denying appellant's claim, the motion court found that this Court has found that Dr. Wiener's study must be discounted and trial counsel could not be ineffective for failing to present evidence that this Court found to be unpersuasive (PCR.L.F.761). Moreover, the motion court stated that counsel need not pursue further objections to the instructions when they would have been meritless. (PCR.L.F.761).

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. Clay, 975 S.W.2d at 136.

This Court on numerous occasions has found that the MAI-CR instructions are constitutional and Dr. Wiener's study should be discounted. Lyons, supra; State v. Deck, 944 S.W.2d 527,542-543 (Mo.banc1999); State v. Jones, 979 S.W.2d 171,181 (Mo.banc1998) (Counsel's failure to object to possible jury misunderstanding of instructions does not support claims of ineffective assistance of counsel). Counsel was not ineffective.

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

XI.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS POST-CONVICTION COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVIDE REASONABLE AND NECESSARY LITIGATION EXPENSES PURSUANT TO SUPREME COURT RULE 29.16(D) BECAUSE THESE CLAIMS ARE NOT COGNIZABLE IN A POST-CONVICTION PROCEEDING.

Appellant claims on his final point on appeal that the motion court was clearly erroneous in denying his claim that the Public Defender failed to provide reasonable and necessary litigation expenses to prepare for his post-conviction proceeding (App.Br.144). Appellant relies on Supreme Court Rule 29.16(d) which states that the State Public Defender shall provide post-conviction counsel with reasonable and necessary litigation expenses.

Appellant's motion alleged that he had requested $15,000 from the Public Defender for preparation of his post-conviction proceeding (PCR.L.F.98-99). According to appellant, investigation in California was necessary as he had spent the majority of his life there (PCR.L.F.98). Appellant pled that witnesses, medical and mental health professionals, teachers, neighbors and family members were "especially critical for mitigation issues" and investigation in California was necessary (PCR.L.F.99). Appellant alleged that the Public Defender provided $5,000 originally to appellant for his investigation in California (PCR.L.F.99). According to appellant, the investigator in California, hired by appellant, started an investigation, but, requested another $5,000 to complete the investigation (PCR.L.F.99). Appellant claimed that the Public Defender provided $3,000 more to conduct the investigation (PCR.L.F.99). Appellant alleged that this was insufficient and he was entitled to reasonable and necessary litigation expenses (PCR.Tr.99).

The motion court denied this claim, finding that appellant's claim was a non-cognizable claim of ineffective assistance of post-conviction counsel and that "Testimony at the hearing showed that, in total, postconviction counsel spent over $27,000 on expert testimony alone in support of movant's postconviction motion. Movant cannot credibly suggest that 'reasonable and necessary' litigation expenses were withheld"(PCR.L.F.808).

The motion court was not clearly erroneous in denying appellant's claim. Appellant's claim is essentially that he did not receive effective assistance of post-conviction counsel. There is no constitutional right to counsel in a post-conviction proceeding and therefore, no right to effective assistance of post-conviction counsel. Clay, 975 S.W.2d at 140 (appellant's claim that he was denied funds to pay witness fees from State Public Defender to accompany subpoenas for witnesses, denied as there is no constitutional right to counsel in a post-conviction proceeding); State v. Hunter, 840 S.W.2d 850,871 (Mo.banc1991); Coleman v. Thompson, 501 U.S. 722,111 S.Ct. 2546,115 L.Ed.2d 640 (1991); Pennsylvania v. Finley, 481 U.S. 551,557,95 L.Ed.2d 539,107 S.Ct.1990 (1987). Therefore, there can be no claim of ineffective assistance of post-conviction counsel. Hunter, supra. Claims of ineffective assistance of post-conviction counsel are categorically unreviewable. Id.

Appellant alleges that the motion court's finding that claims of ineffective assistance of postconviction counsel are categorically unreviewable is not applicable because his complaint is not that his post-conviction counsel was ineffective, but rather, "he asked that Rule 29.16(d) be enforced" (App.Br. 144). However, no matter how appellant phrases his claim, it is still essentially a claim that his post-conviction counsel was not effective.

In any event, appellant has made no effort to specify in his amended motion or now on appeal what additional investigation he claims was needed. If he truly believed that more investigation was "reasonable and necessary" for his post-conviction proceeding, he could have

sought to enforce Supreme Court Rule 29.16(d) by means of an extraordinary writ. Appellant failed to do so.

Appellant's claim is unreviewable and the motion court was not clearly erroneous in denying his claim.

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court 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 May, 2004.

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