No. 83179

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IN THE MISSOURI SUPREME COURT

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HERBERT SMULLS,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of St. Louis County, Mo.
Twenty-First Judicial Circuit
The Honorable Emmett O=Brien and
The Honorable James Hartenbach, Judges

_____

RESPONDENT=S STATEMENT, BRIEF AND ARGUMENT

_____

JEREMIAH W. (JAY) NIXON
Attorney General

BRECK K. BURGESS
Assistant Attorney General
Missouri Bar No. 34567
Post Office Box 899
Jefferson City, MO. 65102-0899
(573) 751-3321
Attorneys for Respondent

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Rule 29.15 in the Circuit Court of St. Louis County. The convictions sought to vacated were for first degree murder, '565.020, RSMo 2000; first degree assault, '565.050, RSMo 2000; two counts of first degree robbery, '569.020, RSMo 2000; and two counts of armed criminal action, '571.015, RSMo 2000, for which appellant received a sentence of death and five concurrent sentences of life imprisonment. This Court has jurisdiction over this appeal, because of its order effective July 1, 1988, that all death penalty post-conviction appeals be heard here, pursuant to this Court=s power under Rule 83.06.

STATEMENT OF FACTS

Appellant, Herbert Smulls, was charged by indictment in the Circuit Court of St. Louis County on August 16, 1991, with first degree murder, first degree assault, two counts of first degree robbery and two counts of armed criminal action, all arising from the killing of Stephen Honickman and the wounding of Florence Honickman during the robbery of their business establishment (L.F. 23-25).[1] Informations in lieu of indictment were later filed that alleged appellant=s nine prior felony convictions, and charged him as a prior, persistent and Class X offender (L.F.5,7,248-252,300-304).

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[1]The record on appeal cited in this brief consists of the transcript of the retrial of appellant in November of 1992 (ATr.@); the trial legal file (AL.F.@); the legal file from appellant=s original Rule 29.15 proceeding (AP.C.L.F.@); the transcript of the original Rule 29.15 evidentiary hearing (APCR Tr.@); the remand post-conviction legal file (AR.L.F.@); the remand post-conviction transcript (AR.Tr.@), the second remand post-conviction transcript (A2nd R.Tr.@); the second remand post-conviction transcript (A2nd R.L.F.@) and various exhibits as designated.

Appellant went to trial before a jury on August 24, 1992, Judge William M. Corrigan presiding (L.F. 7). The jury found appellant guilty of the first degree robbery of Florence Honickman, but was unable to reach a verdict as to all other counts (L.F.8,387-426). The retrial of appellant on the remaining charges began before a jury on November 9, 1992, with Judge Corrigan again presiding (Tr.1).

The State=s guilt-phase evidence, as stated by this Court, was as follows:

> Stephen and Florence Honickman owned and operated a jewelry business. Typically, customers would make an appointment to examine the jewelry for sale. In early July 1991, a person identifying himself as AJeffrey Taylor@ called the Honickmans and made an appointment to buy a diamond. AJeffrey Taylor@ was later identified as defendant. On July 22, 1991, defendant and Norman Brown went to the Honickmans= store. After viewing several diamonds, defendant and Brown left the store without making a purchase.
>
> On the afternoon of July 27, 1991, defendant and Norman Brown followed another customer into the store. Florence Honickman was unable to show them any jewelry at that time but suggested she might be able to help them later. Defendant and Brown returned to the store that evening. After viewing some diamonds, defendant and Brown went into a hallway, purportedly to discuss the diamond prices. A short time later, Florence Honickman looked up and saw defendant aiming a pistol at her. She then ran and hid behind a door. Defendant fired three shots at her, striking her arm and side. Defendant then fired several shots at Stephen Honickman, who was struck three times. Defendant and Brown

stole jewelry worn by Florence Honickman and other items in the store. After the two men left the store, Florence Honickman contacted the police. Stephen Honickman died from his wounds, and Florence Honickman suffered permanent injuries from the attack.

A short time after the robbery, police stopped defendant and Brown for speeding. While defendant was standing at the rear of his car, the police officer heard a radio broadcast describing the men who robbed the Honickmans= store. Defendant and Brown fit the descriptions. The officer ordered defendant to lie on the ground. Defendant then ran from his car but was apprehended while hiding near a service road. The police found jewelry and other stolen items from the store in the car and in Brown=s possession. The following morning police found a pistol on the shoulder of the road on which defendant drove prior to being stopped for speeding. Bullets test fired from the pistol matched bullets recovered from the store and Stephen Honickman.

State v. Smulls, 935 S.W.2d 9,13-14 (Mo.banc 1996).

Appellant declined to take the stand at his retrial, and he presented no testimony in his defense (Tr.793-799). The jury found appellant guilty as charged of first degree murder, first degree assault, first degree robbery and two counts of armed criminal action (Tr.846;L.F.536-540). In the punishment phase, the State presented evidence of appellant=s eleven prior felony convictions for robbery, stealing and operating a vehicle without the owner=s consent (Tr.892-896), as well as evidence that appellant had committed a prior robbery in a manner similar to that employed by him in the robbery and shooting of the Honickmans (Tr.864-892). Appellant

adduced testimony from a psychologist and from several persons acquainted with or related to him in purported mitigation of punishment (Tr.897-950). Thereafter, the jury returned a sentence of death upon appellant for his murder of Stephen Honickman, finding three statutory aggravating circumstances as a basis for consideration of capital punishment (Tr.973;L.F.498-500,546). Appellant was sentenced as a prior, persistent and class X offender to five concurrent life terms for his remaining offenses (Tr.983-984;L.F.591-592).

On June 18, 1993, appellant filed a Rule 29.15 motion (P.C.L.F.9-16). On August 26, 1993, counsel filed a 168-page Aamended motion@ (P.C.L.F.114-281). The motion court, Judge Corrigan, issued an order dismissing without an evidentiary hearing some of appellant=s claims (P.C.L.F. 661), and an evidentiary hearing was conducted as to the remaining allegations on September 6, 1994 (PCR.Tr.2). On October 7, 1994, the motion court issued findings denying appellant=s post-conviction motion (P.C.L.F. 1379-1419).

In appellant=s consolidated appeal, this Court affirmed his convictions and sentences, but found that Judge Corrigan should have disqualified himself from ruling on the Rule 29.15 motion because of claims that attacked him as being racially biased. State v. Smulls, supra at 27. Accordingly, this Court remanded appellant=s post-conviction action to the St. Louis County Circuit Court for hearing before a different judge. Id.

On February 2, 1997, the case was assigned to Judge Emmett M. O=Brien of the St. Louis County Circuit Court (R.L.F.68). At a hearing on May 9, 1997, the motion court wanted to determine what claims required an evidentiary hearing (R.Tr.2). However, it granted appellant=s request to delay proceedings until after his certiorari petition on his direct appeal was denied (R.Tr.10-11).

On July 24, 1997, a hearing was held on whether appellant was entitled to an evidentiary hearing on his claims (R.Tr.181-228). On December 17, 1997, the motion court entered an order on that issue (R.L.F. 484).

An evidentiary hearing was held on appellant=s post-conviction motion on February 26, and April 27-30, 1998 (R.Tr.274-1440). After hearing the evidence, the motion court denied appellant=s post-conviction motion (R.L.F. 785-844). It filed its findings on September 11, 1998 (R.L.F. 785-844).

On appeal, this Court found that an evidentiary hearing before an independent judge was required to resolve appellant=s allegation that Judge O=Brien was biased against him. Smulls v. State, 10 S.W.3d 397,504-505 (Mo.banc 2000). This Court found that if the hearing court found no basis for disqualifying Judge O=Brien, the Rule 29.15 proceedings could be reassigned to him for re-entry of his judgment. Id. at 505.

Judge O=Brien transferred the cause to the St. Louis County Presiding Judge for reassignment (2nd R.L.F. 29). The presiding judge, who had already recused himself from the case, asked the assistant presiding judge, James Hartenbach, to act in his behalf (2nd R.L.F. 30). Judge Hartenbach then assigned the case to himself (2nd R.L.F. 31).

On July 21, 2000, an evidentiary hearing was held (2nd R.Tr.100). Judge O=Brien was the only witness who testified at the hearing (2nd R.Tr.100-183). After hearing Judge O=Brien=s testimony about how he could fairly and impartially judge the case and examining numerous exhibits offered by the appellant, Judge Hartenbach found, in findings issued on September 15, 2000, that there was no basis for requiring the disqualification of Judge O=Brien and he

reassigned the case to Judge O=Brien (2nd R.Tr.164-183; 2nd R.L.F. 208-216). On October 2, 2000, Judge O=Brien filed findings denying appellant=s Rule 29.15 motion (2nd L.F. 220-342).

POINTS RELIED ON

I.

The Rule 29.15 motion court did not clearly err when it denied appellant's post-conviction motion that claimed that appellant was denied effective assistance of counsel on the ground that his trial counsel failed to discover that Judge Corrigan allegedly made a racial joke nine years before appellant=s trial and allegedly treated African-Americans harsher than others, and failed to use this allegation to move to disqualify Judge Corrigan, because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

The Rule 29.15 motion court did not clearly err when it denied appellant=s claim that he was denied a fair trial on the ground that Judge Corrigan was allegedly biased based on the matters discussed above that were not discovered by his counsel, because this claim is not cognizable in proceedings pursuant to Rule 29.15 in that it could have been raised on direct appeal, and appellant failed to prove that Judge Corrigan was racially biased and that he was prejudiced by Judge Corrigan's actions.

Morrow v. State, 21 S.W.3d 819 (Mo.banc 2000);

State v. Colbert, 949 S.W.2d 932 (Mo.App.W.D. 1997);

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

State v. Hunter, 840 S.W.2d 850 (Mo.banc 1992);

Supreme Court Rule 29.15(i);

Supreme Court Rule 29.15(k);

MAI-CR3d 313.48B.

II.

Judge Hartenbach did not err by finding that Judge O=Brien was able to fairly decide the Rule 29.15 motion because the evidence adduced showed that a reasonable person would not find a factual basis to doubt the impartiality of Judge O=Brien and the allegations raised by appellant in his point relied on are unsupported by the evidence.

Judge Hartenbach did not err by denying appellant=s motion to disqualify all St. Louis County Judges because blanket disqualifications of judges are improper without the agreement of all affected judges and appellant did not get the agreement of all affected judges.

State v. Smulls, 935 S.W.2d 165 (Mo.banc 1991);

State v. Kinder, 942 S.W.2d 313 (Mo.banc 1996);

State v. Carter, 955 S.W.2d 548 (Mo.banc 1997);

State v. Owens, 759 S.W.2d 73 (Mo.App.S.D. 1988);

Missouri=s Code of Judicial Conduct, Rule 2, Canons 2 and 3(C).

III.

Judge Hartenbach did not abuse his discretion when he refused to admit into evidence Movant=s Exhibits 67-70,74-78,80-86, and 91-92 because these exhibits contained inadmissible hearsay, were irrelevant and appellant was not prejudiced.

State v. Ray, 945 S.W.2d 462 (Mo.App.W.D. 1997);

State v. Johns, 34 S.W.3d 93 (Mo.banc 2000);

State v. Nettles, 10 S.W.3d 521 (Mo.App.E.D. 1999).

IV.

The motion court did not abuse its discretion when it refused to admit movant=s first request for admissions and an unauthenticated transcript, an affidavit from appellant=s prior post-conviction counsel, Valerie Leftwich, and her testimony as to a statement that Judge Corrigan allegedly made about another case, because this evidence was hearsay, was without the required foundation, pertained to matters not pled in appellant=s post-conviction motion, and the motion court=s actions did not prejudice appellant.

State v. Zimmerman, 886 S.W.2d 684 (Mo.App.S.D 1994);

State v. Nettles, 10 S.W.3d 521 (Mo.App.E.D. 1999).

V.

The motion court did not abuse its discretion when it limited evidence about as to what Judge Corrigan allegedly said in 1983 at a meeting of St. Louis County Judges to legally admissible evidence, admitted the official records of the St. Louis County Circuit Court pertaining to an en banc meeting, and did not allow Karen Kraft to speculate about what she may have done if she had been aware of the comments that Judge Corrigan allegedly made at that meeting, because the motion court=s actions were proper and appellant was not prejudiced.

In Re Marriage Of Wessel, 953 S.W.2d 630 (Mo.App.S.D. 1997);

State v. Blue, 857 S.W.2d 632 (Mo.App.E.D. 1994);

State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996);

State v. Weber, 814 S.W.2d 298 (Mo.App.E.D. 1991).

VI.

The motion court did not clearly err when it stayed appellant=s deposition of Judge O=Toole until after it decided what claims appellant was entitled to an evidentiary hearing on because this was not done for the purpose of preventing appellant from ever deposing Judge O=Toole, and this was a reasonable procedure designed to prevent the waste of judicial and prosecutorial resources.

State v. Leisure, 838 S.W.2d 49 (Mo.App.E.D. 1992);

State v. Boone, 869 S.W.2d 70 (Mo.App.W.D. 1993);

State v. Baker, 859 S.W.2d 805 (Mo.App.E.D. 1993);

State v. Zimmerman, 886 S.W.2d 684 (Mo.App.S.D. 1994).

VII.

The motion court did not abuse its discretion by excluding the affidavit of Mary Goodwin who successfully sued Judge Corrigan for gender discrimination for conduct that occurred in 1979, and the docket sheets from that case because that evidence was not pled as facts that would be relied on in appellant=s post-conviction motion to prove a claim, and appellant was not prejudiced by the motion court=s actions in that other evidence showed that appellant=s counsel was aware of that case and reasonably chose not to attempt to disqualify Judge Corrigan.

State v. Harris, 870 S.W.2d 798 (Mo.banc 1994).

VIII.

The motion court did not clearly err when it denied, without an evidentiary hearing, appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to discover Areadily available evidence@ that a prosecutor=s reasons for striking venireperson Sydney were a pretext for racial discrimination because appellant failed to plead facts that if true would entitle him to relief. Nor did the motion court abuse its discretion by denying appellant=s offers of proof and discovery requests on this matter because appellant failed to plead facts entitling him to an evidentiary hearing.

State v. Colbert, 949 S.W.2d 932 (Mo.App.W.D. 1997);

Morrow v. State, 21 S.W.3d 819 (Mo.banc 2000);

State v. Zimmerman, 886 S.W.2d 684 (Mo.App.S.D. 1994);

State v. Leisure, 838 S.W.2d 49 (Mo.App.E.D. 1992).

IX.

The motion court did not clearly err when it rejected appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to move to recuse Judge Corrigan on the ground that Judge Corrigan expressed concerns about retention and then was retained before appellant=s trial because appellant failed to show that his trial counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

The motion court did not abuse its discretion when it excluded Movant=s Exhibits 54-58, articles from the St. Louis Post-Dispatch because they contained hearsay, were irrelevant, and appellant was not prejudice by the motion court=s actions.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Malicoat, 942 S.W.2d 458 (Mo.App.S.D. 1997);

Breeden v. State, 987 S.W.2d 15 (Mo.App.W.D. 1999).

X.

A. The motion court did not clearly err when it admitted testimony of five defense attorneys on Judge Corrigan=s reputation for being fair towards defendants regardless of their race, because this evidence rebutted evidence and inferences of bad character that were injected into the case by appellant and showed why it was reasonable for counsel not to do further investigation into Judge Corrigan=s background.

B. The motion court did not clearly err when it excluded the testimony of John Galliher, a sociologist who was willing to testify that Judge Corrigan could not fairly serve as a judge in a case that involved an African-American defendant, because the motion court was capable of evaluating the evidence in the case without the assistance of a sociologist, and this evidence would not have assisted the motion court even had it been admitted in that the motion court found that Galliher was not credible.

C. The motion court did not clearly err by not allowing appellant to present evidence from defense attorney Donald Wolff that he engaged in racial discrimination during jury selection when he was a St. Louis County Prosecutor in the 1960's, because this testimony was not offered to prove any claim that appellant was granted an evidentiary hearing on and it was irrelevant. The motion court did not clearly err by not allowing appellant to cross-examine defense attorneys Stormy White and Bradford Kessler with affidavits on whether they believed in 1990 that the St. Louis County Prosecutor=s Office engaged in racial discrimination during jury selection, because this testimony was not offered to prove any claims upon which an evidentiary hearing had been granted, and it was irrelevant inadmissible hearsay.

Hayman v. Laclede Elec. Co-op., Inc., 827 S.W.2d 200 (Mo.banc 1992);

State v. Weaver, 912 S.W.2d 499 (Mo.banc 1995);

State v. Kinder, 942 S.W.2d 313 (Mo.banc 1996);

State v. Edwards, 918 S.W.2d 841 (Mo.App.W.D. 1996).

XI.

The motion court did not clearly err when it denied, without an evidentiary hearing, appellant=s allegation that the prosecutor sought the death penalty based on appellant=s race and his claim that he was denied effective assistance of counsel on the ground that his counsel failed to investigate and raise that claim because appellant=s first claim is not cognizable in post-conviction proceedings in that it could have been raised by appellant at trial and on direct appeal, appellant failed to allege facts that were not refuted by the record that would constitute exceptionally clear proof that the prosecutor=s decision was based on race, and that show that reasonable counsel would have raised that claim, and the proper limits placed on discovery did not excuse appellant=s failure to plead such facts.

McCleskey v. Kemp, 481 U.S. 279 (1987);

State v. Taylor, 929 S.W.2d 209 (Mo.banc 1996);

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

State v. Six, 805 S.W.2d 159 (Mo.banc 1991).

XII.

The motion court did not clearly err when it denied appellant=s allegation that he was denied effective assistance of counsel when his trial counsel did not introduce into evidence the stipulation between the State and the defense that the gunpowder residue tests performed on appellant and his accomplice indicated that no gunshot residues were detected on appellant and that the test on his accomplice was inconclusive as to the presence of gunshot residue, because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel in that the State had withdrawn its stipulation by the time of appellant=s trial.

Appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel did not call Donald Smith to testify about gunshot residue tests that he ran was waived by appellant because it was not pled in his post-conviction motion.

Morrow v. State, 21 S.W.3d 819 (Mo.banc 2000);

State v. Harris, 870 S.W.2d 798 (Mo.banc 1994);

Rohwer v. State, 791 S.W.2d 741 (Mo.App.W.D. 1990)**;**

Supreme Court Rule 29.15.

XIII.

The motion court did not clearly err when it rejected appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel did not call numerous mitigation witnesses because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

Appellant=s other claims raised in his thirteenth point should not be reviewed because they were waived in that appellant did not plead them in his post-conviction motion.

State v. Clay, 975 S.W.2d 121 (Mo.banc 1998);

State v. Kreutzer, 928 S.W.2d 854 (Mo.banc 1996);

State v. Brown, 902 S.W.2d 278 (Mo.banc 1994);

State v. Nunley, 923 S.W.2d 911 (Mo.banc 1996).

XIV.

The motion court did not clearly err when it denied without an evidentiary hearing some of the claims in appellant=s post-conviction motions because appellant failed to allege facts that would entitle him to a relief if taken as true, or the facts alleged were refuted by the record.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Ramsey, 864 S.W.2d 320 (Mo.banc 1993);

State v. Smulls, 935 S.W.2d 9 (Mo.banc 1996).

XV.

The appellant=s claim that he was denied his right to effective assistance of counsel because his counsel refused to allow him to testify is unsupported by any evidence and refuted by the record.

State v. Starks, 856 S.W.2d 334 (Mo.banc 1993).

ARGUMENT

I.

The Rule 29.15 motion court did not clearly err when it denied appellant's post-conviction motion that claimed that appellant was denied effective assistance of counsel on the ground that his trial counsel failed to discover that Judge Corrigan allegedly made a racial joke nine years before appellant=s trial and allegedly treated African-Americans harsher than others, and failed to use this allegation to move to disqualify Judge Corrigan, because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

The Rule 29.15 motion court did not clearly err when it denied appellant=s claim that he was denied a fair trial on the ground that Judge Corrigan was allegedly biased based on the matters discussed above that were not discovered by his counsel, because this claim is not cognizable in proceedings pursuant to Rule 29.15 in that it could have been raised on direct appeal, and appellant failed to prove that Judge Corrigan was racially biased and that he was prejudiced by Judge Corrigan=s actions.

A. Appellant=s improper transmogrification of his claims

Appellant alleged in his Rule 29.15 motion that he was denied effective assistance of counsel because his trial counsel failed to discover evidence that Judge Corrigan was racially biased and failed to move to disqualify Judge Corrigan on the ground that Judge Corrigan could not fairly serve as a judge in all phases of a capital murder case involving an African-American (P.C.L.F. 185). The only evidence that appellant alleged that his counsel should have discovered and used in the motion to recuse is that Judge Corrigan allegedly made a racial joke at a judges=

meeting in 1983, and his conclusory allegation that Judge Corrigan gave harsher treatment to African-Americans (P.C.L.F. 185-189). He alleged that Judge Corrigan could not fairly consider the Batson challenge that was made because of a history of actions indicating racial bias (P.C.L.F. 189). However, he did not allege that Judge Corrigan made any improper statements during the Batson hearing.

Appellant=s other relevant claim in his post-conviction motion is that he was denied a fair trial because Judge Corrigan allegedly could not fairly serve as a judge in a case that involved an African-American in light of the above-mentioned evidence that his counsel failed to discover (P.C.L.F. 185).

Appellant attempts to mislead this court by improperly substituting the claims in his motion to recuse Judge Corrigan from hearing his Rule 29.15 motion (P.C.L.F. 284-292,443-582,668-1052) for his actual claims in his Rule 29.15 motion (P.C.L.F. 185-189).[2]

This Court may only consider claims as they were pled to the motion court. Belcher v. State, 801 S.W.2d 372, 375 (Mo.App.E.D.1990); State v. Clay, 975 S.W.2d 121,141-142 (Mo.banc 1998). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. State v. Harris, 870 S.W.2d 798,815 (Mo.banc 1994), because pleadings may not be amended to conform to the evidence after the time for amending pleadings under Rule 29.15 has passed. Rohwer v. State, 791 S.W.2d 741,743-744 (Mo.App.W.D.1990).

[2]The amicus brief suffers from this same defect.

The motion court did consider appellant=s new versions of his claims, and it did make extensive findings on them (2nd P.C.L.F. 250-276). Respondent will point out whether the claims addressed were pled below.

B. Standard of review

Appellant attempts to subvert the standard of review by refusing to consider the evidence in the light most favorable to the motion court=s findings. He ignores credibility findings and cites matters and offers of proof that were not admitted into evidence (Petitioner=s Exhibits 2, 23, 51, 60; R.Tr.280-282;App.Br. 46,60-61). He argues pleadings pertaining to the proposed testimony of John Galliher, without mentioning in this point that Galliher=s testimony was not admitted into evidence (App.Br.42). He also relies on law review articles that were not admitted into evidence (App.Br.47,52,54,56,58-64), even though A[m]ere citation of a law review to a court does not suffice to introduced into evidence the truth of the hearsay@ contained within it. Ramdas v. Angelone, 120 S.Ct. 2113 (2000).

However, appellate courts do not conduct de novo review and consider matters that were not admitted into evidence. See Breeden v. State, 987 S.W.2d 15, 16 (Mo.App.W.D.1999). The ruling of the lower court will be overturned only if it is Aclearly erroneous.@ Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only 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. State v. Taylor, 929 S.W.2d 209, 224 (Mo.banc 1996). AIf the trial court=s ruling is plausible in light of the record viewed in its entirety, this court may not reverse the ruling even though convinced it would have weighed the evidence differently had it been sitting as the trier

of fact.@ State v. Young, 991 S.W.2d 173, 174 (Mo.App.S.D.1999); see also State v. Walton, 796 S.W.2d 374, 377 (Mo.banc 1990).

C. Claims of ineffective assistance of counsel:

1. Claim that counsel failed to discover alleged racial joke and alleged harsher treatment of African-Americans and failed to move to recuse (raised in 29.15 motion).

As to the claim that appellant=s trial counsel were ineffective for failing to discover the alleged barbeque joke and use that information to move to recuse Judge Corrigan to prove ineffective assistance of counsel, a defendant has to show two things. AFirst, the defendant must show that counsel=s performance was deficient.@ Strickland v. Washington, 466 U.S. 668, 687 (1984). ASecond, the defendant must show that the deficient performance prejudiced the defense.@ Id. at 687. In order to show prejudice, A[t]he defendant must show that there is a reasonable probability that, but for counsel=s unprofessional errors, the result of the proceeding would have been different.@ Id. at 694.

The motion court made the following findings:

> b) Movant=s next accusation asserts that trial counsel should have investigated Judge Corrigan=s background to learn of an alleged racial slur attributed to Judge Corrigan made in the company of a few people at a social meeting of judges in 1983. As substantive proof, Movant has offered inadmissible hearsay as to the content of the statement and the circumstances surrounding its occurrence. The testimony Movant attempted to present in this regard came from a retired reporter from the Post-Dispatch and Judge Robert Lee Campbell. In both regards, Movant was unable to overcome the hearsay

objections to this testimony [(R.Tr.280-291)]. Movant declined to call Judge Corrigan as a witness and failed to elicit any testimony concerning this alleged statement during his deposition [(Movant=s Exhibit 2)]. Moreover, Judge Campbell indicated in his testimony that the alleged statement in question was an attempt at humor and in his twenty-five (25) years on the bench with Judge Corrigan, he was not aware of any allegation of racial bias or prejudice on the part of Judge Corrigan [(Movant=s Exhibit 1 at 15-17,23-24)]. Trial counsel each testified that they were unaware of the alleged remarks which were reported in the newspaper prior to them becoming licensed attorneys [(R.Tr.696,1111)].

From the evidence presented in this 29.15 action, this Court is unable to discern whether or not this alleged racial remark was made and if so by whom. From the newspaper articles offered by Movant, which were not admitted into evidence, it is clear that Judge Corrigan has steadfastly denied making the alleged remark. This Court=s review of the official minutes of the Court en banc meetings during 1983 received under seal after being subpoenaed by Movant, do not reflect the presence of Judges Corrigan, Ruddy and Campbell at the same meeting after the month of February. Nor do the minutes indicate the presence of Kenneth Rothman at any time during 1983. From every description of this meeting, whenever it occurred, it is clear that it was not an official judicial assembly, but rather a gathering of individuals hoping to take legislative action for a pay raise. The remark, if made and by whomever, even as an attempt of humor, can be considered insensitive and offensive. But that does not make it a judicial

act and indicative of a judge=s in-court treatment of minorities. This Court finds that a reasonable person would consider the passage of time, the difference between matters outside the courtroom and the task of judging, along with Judge Corrigan=s impeccable reputation among criminal defense attorneys in the area [(R.Tr.1164-1165,1255-1260,1282-1292,1304-1310,1317-1325,1346-1351)] to determine that he is free from racial bias and able to impartially determine claims of racial discrimination in a Batson inquiry. Trial counsel is not ineffective for failing to investigate a disputed statement allegedly made prior to the start of counsel=s professional career, nearly ten (10) years prior to the trial, having participated in a previous trial and Batson hearing with the trial court and not observing any evidence of racial bias or prejudice on the part of the judge in his rulings.

(2nd R.L.F.252-253).

As to appellant=s claim that his counsel should have discovered that Judge Corrigan gave harsher treatment to African-Americans, appellant did not plead facts showing what this harsher treatment consisted of. Missouri is a fact pleading state, and the refinement of a point at a hearing and on appeal does not remedy this pleading defect. State v. Harris, supra at 815. Additionally, A[a]s distinguished from other civil proceedings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief.@ Morrow v. State, 21 S.W.3d 819,823 (Mo.banc 2000). Nevertheless, the motion court made the following findings on this issue:

c) Movant=s next pronouncement of racial bias on the part of Judge Corrigan asserts Aa disparate treatment of African-Americans in other criminal cases tried before him.@ As proof of this discordant handling of minority defendants, Movant submitted and this Court took judicial notice of the files and transcripts of nine (9) criminal cases tried before Judge Corrigan. Movant=s theory, as discerned by argument of counsel, is that Judge Corrigan=s statements during these trials reflect an obvious prejudice against African-American defendants. Movant does not claim and the record does not support any allegation that sentences were meted out unevenly or that the rulings prejudiced the defendants.

A review of the nine (9) cases selected by Movant's counsel from the twenty-five year career of Judge Corrigan reveal that in six (6) of the cases the judge referred to the defendants as Aan animal, a mad dog, a manipulator, a flim-flam man, a clown, and a coward.@ All of these defendants were African-Americans. The first, a twice-convicted felon, was found guilty by a jury of a brutal beating and rape of an elderly woman. The second, was a serial rapist convicted of eight (8) counts of burglary, seven (7) counts of rape, six (6) counts of sodomy, eight (8) counts of armed criminal action, one (1) count of stealing a firearm, two (2) counts of attempt rape and one (1) count of attempt rape. The third defendant, a five (5) time convicted felony, was convicted of the rape and sodomy of five (5) black females. The fourth offender, a four (4) time convicted felon, was found guilty of four (4) counts of forgery and two (2) counts of

stealing in a scheme to defraud his employer. The fifth criminal was a previously convicted armed robber and burglar who was convicted of an armed robbery at a gas station, who after being referred to as a clown by the Court concluded his sentencing by telling Judge Corrigan, A. . .Fuck you, you fucking white pigs.@ The final defendant was a four (4) time convicted felon who a jury found guilty of stealing. The remaining three (3) cases involved apparently Caucasian defendants. The first two (2) transcripts contained nothing of note. The final defendant was convicted of what the Court called a Avicious crime@ and the Court referred to his testimony as A. . .a story only a fool would believe.@

Based upon these nine (9) cases, Movant opines a belief that a pattern of racial bias has been proven. This Court disagrees. Careful scrutiny of each transcript submitted by Movant reveals that the comments of the trial court in every instance fail to reveal bias or prejudice on the part of the Court but rather, the comments are reasonable when considered in light of all of the evidence and circumstances before the judge at the sentencing of each defendant. In every case the sentence imposed was appropriate and the comments accurate based upon the defendant's conviction record and the evidence adduced at trial. Although nine (9) cases taken from a career which has spanned twenty-five (25) years and innumerable criminal cases is insufficient for a meaningful review, Movant has not proven a hint of racial bias in any case. Even with Movant=s counsel handicapping the cases to be reviewed [(R.Tr. 877)], Judge Corrigan exhibits no pattern of racial bias or prejudice.

> Trial counsel cannot be found to be ineffective for failing to investigate and movant to disqualify Judge Corrigan based upon alleged disparate treatment of African-American defendants. Clearly there was no disparate treatment of Movant in this case. At sentencing, the trial court followed the recommendation of the jury in sentencing Movant to death on the Murder in the First Degree Count. In sentencing Movant on the remaining five (5) felonies, the trial court on count one. The Court=s sentencing of Movant based on his eleven (11) previous felony convictions to concurrent sentences can hardly be construed as harsh or disparate treatment.

(2nd R.L.F. 253-255).

In addition to the pleading deficiencies of appellant=s claims, the motion court did not clearly err when it found that appellant failed to show that reasonable counsel would have discovered the remark that Judge Corrigan allegedly made in 1983. Appellant has not even proven by a preponderance of credible evidence that the remark ever occurred (2nd R.L.F. 252-253). The credibility of witnesses is a matter for the motion court to determine. Rousan v. State, No. SC82406, slip op. at 18 (Mo.banc May 15,2001).

Nor has appellant proven that reasonable counsel would have been aware of the alleged harsher treatment of African-Americans by Judge Corrigan, which appellant did not plead with any specificity and which the motion court found did not occur.

Appellant=s counsel conducted a reasonable investigation of Judge Corrigan by talking to other attorneys, and they did not learn any information that tarnished Judge Corrigan=s reputation for being fair with defendants regardless of their race (R.Tr.642-

643,696,1111,1164-1166). Reasonable counsel would not perform an F.B.I.-type background check on every judge he or she appears before. Counsel is entitled to assume that the bench is populated with individuals of great integrity. State v. Kinder, 942 S.W.2d 313, 320 (Mo.banc 1996). The reputation evidence presented at the evidentiary hearing showed that it was unlikely that counsel would have learned anything unfavorable about Corrigan=s reputation for fairness if they had conducted a further inquiry (R.Tr.1255-1261,1289-1290,1307-1309,1322-1325,1348-1351).

Nor has appellant demonstrated that reasonable counsel would have moved to disqualify Judge Corrigan had they seen a report on the alleged joke in a newspaper. In discussing Judge Corrigan=s ability to rule on a gender-Batson claim in this case, this Court found that Aa reasonable person would look to the passage of time@ since the past conduct occurred, Athe difference between personnel decisions and the task of judging, and decide one who had been punished for sex discrimination in the past would be more sensitive to the problem and recognize it if the State engaged in it.@ State v. Smulls, supra at 17. Similarly, *if* Judge Corrigan had made the joke in question and had been criticized for it in a newspaper article about nine before appellant=s trial, reasonable counsel could look at the passage of time, the difference between telling a joke at a small social gathering and judging, the criticism that the judge received, and perceive that Judge Corrigan would now be more sensitive to racial issues. In fact, the Public Defender=s position in this case is contrary to their position in cases that are being tried in St. Louis County. Stormy White, the First Assistant Public Defender in St. Louis County, testified that the Public Defender=s Office does not have a policy of disqualifying Judge Corrigan in cases involving minorities (R.Tr.1293).

Moreover, appellant=s counsel wanted to have the case tried by Judge Corrigan as part of a reasonable trial strategy. They were aware that Judge Corrigan believed that the jury instruction that permitted the judge to impose a death penalty if the jury could not agree on the punishment, MAI-CR3d 313.48B, was unconstitutional, and that Judge Corrigan stated that he would have an extremely difficult time imposing the death penalty if the jury did not (R.Tr.648-651,1162-1163). Counsel stated that a judge=s reluctance to impose the death penalty was valuable information that would be a strategic reason to keep the case in front of Judge Corrigan (R.Tr.1163).

Nor has appellant shown that he suffered Strickland prejudice from his counsel=s actions. Appellant=s post-conviction motion did not plead any facts showing such prejudice. It merely contained the conclusory allegation that Judge Corrigan Acould not fairly consider the Batson challenge that was made as a result of actions indicating racial bias@ (R.L.F.189). However, Judge Corrigan properly heard evidence and decided the Batson claim, and this Court found that his ruling was not clearly erroneous (R.L.F.825-836). State v. Smulls, 935 S.W.2d 9,14-16 (Mo.banc 1996).

Additionally, even if Judge Corrigan had improperly ruled on appellant=s Batson claim, Strickland prejudice did not occur because appellant has failed to show that any biased jurors served on his case. State v. Colbert, 949 S.W.2d 932,944 (Mo.App.W.D.1997); State v. Pierce, 927 S.W.2d 374, 377(Mo.App.W.D.1997); Morrow v. State, supra at 827; Murray v. Groose, 106 F.3d 812,815 (8th Cir.1996); Young v. Bowersox, 161 F.3d 1159,1160-1161 (8th Cir. 1998); Wright v. Nix, 928 F.3d 270,273-274 (8th Cir.1991). It should be remembered that A[a] person's race simply 'is unrelated to his fitness as a juror.=@ Batson v. Kentucky, 476 U.S. 79

(1986) (citation omitted). To claim that a person would vote a certain way based on race or gender is Ato engage, at best, in mere speculation and, at worst, in the stereotyping that Batson and its progeny strive to prevent.@ Morrow v. State, supra at 827.

2. Claim about statements Judge Corrigan made the day after the Batson hearing (not raised in 29.15 motion).

Appellant attempts to improperly expand his claim beyond his pleadings by alleging that his counsel should have attempted to disqualify Judge Corrigan based on Judge Corrigan=s comments at a hearing the *day after* appellant's Batson claim was denied (App.Br.16;Tr.380-382). However, as was explained above, this claim was not specifically pled in appellant=s Rule 29.15 motion and this Court is without jurisdiction to review claims that were not raised in a timely filed motion. State v. Gilpin, 954 S.W.2d 570,579 (Mo.App.W.D.1997); State v. Brooks, 960 S.W.2d 479,498-499 (Mo.banc 1997).

In any event, the respondent will gratuitously address this claim, in order to clear up any misperceptions. At the Batson hearing, appellant=s counsel stated that venireperson Sidney was black and the prosecutor agreed with this assertion (Tr.367-368). Judge Corrigan did not dispute that Sidney was black. He found, though, that appellant=s Batson claim was without merit (Tr.367-373). The day *after* appellant=s Batson hearing, appellant=s counsel attempted to make an untimely addition to the previous day=s record at the Batson hearing, and asked for the record to reflect the races of the victims and all of the witnesses who testified in appellant=s first trial (Tr.376-377). Judge Corrigan stated that he did *not remember* the races of all those individuals because he did not think about that, but that he would *accept* appellant=s counsel=s statement about the race of those individuals (Tr.376-377). *After* Judge Corrigan rejected appellant=s

untimely request for a mistrial based on Batson, he mused about how hard it was for judges to tell the race of individuals without direct evidence (Tr.381). He said:

> COURT: You see, I have a problem. I don=t know what it is to be black. I don=t know what constitutes black. And I never, in this Court, no matter what any appellate court may say, I never take judicial notice that anybody is black or that only one person or four persons or eight persons are black.
>
> That to me is something that I don=t think this Court is wise enough or any other appellate court is wise enough unless there is direct evidence as to who is black and who is white and who is orange and who is purple. I do not under any circumstances in this division ever take judicial notice of the number of people who are black. And I believe that's counsel's responsibility to prove who is black and who isn=t or who is a minority and who isn=t.
>
> There were some dark complexioned people on this jury. I don=t know if that makes them black or white. As I said, I don=t know what constitutes black. Years ago they used to say one drop of blood constitutes black. I don=t know what black means. Can somebody enlighten me of what black is? I don=t know; I think of them as people.
>
> I listened to the responses of Ms. Sidney. I watched her attitude very briefly as it may have been, and I=m not going to sit here and say to you that Ms. Sidney is not black. But I=m not going to make a judgment as to whether anybody else on the panel was, so in any event, I=m merely telling you that for the record. I=d rather not even discuss it on the record.

(Tr.381-382).

In other words, Judge Corrigan did not dispute that Sidney was an African-American, but he was not going to take judicial notice of individuals who were not presently in front of him and who he could not remember their races, because he had not focused on their races when they were before him and because of the great difficulty, if not impossibility, of guessing the race of many people by merely looking at them.

The motion court made the following findings:

> Trial counsel acknowledged during their testimony in this action that the objections made the next day following the release of the venire was untimely under the law of this state. State v. Parker, 836 S.W.2d 930,939 (Mo banc 1992)... [(R.Tr.1211-1216)]. Testimony also indicated that although counsel was offended by the remarks, they did not believe it rose to the level of requiring a request for the trial court to be disqualified [(R.Tr.690-691, 1217)]. Based upon their experience from the previous trial with the judge and the approval of the trial court=s ruling by the Missouri Supreme Court, this Court does not find trial counsel ineffective for failing to request disqualification based upon the remarks of the Court.
>
> This Court agrees that the remarks, when taken out of context, could be considered insensitive and unnecessary. However, when taken in the full context of the entire Batson proceedings, it constitutes little more than the judge=s unwillingness to presume or take judicial notice as a matter of law, the race of any individual. Indeed, trial counsel who identified himself as an African-

> American, testified that it is a very personal decision in which an individual determines which racial group he or she determines that they belong [(R.Tr.682-683)]. The trial court=s words, given his correct rulings and acceptance of the parties= determinations of race in the Batson hearings, when read in context and given reasonable interpretation, do not rise to the level of personal bias or prejudice based upon race.

(R.L.F.835-836;A-51 to A-52).

The United States Supreme Court has recognized that racial classifications are not clear cut and are more sociopolitical than biological and, hence, may be arbitrary and meaningless. Saint Francis College v. Al-Khazraji, 481 U.S. 604,609 n.4 (1987). Sociopolitical factors may not appear from the way a person looks. Moreover, many individuals may not wish to simply be classified as only belonging to one race. To do so is to fail to honor *all* of their heritage. One of appellant=s trial counsel recognized that determining the race of an individual could be subjective and may require questioning the individuals in some circumstances because the individuals might disagree with the label that others place on them (Tr.682-683).

It was not wrong for Judge Corrigan to attempt to avoid offending individuals by not taking judicial notice of matters on which he could have been wrong, during an untimely attempt to supplement a Batson motion. Judicial notice should only be taken as to matters that are regarded as established by common notoriety and this is not always true as to race.

As to Judge Corrigan=s comment about *others* views about Aone drop of blood,@ it was not a statement of Judge Corrigan=s views. It was a historical observation concerning the insensitivity of others in the past in deciding the race of individuals. Judge Corrigan made this

statement in the context of explaining why he was sensitive to the possibility of mislabeling the races of individuals. The mere mentioning of this phrase is not wrong.

This comment and the aforementioned alleged comments of Judge Corrigan also had nothing to do with appellant=s Batson claim, which as was mentioned above had already been properly decided. Thus, counsel could not have acted unreasonably by not moving to disqualify Judge Corrigan when he made these comments. Nor can appellant show that he suffered Strickland prejudice from the actions of his counsel, for the reasons discussed above.

D. Alleged denial of fair trial (raised in 29.15 motion)

Appellant=s claim that Judge Corrigan could not fairly try an African-American defendant because he allegedly made the barbeque remark in 1983, and he allegedly treated African-Americans harsher than others is not cognizable in post-conviction relief proceedings because it is a claim of trial court error that could have been raised on a direct appeal (P.C.L.F. 185-189). State v. Owens, 759 S.W.2d 73,75 (Mo.App.S.D. 1988);Mallett v. State, 769 S.W.2d 77,82-83 (Mo.banc 1989)(claim that trial court should have recused himself was not cognizable in proceedings pursuant to Rule 27.26); Follins v. State, 809 S.W.2d 161 (Mo.App.E.D. 1991). The post-conviction relief rules cannot be used to obtain review of matters that could have been raised on direct appeal. State v. Six, 805 S.W.2d 159,168 (Mo.banc 1991); State v. Hunter, 840 S.W.2d 850,860 (Mo.banc 1992). Movant did not allege facts in his Rule 29.15 motion showing that any extraordinary circumstances existed that precluded him from raising this claim in his direct appeal. In fact, he alleged that reasonable counsel would have been aware of the matters in question (P.C.L.F.188).

In any event, appellant had the burden of proving his claim by a preponderance of the evidence, under 29.15(i), and he failed to prove that Judge Corrigan denied him a fair trial. As was described above, appellant failed to prove by credible evidence that Judge Corrigan was biased. The motion court stated,

> Testimony from Judge Robert Lee Campbell and five (5) prominent St. Louis Area criminal defense attorneys indicated that Judge Corrigan has an impeccable reputation for his ability to be fair to all individuals who appear before him no matter their race, creed or color [(Movant=s Exhibit 1 at 15-17;R.Tr.1255-1261,1289-1290,1307-1309,1322-1325,1348-1351)]. Based upon all of the credible evidence adduced during this proceeding, this Court finds that Judge Corrigan is free from racial bias and prejudice in the exercise of his judicial duties. A review of the record in the underlying cases reveals no instance in which the trial judge committed an act or failed to act in such a way that it might lead a reasonable person to any other conclusion.
>
> This Court=s careful scrutiny of the entire record reveals no instance in which the trial judge=s rulings appear even remotely racially motivated, incorrectly prejudice the Movant, result in manifest injustice or a miscarriage of justice. The Missouri Supreme Court has determined that the trial judge=s Batson determinations, the most race-specific part of the trial, were correct. This review of the record reveals no instance in which the trial judge committed an act or failed to act in such a way that it might reasonably have altered the jury=s verdict that defendant killed the victim in this case and that he deserved to die as a result

of his crime. Movant has failed to produce one scintilla of credible evidence indicating that Judge Corrigan is prone to racial bias or prejudice or that the outcome of the trial was changed based upon the actions of Judge Corrigan.

(2ndR.L.F. 274-275).

II.

Judge Hartenbach did not err by finding that Judge O=Brien was able to fairly decide the Rule 29.15 motion because the evidence adduced showed that a reasonable person would not find a factual basis to doubt the impartiality of Judge O=Brien and the allegations raised by appellant in his point relied on are unsupported by the evidence.

Judge Hartenbach did not err by denying appellant=s motion to disqualify all St. Louis County Judges because blanket disqualifications of judges are improper without the agreement of all affected judges and appellant did not get the agreement of all affected judges.

Appellant claims that Judge Hartenbach erred in finding that Judge O=Brien was able to fairly decide his case because Judge O=Brien was with Judge Corrigan when Judge Corrigan allegedly condemned this Court for calling him a racist, and he speculates that Judge O=Brien Amay have participated in the criticizing language that produced lobbing against this Court...,and his rulings showed actual bias@ (App.Br. 66). He also alleges that Judge Hartenbach and the other St. Louis County Judges should have been disqualified because they were not able to fairly serve (App.Br. 66).[3]

A. Judge O=Brien was fair and impartial

[3]Appellant improperly cites newspaper articles and exhibits that were not admitted into evidence at the Rule 29.15 hearing (App.Br.73-74;Movant=s Exhibits 67-71).

Missouri=s standard for judicial disqualification is drawn from Missouri=s Code of Judicial Conduct, Rule 2, Canons 2 and 3(C), Awhich provide that a judge should avoid the appearance of impropriety and shall perform judicial duties without bias or prejudice, and Rule 2, Canon 3(D), which provides that a judge should recuse in a proceeding in which the judge=s partiality might reasonably be questioned.@ State v. Kinder, 942 S.W.2d 313,321(Mo.banc 1996). The test applied is whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court. State v. Jones, 979 S.W.2d 171,178(Mo.banc 1998). A>A reasonable person... is not one who is ignorant of what has gone on in the courtroom before the judge. Rather, the reasonable person knows all that has been said and done in the presence of the judge.=@ Smulls v. State, 10 S.W.3d 497,499(Mo.banc 2000)(citation omitted).

Under this standard, a disqualifying bias and prejudice is one with an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learning from participation in the case. State v. Nicklasson, 967 S.W.2d 596,605(Mo.banc 1998); State v. Hunter, 840 S.W.2d 850,866(Mo.banc 1992). AIn cases requiring recusal, the common thread is >either a fact from which prejudgment of some evidentiary issue in the case by the judge may be inferred or facts indicating the judge considered some evidence properly in the case for an illegitimate purpose.=@ Smulls v. State, supra (citation omitted).

Judge O=Brien was the only witness who testified at the hearing on whether he was improperly biased, though appellant presented a large number of documents into evidence. He said that his courtroom was across the hall from Judge Corrigan=s courtroom and that they

sometimes saw each other and exchanged a few words as they passed in the hallway (2nd R.Tr.101-105). He said that he sometimes ate in the judges= lunchroom in the courthouse in the presence of Judge Corrigan and other judges (2nd R.Tr.164-165). He said that he and Judge Corrigan did not socialize except for at the courthouse and at judicial functions (2nd R.Tr.166).

Judge O=Brien saw this Court=s first version of the first opinion in this case that contained language about Judge Corrigan=s fitness to serve as a judge (2nd R.Tr.167; Movant=s Exhibit 65 at 31). He did not make any statements about the merits of the case (2nd R.Tr.121). He thought that said language was not necessary for this Court to reach its decision and was more appropriate for the Commission on Discipline and Removal of Judges (2nd R.Tr.121,167-168). Judge Holstein wrote a concurring opinion that stated that he was uncomfortable with the Aunnecessary rhetoric@ of main opinion (Movant=s Exhibit 65 at 34-35;2nd R.Tr.171).

Judge O=Brien heard comments about this Court=s first opinion and was present with other persons when Judge Corrigan made comments about that opinion, but he did not remember what the comments were (2nd R.Tr. 120,134-135). He assumed that the opinion was not one of Judge Corrigan=s favorite ones (2nd R.Tr.139). He did not believe that he heard Judge Corrigan say anything specific about the first opinion, but that Judge Corrigan simply expressed overall displeasure with it (2nd R.Tr.145-147). Judge O=Brien read some newspaper articles about the opinion (2nd R.Tr.114-115). He was not aware of any efforts to get this Court to change its first opinion (2nd R.Tr.178). This Court, though, later modified its opinion, by removing the language that Judges O=Brien and Holstein had thought was inappropriate and by removing language that

considered the truth of the matters asserted in a newspaper article that had not been admitted into evidence (Movant=s Exhibit 66).

After this Court issued its modified opinion, Judge O=Brien made a concerted effort to avoid being around anyone who was discussing the case, because he knew that the case could be assigned to him (2nd R.Tr.126-127,177). After the case was assigned to him, he did not discuss it with anyone, other than the parties (2nd R.Tr.179). His opinions on the issues in the case were based on the evidence that was presented to him by the parties (2nd R.Tr.176-177). He did not have any reservations about his ability to fairly and impartially judge the case (2nd R.Tr.182).

The motion court found that Judge O=Brien did not have any untoward contact with Judge Corrigan before or after the case was assigned to him, he never expressed an opinion about the merits of this case before it was submitted to him after all evidence and argument was presented, and there was no factual basis for a reasonable person to question his impartiality (2nd R.L.F.212-214).

The evidence did not show Judge O=Brien formed any opinions on the merits of appellant=s case before he heard the evidence and it showed that he fairly and impartially considered the evidence that was presented. The presumption that Judge O=Brien was acting with honesty and integrity and was only presiding over the case because he could be fair and impartial, Smulls v. State, supra at 499, was not overcome and was, in fact, supported by the testimony of Judge O=Brien.

Appellant raises three attacks on the character of Judge O=Brien.

1. He alleges that AO=Brien was with Corrigan when Corrigan condemned this Court=s original opinion for calling him >a racist= ...@ (App.Br.67 citing 2nd R.Tr.134-135,140). However, there is no evidence that Judge Corrigan made any such statements in Judge O=Brien=s presence. The pages cited by appellant and the pages cited above show that Judge O=Brien testified that he did not remember what Judge Corrigan said in his presence. He said that Judge Corrigan=s comments, which were made in the presence of others besides him, were simply an expression of overall dissatisfaction with this Court=s first opinion, which was later withdrawn due to this Court=s dissatisfaction with that opinion (2nd R.Tr.145-147).

Nor would it matter if Judge Corrigan made the alleged statements in Judge O=Brien=s presence. Recusal of a judge is not required simply because a judge has previously heard statements about a case or a party interested in a case. State v. Owens, 759 S.W.2d 73,75 (Mo.App.,S.D.1988)(contact with a defendant in prior criminal matters does not establish prejudice requiring recusal); State v. Whitlow, 988 S.W.2d 121 (Mo.App.W.D. 1999). Judges are presumed to be able to disregard matters that are not properly before them. State v. Carter, 955 S.W.2d 548,560 (Mo.banc 1997);State v. Taylor, 944 S.W.2d 925,938 (Mo.banc 1997).

2. Appellant states, AO=Brien may have participated in criticizing language that produced lobbying against this Court thereby creating an appearance of impropriety...@ (App.Br. 66). However, Judge O=Brien was unaware of the lobbying, there is no evidence that he made any statements that produced the lobbying, and the views expressed by Judge O=Brien about this Court=s original opinion containing unnecessary language were also expressed by this Court when it removed that language (2nd R.Tr.178).

3. Appellant alleges that Judge O=Brien=s rulings Athroughout@ establish actual prejudice (App.Br.66). However, adverse rulings do not violate the Due Process Clause, State v. Haynes, 937 S.W.2d 199,204 (Mo.banc 1996), or require recusal of a judge. State v. Copeland, 928 S.W.2d 828,841 (Mo.banc 1996).

Moreover, Judge O=Brien=s adverse rulings against appellant were correct. For example, appellant alleges that Judge O=Brien went outside the record when he stated in his findings that Judge Corrigan steadfastly denied telling the barbecue joke (App.Br.68). Appellant neglects to mention that this finding is part of an explanation as to why the newspaper articles offered by him to show that the alleged joke occurred were unreliable and inadmissible hearsay because they also contained Judge Corrigan=s denial that he ever made those statements (2nd R.L.F.252-253).

Appellant complains that Judge O=Brien was biased because he would not allow one of his post-conviction counsel testify or make a record concerning what Harold Satz, a retired Court of Appeals Judge, said to appellant=s post-conviction counsel during an evidentiary hearing (App.Br. 69;R.Tr.1408-1423). Those unknown statements were not offered for the truth of what was asserted, but were offered to show the Apopularity of this case@ (R.Tr.1413-1414). The popularity of the case is not relevant, the statements do not show the popularity case unless they are used for the truth of the matter asserted therein, and the fact that Judge O=Brien did not allow counsel to go further into this area does not show that he was biased against appellant.

Appellant alleges that O=Brien was biased because he refused to allow him to present this Court with a complete record (App.Br.70). He states that his claim is explained in Point IV of his brief (App.Br.70). Likewise, his claim is refuted in Point IV of respondent=s brief.

Appellant alleges that O=Brien was biased because he refused to allow him to get answers to questions that were certified in Corrigan=s 1998 deposition. This claim is untrue because Judge O=Brien reopened the deposition for the purpose of having relevant questions answered and ordered that questions on irrelevant matters would not have to be answered (R.L.F.550-551). Moreover, Judge Corrigan eventually answered some of the questions that he initially refused to answer, and that appellant abandoned some other questions (Movant=s Exhibit 2 at 43-53).

Appellant alleges that Judge O=Brien was biased because he refused to answer voir dire questions that were directed at him in 1997 (App.Br.70). However, judges are not required to submit to voir dire. Smulls v. State, supra at 505.

Appellant alleges that Judge O=Brien was biased because he was cautious about taking judicial notice of the entire court file in that it contained numerous newspaper articles containing rank hearsay that had never been admitted into evidence (App.Br.71). Appellant neglects to mention that Judge O=Brien did in fact take judicial notice of the entire court file, including the newspaper articles, and that the use of this information was limited, with appellant=s consent, to the purpose of showing what was in the file (R.Tr.13-14).

Appellant also alleges that Judge O=Brien was biased because he permitted the prosecutor to question his counsel about whether their supplemental record on their Batson objection was timely because this Court had decided that it was timely (App.Br.71). However, this Court=s never stated that the objection was timely. It simply went to the merits of appellant=s claim. State v. Smulls, 935 S.W.2d 9,16-17 (Mo.banc 1996). Moreover, the point of the untimeliness of that record was, as is described in Point I of this brief and the motion

court=s findings, to show that the complained of conduct of Judge Corrigan occurred after he had already denied the Batson motion (2nd R.L.F. 270-271).

B. Motions to disqualify all St. Louis County Judges

As to appellant=s claim that Judge Hartenbach erred by denying his motions to recuse all past and present St. Louis County judges, this Court has stated that A[d]isqualification and recusal are case-by-case determinations that cannot and should not be resolved with blanket orders, at least not without the agreement of all affected judges.@ Smulls v. State, supra 10 S.W.3d at 500.[4] Appellant failed to get the agreement of all affected judges.

Judge Hartenbach=s statement that this case had a tortured history is an accurate statement of fact that there have been three remands in this case and it does not mean that the entire circuit was biased against appellant (2nd R.Tr.2). Appellant concedes that Hartenbach had not been exposed to Judge Corrigan=s views (App.Br.69;2nd R.Tr.28-30).

[4]Appellant argued that all St. Louis County Judges except for Judge Campbell, who had recused himself, should be recused but he did not know how this argument was effected by Judge Campbell=s retirement (2nd R.Tr.170;Movant=s Exhibit 1 at 26-28;R.L.F. 26).

III.

Judge Hartenbach did not abuse his discretion when he refused to admit into evidence Movant=s Exhibits 67-70,74-78,80-86, and 91-92 because these exhibits contained inadmissible hearsay, were irrelevant and appellant was not prejudiced.

Appellant alleges that Judge Hartenbach court clearly erred when he refused to admit into evidence, at the hearing on whether Judge O=Brien was improperly biased, newspaper articles, letters and motions to this Court, and the depositions of two judges because those materials showed the controversy surrounding this case and they were not hearsay in that they explained the conduct of Judge O=Brien even if there was no evidence that Judge O=Brien was aware of them (App.Br.77).

The trial court has broad discretion to admit or exclude evidence and this Court will reverse only upon a showing of a clear abuse of discretion. State v. Simmons, 944 S.W.2d 165,178 (Mo.banc 1997). A trial court will be found to have abused its discretion when a ruling is Aclearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.@ State v. Brown, 939 S.W.2d 882,883(Mo.banc 1997).

A. Newspaper articles

Movant=s Exhibits 74-78 and 80-86 were newspaper articles that were hearsay (2nd R.L.F. 211-212). While it is true that A[a] statement offered to explain the subsequent conduct of one who heard the statement is not inadmissible hearsay,@ State v. Ray, 945 S.W.2d 462,468-469

(Mo.App.W.D.1997), a statement cannot be used to explain the conduct of a person if that person did not hear the statement. See State v. Johns, 34 S.W.3d 93,111 (Mo.banc 2000).

Judge Hartenbach did not prevent appellant from asking Judge O=Brien about whether he had read any of the newspaper articles in question. Appellant only brought up three articles while Judge O=Brien was testifying, Movant=s Exhibits 74-75 and 82, and he did not ask whether Judge O=Brien had read any of them (2nd R.Tr.110-122). Instead, he simply adduced testimony that Judge O=Brien sometimes read the Post-Dispatch, read some articles about this case in it, and that he may have learned about the language in the first opinion from an article, that was not identified, in that paper (2nd R.Tr.114-115,122). The articles have no relevance if Judge O=Brien had not seen them.

Judge Hartenbach was also aware that appellant=s counsel had Aa habit of arguing such articles as the truth of the matters asserted at the appellate level@ and this provided an additional incentive to limit the evidence on this matter to the testimony of Judge O=Brien as to what he read if the purpose of this evidence was truly to explain his actions (2nd R.L.F. 211;Movant=s Exhibits 65,87).

The articles were irrelevant even if Judge O=Brien saw them because they did not explain why he did anything. He did not testify that he did anything because of seeing the articles. The alleged fact that articles were written about the case does not mean that a judge would be biased.

B. Letters and motions

Appellant complains that Judge Hartenbach refused to admit on the issue of whether Judge O=Brien was improperly biased Movant=s Exhibits 67-70, a letter to this Court allegedly from Constance Klepper about this Court=s first opinion in this case, a letter allegedly from

John Bardgett that asked this Court to modify its first opinion in this case, a letter to Judge Holstein allegedly from Judge Simeone that asked this Court to modify its first opinion, and a letter to this Court allegedly from Clyde Farris, Jr., that asked this Court to withdraw the majority opinion and to reissue it without the Apersonal characterizations about Judge Corrigan@ that appear at the end of the opinion. Appellant improperly argues the letters for the truth of the matters asserted in the letters when he alleges that they were written by the people whose names appear on them (App.Br.14,80-81).

Appellant argues that these letters were admissible for the non-hearsay purpose of explaining the conduct of Judge O=Brien (App.Br.78). However, he failed to show that Judge O=Brien was aware of any of these letters. In fact, he never asked Judge O=Brien about any specific letters, and Judge O=Brien testified on cross-examination that he was unaware of efforts to get this Court to modify its opinion (2nd R.Tr.178). They do not even pertain to the version of the opinion that was in effect when Judge O=Brien was assigned to the case.

C. Letter and Deposition of Judge Calvin

Appellant=s offer of proof pertaining to Judge Michael Calvin, of the St. Louis City Circuit Court, was his deposition and a letter that he wrote to Judge Holstein (Movant=s Exhibit 91 and Deposition Exhibit 1).[5]

The letter attached to Judge Calvin=s deposition praises this Court=s opinion that was later modified. It is inadmissible hearsay. It does not explain Judge O=Brien=s actions because there is no evidence that he saw it. Appellant never asked Judge O=Brien about the letter. It is also irrelevant in that it does not show whether Judge O=Brien was biased.

In Judge Calvin=s deposition, he said that he heard that there were people who he felt were improperly writing this Court to influence it to change its first opinion, so he wrote this Court to influence it not to change that opinion (Movant=s Exhibit 91-13). He said that there were a great deal of heated discussions, and that different judges had different views on the issues (Movant=s Exhibit 91 at 16). He said that the controversy over the opinion came from the fact that it was viewed as a personal attack on a trial judge (Movant=s Exhibit 91 at 17-18).

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[5]If any of this offer of proof was inadmissible the offer fails in its entirety because it is for the proponent of an offer of proof to sever the good parts from the bad parts of the offer. State v. Nettles, 10 S.W.3d 521,525 (Mo.App.E.D.1999).

He also testified that he Aheard@ that there was encouragement Aon the behalf of Judge Corrigan@ to get members of the bar to contact this Court (Movant=s Exhibit 91 at 24).

As can be seen from the above, this testimony is filled with hearsay in that Judge Calvin repeatedly refers to the out-of-court statements of others and uses them for the truth of the matters asserted therein. Moreover, the testimony in question is irrelevant. Whether he heard that people were encouraging others to get this Court to withdraw an opinion, which was later withdrawn, has nothing to do with whether Judge O=Brien was biased. Judge Calvin even stated that the opinions of the judges who he talked to differed as to the correctness of the original opinion, thus refuting appellant=s stereotyping of St. Louis County Judges (Movant=s Exhibit 91 at 16).

E. Letter and deposition of Judge Shaw

Appellant=s offer of proof pertaining to Judge Booker Shaw, of the St. Louis City Circuit Court, was his deposition and a letter that Judge Shaw wrote to Judge Holstein (Movant=s Exhibit 92 and Deposition Exhibit 1).

The letter attached to Judge Shaw=s deposition praises this Court=s opinion that was later withdrawn, states that Aword around the courthouse@ is that a campaign was organized around the State for Judge Corrigan and against Judge White, and states that he believes that it is wrong for one to criticize this Court (Movant=s Exhibit 92 and Deposition Exhibit 1). It is inadmissible hearsay. It does not explain Judge O=Brien=s actions because there is no evidence that he saw it. Appellant never asked Judge O=Brien about the letter. It is also irrelevant in that it does not show whether Judge O=Brien was biased.

In Judge Shaw=s deposition, he said that he Aheard@ that phone calls and letters that were sent out to support Judge Corrigan indicated that Judge Corrigan was not a racist, that this Court=s first opinion went too far, and that some letters attacked Judge White (Movant=s Exhibit 92 at 12). He had no feelings about the conduct of Judge Corrigan, but he wrote his letter because he wanted to defend Judge White in that Judge White was a personal friend of his and he did not want criticism of Judge White to prevent him from becoming a federal judge (Movant=s Exhibit 92 at 14-15). Judge Shaw said that he talked to other judges in the City of St. Louis and that it was not that big of an issue there, but that it was an unusual thing that caused some discussion (Movant=s Exhibit 92 at 16). He said that the controversy centered around the language in the opinion that this Court later removed (Movant=s Exhibit 92 at 17). He said that he could not speculate about what was going on in St. Louis County (Movant=s Exhibit 92 at 17).

This testimony is filled with hearsay because Judge Shaw repeatedly refers to the out-of-court statements of others and used them for the truth of the matters asserted therein. Moreover, the testimony in question is irrelevant. Whether he heard that people across the State were encouraging others to get this Court to withdraw an opinion, which was later withdrawn, has nothing to do with whether Judge O=Brien was biased. Judge Shaw did not think that it was a big issue in St. Louis City and would not speculate about what was occurring in St. Louis County.

F. No prejudice

Finally, appellant has failed to show that he was prejudiced by the trial court=s actions. He was not precluded from questioning Judge O=Brien on any of these matters. His almost

complete failure to bring them up while he was questioning Judge O'Brien shows the lack of relevance of these matters for the proposed purpose of explaining the conduct of Judge O'Brien or for showing that he was biased. Evidence that an opinion was criticized and withdrawn shows that the criticism was correct, it does not show Judge O'Brien was biased when he ruled on the case after a new opinion had been issued by this Court. Due to the unreliability of the gossip offered by appellant and its irrelevance, there is no likelihood that a different result would have been reached if it had been admitted into evidence.

IV.

The motion court did not abuse its discretion when it refused to admit movant=s first request for admissions and an unauthenticated transcript, an affidavit from appellant=s prior post-conviction counsel, Valerie Leftwich, and her testimony as to a statement that Judge Corrigan allegedly made about another case, because this evidence was hearsay, was without the required foundation, pertained to matters not pled in appellant=s post-conviction motion, and the motion court=s actions did not prejudice appellant.

Appellant alleges that the motion court erred when it refused to admit four matters into evidence at his post-conviction hearing (App.Br.84).

A. Petitioner=s Exhibits 21 and 22

Appellant alleges that Judge O=Brien erred when he refused to admit into evidence two exhibits that were offered together in one offer of proof (App.Br.77;R.Tr.1389). If any part of the offer of proof was inadmissible, the offer of proof fails in its entirety. State v. Nettles, 10 S.W.3d 521, 525 (Mo.App.E.D.1999).

One of these exhibits is Petitioner=s Exhibit 21 (R.Tr.1393-1394). It is movant=s first request for admissions, in which appellant asked for the prosecutor to stipulate to the race and genders of Stephen Honickman, Florence Honickman and all of the jurors in appellant=s trial (P.C.L.F. 41). It was not relevant to any pleading that was before the motion court (See discussions on deficient pleadings in Point I of this brief). It was also an unnecessary request because appellant could easily have gotten testimony on this matter from his trial counsel.

Petitioner=s Exhibit 22 is an unofficial transcript that appellant made at a hearing in which Judge Corrigan allegedly discussed Petitioner=s Exhibit 21. Rather than following the custom and practice of not having a court reporter at non-evidentiary hearings in civil cases, appellant=s post-conviction counsel brought his own court reporter, who was not the official court reporter for Division 7, to the hearing and made an unofficial transcript of what allegedly occurred (Petitioner=s Exhibit 22 at 3-10).

Respondent objected to Petitioner=s Exhibit 22 on the ground that it was hearsay and that it was not properly authenticated (R.Tr.1391). Judge O=Brien found that a transcript that was prepared by a person who was not the official court reporter was not self-proving and that appellant failed to bring in the court reporter to lay a foundation for the admission of the transcript (R.Tr.1392-1393). Appellant=s counsel admitted that he knew of no law that was contrary to this finding (R.Tr.1393). This is because such a transcript is like an affidavit by a person as to what that person believes was said. Affidavits are inadmissible hearsay that cannot be treated as evidence absent a stipulation of counsel. State v. Zimmerman, 886 S.W.2d 684, 691 (Mo.App.,S.D.1994).[6] Additionally, none of appellant=s factual pleadings in his post-conviction motion mentioned this item, though it was drafted and Judge Corrigan ruled on it before appellant filed his amended post-conviction motion (R.Tr.1393-1394;P.C.L.F. 41,114).

[6]While the cases cited by appellant show that the State would have to show that it was prejudiced by the use of the transcript if it was appealing the admission of the transcript (App.Br.88-89), the State has no such duty when the trial court has properly refused to admit a transcript.

Thus, it was not relevant to any pleading that was before the motion court. Moreover, appellant could not have been prejudiced by the exclusion of this evidence because it was cumulative to Judge Corrigan=s statements that were made during appellant=s trial (Tr. 381).[7]

B. Leftwich testimony and affidavit on statement allegedly made by Judge Corrigan

Appellant alleges that Judge O=Brien erred by refusing to admit testimony and an affidavit, Petitioner=s Exhibit 23, from appellant=s counsel in his first post-conviction hearing, Valerie Leftwich, that Judge Corrigan told her that Ms. Goodwin, who successfully sued Judge Corrigan for gender discrimination, was white (App.Br.20;R.Tr.856-860). Affidavits are by definition inadmissible hearsay. State v. Zimmerman, supra at 691. The testimony in question was also hearsay. It was a statement that was allegedly made by an out-of-court declarant. Appellant argues that it was not offered for the truth of the matter asserted, but simply to show

[7]If the statements attributed to Judge Corrigan in Petitioner=s Exhibit 22 were actually made by him, they explain why he does not like to take judicial notice of race. Those alleged statements indicate that Judge Corrigan said that on occasions he heard individuals say what race they belonged to and he was surprised by what they said and he considered that he was not smart enough to decide the race of individuals (Petitioner=s Exhibit 22 at 21-22).

that Judge Corrigan made that statement and that he can ascertain the race of people. However, if the statement is not offered for the truth of the matter asserted it has no value. For example, if the alleged statement was untrue, it would show that Judge Corrigan incorrectly determined the race of an individual and would help to show that judicial notice should not always be taken of individuals= race. Moreover, the evidence in question was irrelevant, because it was not pled in appellant=s post-conviction motion. Thus, appellant could not have been prejudiced by the trial court=s actions.

V.

The motion court did not abuse its discretion when it limited evidence about as to what Judge Corrigan allegedly said in 1983 at a meeting of St. Louis County judges to legally admissible evidence, admitted the official records of the St. Louis County Circuit Court pertaining to an en banc meeting, and did not allow Karen Kraft to speculate about what she may have done if she had been aware of the comments that Judge Corrigan allegedly made at that meeting, because the motion court=s actions were proper and appellant was not prejudiced.

Appellant alleges that the Rule 29.15 motion court erred in ruling on numerous evidentiary matters (App.Br. 91).

A. Newspaper article

As to a newspaper article written by Emory Evans in 1983 about a statement that someone allegedly made to him about Judge Corrigan allegedly making a joke about a barbeque, the motion court allowed that article to be used for the non-hearsay purpose of showing whether appellant=s counsel were aware of it, but neither of appellant=s counsel were aware of it (R.Tr.695-696,1113-1116).[8] It could not be used to show that Judge Corrigan actually made the statement because that would be using it for the hearsay purpose of proving the truth of the

[8]Evans, the retired writer from the St. Louis Post Dispatch who wrote the article about the alleged barbeque comment, testified at the post-conviction hearing that he did not recall who told him about that alleged comment (R.Tr.300).

matter asserted. In Re Marriage Of Wessel, 953 S.W.2d 630,631 (Mo.App.S.D.1997)(newspaper articles are not admissible for the truth of the matters asserted).

Appellant also complains because the motion court considered the fact that the newspaper article said that Judge Corrigan denied making the joke in question (App.Br.94). While appellant cannot complain about this, because he is the one who offered the newspaper article, the motion court did this in a way that was not improper. It relied on that fact in discussing why the newspaper article was unreliable and inadmissible hearsay (2nd R.L.F.252-253). It was not using that statement for the truth of the matter asserted, but was using it to show why the newspaper article if admitted for that purpose by appellant would have helped to prove that appellant=s claim was untrue (2nd R.L.F.252-253).

B. Judge Campbell=s testimony

As to appellant=s claim that the motion court erred by finding that Judge Campbell=s deposition testimony about the barbeque joke was hearsay, appellant alleges that the statement is not hearsay because he wanted to use the testimony for the purpose of showing the Judge Corrigan=s state of mind at the time that he allegedly made the statement, which was about eight years before appellant=s trial. (App.Br.93).

However, appellant cannot demonstrate that he was prejudiced by this ruling, because the motion court also considered Judge Campbell=s testimony on this matter as if it was admissible (App.Br. 21;2nd R.L.F.252-254). It found that the evidence in question was not persuasive, appellant failed to ask Judge Corrigan about the alleged remark, the remark, if made, was not made during an official judicial proceeding, and appellant failed to show that the remark, if

made, had anything to do with Judge Corrigan=s in-court treatment of appellant or other minorities (2nd R.L.F.252-254).[9]

C. En banc minutes

[9]Appellant alleges in passing that the motion court erred by finding that Judge Campbell and five prominent St. Louis area defense attorneys said that Judge Corrigan has an impeccable reputation for his ability to be fair to all individuals regardless of their race, because at one point Judge Campbell said that he had no opinion on Judge Corrigan=s reputation (App.Br.94;Movant's Exhibit 1 at 18). However, appellant ignores Judge Campbell=s testimony that he had never heard that Judge Corrigan had a reputation for racial bias, that in the past 25 years he had not heard any reports that Judge Campbell performed his duties with racial bias, and that he heard that Judge Corrigan was Aequally mean@ to individuals of all races (Movant=s Exhibit 1 at 15-17).

Appellant claims that the motion court erred by admitting the official minutes of the St. Louis County Circuit Court en banc meeting at which the alleged barbeque joke could have occurred because this evidence, which was subpoenaed by both parties, was allegedly irrelevant hearsay (App.Br.91,95;R.Tr.1426-1429;2nd R.L.F.253). As to appellant=s relevancy claim, the record shows that Judge Campbell testified in his deposition about the details of the meeting in where the barbeque remark allegedly occurred and he said that he did not know whether it occurred at an official en banc meeting of the court or some other meeting concerning judicial pay raises (Movant=s Exhibit 1 at 19-25). The motion court properly used Judge Campbell=s testimony and the details in the minutes as to who was present at the meeting to show that the barbeque remark, if made, was not made in the en banc meeting but would have had to have been made in an unofficial meeting of judges (2nd R.L.F.253). When and where the remark in question allegedly occurred is not irrelevant and collateral. Appellant=s appeal revolves around it.

As to appellant=s hearsay claim, the record shows that these documents were forwarded directly to the motion court under seal by the Judicial Court Administrator, and it was admissible under the judicially created Aofficial records@ exception to the hearsay rule (R.Tr.1426). State v. Weber, 814 S.W.2d 298,302 (Mo.AppE.D.1991). Appellant alleges for the first time on appeal that the State failed to show that the records were prepared by someone who had an public duty (App.Br.96). However, a foundational objection cannot be raised for the first time on appeal because foundational concerns may be easily fixed at the motion court level if they are raised. State v. Holland, 781 S.W.2d 808,811 (Mo.App.E.D.1989); State v. Blue, 857 S.W.2d 632,633 (Mo.App.E.D.1994).

Moreover, appellant could not have been prejudiced because, as is described above, Campbell=s testimony was not credible and if credible did not show that appellant was prejudiced by Corrigan=s actions in his trial (2nd R.L.F. 253). Additionally, the appellant concedes that the motion court was correct in its conclusion based on the records that Judge Corrigan did not make the remark in question at a regular en banc meeting (App.Br. 95).

D. Kraft=s speculation

Appellant alleges that the motion court erred by not allowing one of his trial counsel, Karen Kraft, to speculate as to whether she would have considered disqualifying Judge Corrigan if she had heard of the alleged barbeque remark before appellant=s trial (App.Br. 96-97;R.Tr. 1116). While State v. Tokar, 918 S.W.2d 753,768(Mo.banc 1996), requires that an inquiry be conducted to determine whether counsel=s actions were the result of a reasonable trial strategy, it does not require that counsel be asked to speculate as to what they would have done if they had heard of something. Once it is established that counsel did not have a strategic reason for doing something, the question is what reasonable counsel would have done under those circumstances, not what the accused counsel would have done.

Moreover, appellant was not prejudiced by the motion court=s ruling because in her offer of proof Kraft did not say that she would have done any act if she was aware of the information in question (R.Tr.1117). She merely said that she would have *considered* a motion to disqualify (R.Tr. 1117).

VI.

The motion court did not clearly err when it stayed appellant=s deposition of Judge O=Toole until after it decided what claims appellant was entitled to an evidentiary hearing on because this was not done for the purpose of preventing appellant from ever deposing Judge O=Toole, and this was a reasonable procedure designed to prevent the waste of judicial and prosecutorial resources.

Appellant claims that the motion court erred when it stayed his deposition of Judge O=Toole until after it decided what claims appellant was entitled to an evidentiary hearing on because he had Areason@ to believe that Judge O=Toole might have heard Judge Corrigan allegedly make the Abarbeque joke@ (App.Br. 98).[10]

[10]Almost nothing that appellant cites to support this claim is evidence or statements of

counsel in open court. He relies largely on factual statements in letters and pleadings that he filed, which are not self-proving, State v. Leisure, 838 S.W.2d 49,58 (Mo.App.E.D.1992);State v. Boone, 869 S.W.2d 70,78 (Mo.App.W.D.1993), and papers that are unauthenticated and hearsay that were attached to pleadings and were never offered into evidence (App.Br.98,100-103;citing R.L.F. 230,251-254,257-258,519,524-526,545,590-591,676, 683690,696-700). While a party can cite a pleading to show that it was filed, it cannot properly be cited for the truth of the matters alleged therein. Appellant alleges that he can cite such statements for the truth of the matters therein to show that he was diligent (App.Br.98 n. 8), but there is no Adiligence exception@ to the hearsay rule.

The record shows that on June 25, 1996, this Court remanded the case to the motion court. State v. Smulls, 935 S.W.2d 9,14-16 (Mo.banc 1996). At a hearing on May 9, 1997, the motion court indicated that it wanted to determine what claims required an evidentiary hearing (R.Tr.2). Appellant took the position that the motion court should *delay* the case until his motion for a writ of certiorari had been ruled on by the United States Supreme Court (R.Tr. 3,7,10). Respondent, on the other hand, took the position that the case should proceed (R.Tr.5,7,9). The motion court agreed with appellant and delayed ruling on whether appellant was entitled to an evidentiary hearing (R.Tr.10-11).

On June 2, 1997, the United States Supreme Court denied appellant=s certiorari petition. Smulls v. State of Missouri, 520 U.S. 1254(1997). On June 4, 1997, respondent filed a motion to quash subpoenas and for protective order (R.L.F.230). That motion alleged that Judge O=Toole had been served with a subpoena and that his deposition was scheduled to be taken on June 18, 1997 (R.L.F.230). It also alleged that Judge Susan Block had been subpoenaed for a deposition (R.L.F.230). It asked for the motion court to stay these depositions until the motion court determined whether appellant was entitled to an evidentiary hearing on the relevant claims (R.L.F.231). On June 24, 1997, the motion court sustained respondent=s motion (R.L.F.281).

On July 24, 1997, a hearing was held on whether appellant was entitled to an evidentiary hearing on his claims (R.Tr.181-228). On December 17, 1997, the motion court granted appellant a hearing on some claims and denied him a hearing on other claims (R.L.F. 484). On December 29, 1997, appellant=s counsel wrote a letter to the motion court and asked it to consider six issues, including the stay of Judge O=Toole=s deposition (R.L.F.487-488). On

January 5, 1997, the motion court lifted its stay on the depositions of Judges O=Toole and Block (R.L.F. 93).

On January 29, 1998, appellant filed a motion to continue the case until Judge O=Toole could be deposed or to hold the evidence open until that occurred (R.L.F. 518). At a hearing on February 10, 1998, appellant=s counsel said that Judge O=Toole told him he would not be available as of March 1, 1998, and that his investigators heard from Judge O=Toole=s clerk that it might be March 15, 1998, before Judge O=Toole was back on the bench (R.Tr.247). The motion court denied appellant=s motion for a continuance, but held that it would give appellant further opportunity to secure Judge O=Toole=s testimony and it would continue the evidentiary hearing, which was scheduled for February 26, 1998, if that was necessary to do so (R.Tr.247).

However, Judge O=Toole died before appellant got around to deposing him (R.Tr.1430). On March 16, 1998, appellant filed AMR. SMULLS= VERIFIED RECORD AND INTENDED LINES OF DEPOSITION EXAMINATION OF THE HONORABLE DANIEL O=TOOLE IN LIGHT OF HIS DEATH,@ which consisted of questions appellant proposed to ask Judge O=Toole, a newspaper article about Judge Corrigan, and an affidavit from Judge Robert G.J. Hoester that was never admitted into evidence and that was inadmissible hearsay (R.L.F.676-690). See State v. Zimmerman, 886 S.W.2d 684,691 (Mo.App.S.D.1994). At a hearing on April 29, 1999, a prosecutor stated that the above matters contained questions that were irrelevant and inadmissible hearsay and should be stricken from the record, because it was an attempt by appellant to improperly place matters that had not been admitted into evidence in front of an appellate court (R.Tr.1429-1437). He stated that appellant had not served Judge O=Toole with a subpoena for the day that the deposition was scheduled, and that Judge O=Toole had died on the

day that appellant had scheduled to depose him (R.Tr.1431). The prosecutor added that he had filed his motion to quash Judge O=Toole=s deposition that was scheduled in June of 1997 at the request of Judge O=Toole (R.Tr.1435). The motion court took the State=s motion to strike the matters file by appellant with the case (R.Tr.1437).

Appellant claims on appeal that the motion court erred by staying the deposition of Judge O=Toole until after it was determined what claims appellant would be entitled to an evidentiary hearing. He argues that this was done for the improper purpose of insuring that Judge O=Toole died before he could testify (App.Br.98). This unsavory attack on the motion court and the prosecutors is unsupported by any evidence. It is also undercut by the fact that Judge O=Toole=s deposition was not the only one that was stayed (R.L.F. 231). Moreover, the evidence shows that most of the delays in this case were caused by appellant pursuing his frivolous certiorari petition (R.Tr.2-11), and by the voluminous amended post-conviction motion that appellant filed (P.C.L.F.114-281).

Appellant also attacks the standing of the State to request that Judge O=Toole=s deposition be stayed until the motion court determined whether appellant was entitled to an evidentiary hearing (App.Br.20;R.L.F.230-231). However, as a party to the case, the Rules of Civil Procedure allowed for the State to make that request. Rule 56.01(c) allows for a protective order to be made A[u]pon motion by a party@ and allows for the court to place limitations as to the time when discovery will occur. The motion court had broad discretion in administering the rules of discovery, State v. Baker, 859 S.W.2d 805, 811(Mo.App.E.D.1993), and it did not abuse its discretion. It properly delayed the depositions of judges until it was determined whether or not a hearing would be held on claims that pertained to them. Appellant

has fails to cite any cases to the contrary. Nor has he proven that he was prejudiced by the trial court=s actions. Thus, his claim is without merit.

VII.

The motion court did not abuse its discretion by excluding the affidavit of Mary Goodwin who successfully sued Judge Corrigan for gender discrimination for conduct that occurred in 1979, and the docket sheets from that case because that evidence was not pled as facts that would be relied on in appellant=s post-conviction motion to prove a claim, and appellant was not prejudiced by the motion court=s actions in that other evidence showed that appellant=s counsel was aware of that case and reasonably chose not to attempt to disqualify Judge Corrigan.

Appellant alleges that the motion court erred when it excluded Plaintiff=s Exhibit 60, the affidavit of Mary Goodwin (a.k.a. Susan Tubbessing) who successfully sued Judge Corrigan for gender discrimination, and Plaintiff=s Exhibit 61, the docket sheets from that case (App.Br.106;R.Tr.1370-1372). Contrary to appellant=s assertions on appeal, these papers show that the judgment from that case was satisfied and they do not show the race of the judge who tried that case (App.Br.106;R.Tr.1370-1372).

Respondent waived any hearsay objection to the affidavit, but objected to both exhibits on the ground that they were irrelevant to the issues upon which appellant was granted an evidentiary hearing and on the ground that they were being used to bolster other inadmissible testimony that had been refused (R.Tr.1371).

The motion court properly excluded these exhibits because they pertain to matters that were not pled in appellant=s post-conviction motion and/or were not properly before the motion court. AMissouri is a fact pleading state,@ and pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. State v. Harris, 870 S.W.2d

798,815(Mo.banc 1994). Nowhere in appellant=s post-conviction motion did he allege that his counsel was ineffective for failing to move to disqualify Judge Corrigan based on this material. In discussing appellant=s claim of ineffective assistance for failing to discover evidence of racial bias and move to disqualify Judge Corrigan, appellant=s post-conviction motion did mention the Goodwin case in a footnote in discussing how a statement made in the presence of others is admissible, but it did not allege that docket sheets or any other material from that case should have been discovered by counsel (P.C.L.F.187). Nor did appellant raise a claim of trial court error, which could not be cognizable here, that pled that this material was the basis for recusal.

Moreover, appellant cannot show that he was prejudiced by the exclusion of this material, because the motion court considered evidence that was adduced concerning the Goodwin case. It concluded that counsel was aware of that case and reasonably did not consider it to be a basis for a change of judge since there was no connection between a sixteen-year-old gender-discrimination suit against the trial judge, which was based upon a personnel decision, and the judge=s ability to hear racial discrimination claims.

(2nd R.L.F.251-252).

VIII.

The motion court did not clearly err when it denied without an evidentiary hearing appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to discover Areadily available evidence@ that a prosecutor=s reasons for striking venireperson Sydney were a pretext for racial discrimination because appellant failed to plead facts that if true would entitle him to relief. Nor did the motion court abuse its discretion by denying appellant=s offers of proof and discovery requests on this matter because appellant failed to plead facts entitling him to an evidentiary hearing.

Appellant alleges that the motion court clearly erred when it denied without an evidentiary hearing his claim that alleged that he was denied effective assistance of counsel on the ground that his trial counsel failed to discover Areadily available evidence@ that the reasons of a prosecutor, Dean Waldemer, for striking venireperson Sydney were a pretext for racial discrimination (App.Br.109;P.C.L.F.140). He also alleges that the motion court clearly erred when it rejected certain offers of proof and numerous discovery requests on this issue (App.Br. 109).

A. Denial of an evidentiary hearing

The motion court found that appellant=s Batson claim had been decided on direct appeal, that this Court had found that no error had occurred in that proceeding, and that appellant could not show that he was prejudiced by his counsel=s actions in a post-conviction motion (2nd R.L.F. 229).

These findings are correct. Regardless of the reasonableness of appellant=s counsel=s actions, appellant failed to plead facts showing that prejudice under Strickland v. Washington, 466 U.S. 668, 687 (1984), occurred, because he has failed to allege facts showing that any biased jurors served on his case. State v. Colbert, 949 S.W.2d 932, 944 (Mo.App.W.D.1997);Morrow v. State, 21 S.W.3d 819,827 (Mo.banc 2000).

While appellant did not plead facts showing that the jurors who tried his case were biased, he raises on appeal the theory that the jury was more likely to convict him because it did not contain any blacks (App.Br.112-113). However, this racial stereotyping is improper and is speculation. State v. Morrow, supra.

Additionally, appellant failed to plead facts showing that reasonable counsel would have used the Areadily available@ evidence that appellant alleged should have been used to impeach Waldemer. While appellant has had years to find information to support his claims as to the percentage of African-Americans who are postal workers, that postal workers are allegedly satisfied with their jobs, that the prosecutor has in-laws who are satisfied postal workers or who are not postal workers, and that the prosecutor failed to strike postal workers in a case that resulted in a hung jury, appellant=s counsel had to react quickly in voir dire and reasonable counsel would not have been able to conduct the investigation alleged by appellant. It should be noted that appellant=s counsel did not have to investigate how venireperson Sidney acted in court or what happened in the first trial in this case because the trial court was able to observe both of those matters.

B. Denials of offers of proof

Appellant claims that the motion court should have accepted his numerous offers of proof, many of which pertained to matters that were not pled in his post-conviction action (App.Br.109). However, the offers of proof were irrelevant because they pertained to claims that were denied without an evidentiary hearing. The test for whether an evidentiary hearing should have been granted has nothing to do with offers of proof. It has to do with the sufficiency of the pleading. As was described above, appellant=s pleadings on the matter in question were insufficient. Thus, the trial court did not clearly err by denying those claims without an evidentiary hearing and by rejecting appellant=s offers of proof.[11]

C. Prohibited discovery

Appellant also alleges that the motion court clearly erred when it denied his request to force Waldemer to answer interrogatories, and his request to depose Waldemer (App.Br.115). However, since this discovery pertained to matters that appellant was not entitled to have a hearing on, appellant was not prejudiced by the motion court=s actions.

D. Appellant=s personal attack on Waldemer

[11]Offers of proof containing affidavits that are cited by appellant contain inadmissible hearsay, State v. Zimmerman, 886 S.W.2d 684, 691 (Mo.App.S.D.1994)(App.Br.113-115; citing Petitioner=s Exhibits 3 and 51 (an exhibit containing about 15 affidavits)).

Appellant next launches into a gratuitous personal attack on Waldemer in an attempt to show that Waldemer is a bad person and has a propensity to be a bad person (App.Br.116-117). However, this effort reflects more about appellant=s present counsel than it does about Waldemer, and it is irrelevant to the claims cited in appellant=s post-conviction motion because appellant did not plead that his counsel should have discovered the evidence in question.

In any event, appellant alleges that Waldemer lied in a motion for a protective order during post-conviction proceedings when he said that appellant=s request for discovery from the Chesterfield Police Department was unduly burdensome and costly (App.Br.116;P.C.L.F. 49-50). However, the discovery request that appellant is referring to was a request for the Chesterfield Police Department to produce Aall police homicide investigative files for homicides committed in Chesterfield during the period of 1977 to the present@ and all statistical data for homicides in Chesterfield during that time period (which would have been August 5, 1993)(P.C.L.F. 46). The City of Chesterfield and the St. Louis County Police Departments filed motions that agreed with Waldemer, and the trial court quashed appellant=s discovery request (P.C.L.F. 92, 94). Appellant relies on out-of-court hearsay statements of his post-conviction counsel as to conversations that he allegedly had with the custodian of records for Chesterfield (App.Br.116). However, even if those inadmissible hearsay statements are considered, they show that Waldemer was truthful because all the records in question had *not* all been found and prepared by Chesterfield (P.C.L.F.105-110).

Appellant argues that Waldemer is a bad person because he allegedly obtained an ex parte ruling (App.Br.116). However, the record refutes this allegation. It shows that on June 30, 1994, Judge Corrigan denied appellant=s motion to disqualify him (P.C.L.F. 1065). Later that

day, Waldemer filed a request to file a written response and a AMEMORANDUM IN OPPOSITION TO MOVANT=S MULTIPLE MOTIONS TO DISQUALIFY JUDGE CORRIGAN@ that argued in favor of the decision that Judge Corrigan had *already* made (P.C.L.F. 1068-1070). These documents were served on appellant=s counsel and they opposed them being filed on the ground that they were untimely and they had no opportunity to respond to them (P.C.Tr.6-7). Judge Corrigan later refused to strike the pleadings (P.C.Tr.7). There was no evidence that an ex parte proceeding occurred.

Appellant also claims that Waldemer had a testimonial writ for an inmate, James Kindell, quashed without notice and an opportunity to be heard (App.Br.116). This is unsupported by evidence. Appellant=s self-serving assertions in his motions are not self-proving. State v. Leisure, 838 S.W.2d 49,58 (Mo.App.E.D.1992). Moreover, appellant did take Kindell=s deposition, Petitioner=s Exhibit 49, although Kindell=s testimony was not relevant to any claim that was pled by appellant.

IX.

The motion court did not clearly err when it rejected appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to move to recuse Judge Corrigan on the ground that Judge Corrigan expressed concerns about retention and then was retained before appellant=s trial because appellant failed to show that his trial counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

The motion court did not abuse its discretion when it excluded Movant=s Exhibits 54-58, articles from the St. Louis Post-Dispatch because they contained hearsay, were irrelevant, and appellant was not prejudice by the motion court=s actions.

Appellant alleges that the motion court clearly erred when it denied his claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to move to recuse Judge Corrigan after he expressed concerns about being retained in the 1992 election and then was retained prior to appellant=s trial (App.Br.118;P.C.L.F.190-192). Appellant also argues that the motion court clearly erred by excluding newspaper articles that he offered on the issue of Judge Corrigan=s retention (App.Br.120).

A. Claim of ineffective assistance of counsel

On the claim of ineffective assistance of counsel, the motion court made the following findings:

> The allegation contained in paragraph fourteen (14) asserts that trial counsel was ineffective for failing to disqualify Judge Corrigan on the basis of statements by him expressing concerns about his judicial retention in the

November, 1992 election. Movant presented no evidence to support his theory that a judge concerned about retention is more likely to give a death sentence and its presumed effect on this trial. The records of this case reflect that the trial which resulted in the jury=s sense of death began on Monday, November 9, 1992 and ended on Saturday, November 14, 1992. The official manual of the State of Missouri reveals that Judge Corrigan was retained for a six (6) year term by the voters of St. Louis County eleven (11) days prior to the jury=s verdict. The sentencing of Movant occurred on December 18, 1992, more than forty-five (45) days after the trial judge=s retention.

Movant=s protest that the trial judge was concerned about retention during this trial and sentencing is in direct conflict with the facts, and any prejudice suffered by Movant is dubious at best. Movant=s death sentence was in accord with the jury=s recommendation. Given his previous eleven (11) felony convictions and the violent facts of this case, it is absurd to profess that the trial court=s sentences were motivated by concerns of the judge=s own popularity.

Movant=s claim fourteen (14) is denied.

(2nd R.L.F. 275-276).

Appellant gives no deference to the motion court=s findings of fact and appears to argue for de novo review, but see Breeden v. State, 987 S.W.2d 15,16 (Mo.App.W.D.1999), though he does states that review is for clear error (App.Br.119).

The record shows that one of appellant=s counsel, Teoffice Cooper, testified that prior to appellant=s first trial he was concerned that the upcoming vote on Judge Corrigan=s retention

might cause Judge Corrigan to be more inclined to impose the death penalty, but this was not a concern at the second trial, which began on November 9, 1992, because by that time Judge Corrigan had already been retained in the general election that occurred on November 3, 1992 (R.Tr.647-648).

Appellant=s other counsel, Karen Kraft, testified that during appellant=s first trial, Judge Corrigan expressed concerns about retention in the upcoming November election, because he had not fared well in surveys (R.Tr.1120-1122). However, she said that she was not concerned with Judge Corrigan=s retention at the time of appellant=s second trial, because he had been retained before that trial began (R.Tr.1202-1203). She said that nothing that Judge Corrigan did during that trial indicated that his actions were caused by concern about retention (R.Tr.1202-1203).

Appellant failed to show that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel. Strickland v. Washington, 466 U.S. 668,687 (1984). It was reasonable for counsel not to attempt to recuse Judge Corrigan, because there was nothing to indicate that he would not be fair and impartial in this case, since he had just been retained for another six year term. Nor did appellant show that he was prejudiced by the actions of his counsel, because he did not show that concerns about retention caused Judge Corrigan to take any actions that prejudiced appellant.

B. Exclusion of newspaper articles

Appellant also alleges that the motion court erred by excluding Movant=s Exhibits 54-58. Movant=s Exhibits 54 and 55 are newspaper articles on polls allegedly taken by the Missouri Bar in 1986 and 1992 (R.Tr.1359-1361). These articles were excluded on the ground that they were not relevant because there was no evidence that Judge Corrigan ever saw or heard of them (R.Tr.1360-1362). Kraft=s testimony, mentioned above, that Judge Corrigan stated during appellant=s first trial that he was concerned about a survey was admissible for the purpose of showing Judge Corrigan=s state of mind and not the truth of the matter asserted -- that is, that he had seen a survey (R.Tr.1120-1122). Moreover, even if Kraft=s testimony was improperly used for the truth of the matter asserted, it would not show that Judge Corrigan saw either of these articles. The article about the first poll was also excluded on the ground that it was remote in time from appellant=s trial and there was no evidence that Judge Corrigan had seen it or was concerned about it (R.Tr.1360).

Movant=s Exhibits 56-58 are St. Louis Post Dispatch articles on lawyer=s opinions about various judges, an article on where lawyers ranked Judge Corrigan, an article about appellant being sentenced to death, an article about a person being arrested at a fish fry, an article about U.S. Marshals hunting a suspect in an LSD ring, and numerous other unrelated articles. These articles were excluded for the same reasons as the polls (R.Tr.1365-1367).[12]

[12]If any part of the offer of proof is inadmissible, the offer of proof fails in its entirety.

State v. Malicoat, 942 S.W.2d 458,460 (Mo.App.S.D.1997).

Moreover, appellant cannot show that he was prejudiced by the actions of the motion court because, as was shown above, he was not prohibited from questioning Judge Corrigan or appellant=s trial counsel about their actions in relation to the articles, that is for the relevant purpose of explaining their conduct. Appellant was merely prevented from putting the articles themselves into evidence because their content was irrelevant if not seen by counsel or Judge Corrigan and it was hearsay.

X.

A. The motion court did not clearly err when it admitted testimony of five defense attorneys on Judge Corrigan=s reputation for being fair towards defendants regardless of their race, because this evidence rebutted evidence and inferences of bad character that were injected into the case by appellant and showed why it was reasonable for counsel not to do further investigation into Judge Corrigan=s background.

B. The motion court did not clearly err when it excluded the testimony of John Galliher, a sociologist who was willing to testify that Judge Corrigan could not fairly serve as a judge in a case that involved an African-American defendant, because the motion court was capable of evaluating the evidence in the case without the assistance of a sociologist, and this evidence would not have assisted the motion court even had it been admitted in that the motion court found that Galliher was not credible.

C. The motion court did not clearly err by not allowing appellant to present evidence from defense attorney Donald Wolff that he engaged in racial discrimination during jury selection when he was a St. Louis County Prosecutor in the 1960's, because this testimony was not offered to prove any claim that appellant was granted an evidentiary hearing on and it was irrelevant. The motion court did not clearly err by not allowing appellant to cross-examine defense attorneys Stormy White and Bradford Kessler with affidavits on whether they believed in 1990 that the St. Louis County Prosecutor=s Office engaged in racial discrimination during jury selection, because this testimony was not offered to prove any claims upon which an evidentiary hearing had been granted, and it was irrelevant inadmissible hearsay.

Appellant alleges that the motion court erred when it admitted the testimony of defense attorneys on Judge Corrigan=s reputation for fairness to individuals of all races (App.Br. 123). He alleges that the motion court erred by refusing to allow him to present the testimony of a sociologist on whether Judge Corrigan could fairly serve as a trial judge in a case that involved an African-American defendant (App.Br. 123). He also alleges that the motion court erred by refusing to allow him to cross-examine three defense attorneys or present affidavits or transcripts on whether these attorney=s believed that racial discrimination had occurred during jury selection in cases between the 1960's and 1990.

A. Reputation evidence

Appellant complains that the motion court erred when it admitted the testimony of defense attorneys Donald Wolff, Stormy White, Bradford Kessler, Charles Kirksey, Jr., and Arthur Margulis, who testified that Judge Corrigan=s reputation was that he conducts proceedings in his criminal cases free of racial bias towards African-Americans (App.Br.123;R.Tr.1255-1261,1288-1290,1306-1309,1322-1325,1348-1351). He alleges that reputation evidence is not admissible (App.Br.125).

While reputation of good character is not generally admissible in a civil case, it may be admissible to rebut inferences of bad character that are introduced into evidence by the other party. Cotner Prods. v. Snadon, 990 S.W.2d 92,101 (Mo.App.S.D.1999); Ackerman v. Watson, 690 S.W.2d 498,499 (Mo.App.W.D.1985); Haynam v. Laclede Elec. Co-op., Inc., 827 S.W.2d 200,205-206 (Mo.banc 1992). Here, appellant launched an all-out assault on Judge Corrigan=s character by attempting to show that Judge Corrigan was racially biased and would act unfairly because of specific statements that Judge Corrigan allegedly made in this case, other cases and

at a meeting of judges. This put Judge Corrigan=s character in issue. Appellant cannot legitimately complain about the fact that respondent was allowed to rebut his attempt to assassinate Judge Corrigan=s character.

Appellant claims that he did not open the door to this testimony because ACorrigan=s character was never put in issue@ (App.Br.125). However, he is betrayed by the record and by his brief, which shows that he was and is presenting evidence and arguing that Judge Corrigan was racially biased and that this made him incapable of fairly deciding a case that involved an African-American.

Appellant also argues that the State should not have been permitted to rehabilitate Judge Corrigan=s character because Judge Corrigan did not testify (App.Br.125). However, appellant=s attack upon the character of a non-testifying person opened the door for the State to retaliate and rehabilitate the character of that same person because appellant injected the issue in the case. See State v. Weaver, 912 S.W.2d 499,510 (Mo.banc 1995).

Moreover, the testimony in question was also admissible for the purpose of showing the reasonableness of the actions of appellant=s trial counsel. Appellant claimed that reasonable counsel would have investigated and moved to disqualify Judge Corrigan based on Judge Corrigan being unfair to minorities (P.C.L.F. 185). Trial counsel testified that they investigated Judge Corrigan by speaking to other attorneys about him (R.Tr.642,1164). Evidence of Judge Corrigan=s reputation with the defense bar for fairness shows that counsel had no reason to further pursue their investigation of Judge Corrigan. Appellant cannot complain about this testimony, because he injected the matter into the case. State v. Pierce, 932 S.W.2d 425,431 (Mo.App.E.D.1996).

Appellant also claims that the admission of this testimony was precluded by State v. Clemmons, 785 S.W.2d 524,531 (Mo.banc 1990), and Sidebottom v. State, 781 S.W.2d 791,795 (Mo.banc 1989)(App.Br.125). However, these cases merely hold that testimony on whether a counsel=s actions were reasonable was not admissible because a motion court is as qualified as the witness to form an opinion on the trial counsel=s competency. The evidence in question, on the other hand, was not on a legal issue that was reserved for the motion court. It was on a factual issue.

B. Sociologist=s opinion that Judge Corrigan was unfit to be a judge

Appellant alleges that the motion court erred in rejecting the testimony of John Galliher, a law school dropout and professor of sociology who testified in an offer of proof that in his opinion Judge Corrigan could not fairly serve as a trial judge in a case that involved an African-American defendant (App.Br.123;R.Tr.770-771,784-850).

Expert opinion testimony is only admissible when it is clear that the fact finder in not able to draw correct conclusions from the facts proved because the fact finder lacks experience or knowledge of the subject matter in question. State v. Wright, 934 S.W.2d 575,587 (Mo.App.S.D.1996). For example, in State v. Kinder, 942 S.W.2d 313,334 (Mo.banc 1996), this Court found that a Rule 29.15 motion court did not err by refusing to allow two experts to testify as to whether the trial judge could fairly serve on the defendant=s case, because this was a question of law that was for the motion court to decide. In the case at bar, the motion court stated:

> f) In support of amended motion claim number thirteen (13) Movant offered the testimony of sociology Professor John Galliher. The Respondent

filed a motion to exclude this evidence which was sustained. The issue of whether the trial judge could fairly serve is an issue of law. Expert testimony is not admissible on issues of law. State v. Kinder, 942 S.W.2d 313,334 (Mo. 1996).

Movant=s claim then submitted the testimony as an offer of proof [(R. Tr.762,790)]. In evaluating this testimony, the court is mindful that for an expert witness= testimony to be admissible, the testimony must be based on scientific principles that are generally accepted in the relevant scientific community. Frye v. United States, 293 F.2d 1013,1014 (D.C.Cir.1923).

* * *

The offer of proof testimony of Professor Galliher falls short of the requirements of expert testimony in every regard. His testimony did not display superior knowledge of a subject in which ordinary persons would be incapable of drawing the appropriate conclusion. He failed to establish that his testimony was based upon scientific principles acceptable in the relevant scientific community. There was no showing that his reasoning or methodology was scientifically reliable. The witness admitted that his theories had never been tested in evaluating a judicial officer [(R.Tr.769-771,778)]. He was unable to state a potential rate of error and conceded that had his sources of information been greater, the reliability level would be higher [(R.Tr.886, 913,921,936,953-954)]. Perhaps most telling of his testimony, Professor Galliher confessed that his entire source of materials for his testimony were litigation materials chosen and provided to him by Movant=s counsel [(R.Tr.876-881,936-937,953)]. Clearly,

this testimony was biased towards the particular conclusion Movant=s counsel desired to reach.

Professor Galliher=s testimony was not educational or helpful to the trier of fact in the least. He was not a credible or persuasive witness. His conclusions were unsupported by the records submitted or any credible evidence adduced. From his study of the transcripts, he was unable to identify any ruling which would be indicative of racial bias or prejudice [(R.Tr.894)]. The only basis for his conclusions came from the limited materials Movant=s counsel chose to expose. No effort was made to independently review or observe Judge Corrigan, although ample opportunity existed [(R.Tr.925-932)]. The testimony cannot be considered reliable as it is not based upon any objective evidence. His testimony and status as an expert witness is rejected by this Court.

(2nd R.L.F. 271-274).

Appellant alleges that this testimony was similar to the testimony that was given by the reputation witnesses, discussed above (App.Br.123). He ignores that Galliher was not reputation witness, but a witness on a legal issue that the motion court was fully capable of deciding. The State=s reputation witnesses, on the other hand, were necessary because the motion court could not consider evidence of Judge Corrigan=s reputation unless evidence on that matter was presented.

C. Cross-examination of defense attorneys about discrimination in the 1960's and about their opinions on whether others discriminated on racial grounds in voir dire

Appellant alleges that the motion court clearly erred by not allowing him to present evidence about an alleged policy of racial discrimination by St. Louis County Prosecutors in voir dire (App.Br.123).

Appellant offered the testimony of Donald Wolff that when he was a prosecutor in St. Louis County, from 1966 to 1969, he systematically excluded African-Americans from jury panels (R.Tr.1266-1272). This testimony was offered for the purpose of Ahaving a fair Batson hearing before Judge Corrigan@ (R.Tr.1265). The motion court properly rejected this claim, because it did nothing to prove that the Batson hearing before Judge Corrigan was fair or unfair.

Appellant later offered Petitioner=s Exhibit 52 into evidence, which was a transcript from State v. Collor, 502 S.W.2d 258 (Mo. 1973). Appellant did not tell the motion court what this was, but simply offered this exhibit because it Ahas documents on which we would rely had we been granted a hearing as to these matters@ (R.Tr.1356). This offer of proof preserved nothing for appeal, because an offer of proof must show (1) what the evidence will be, (2) its purpose and object, and (3) all of the facts necessary to establish its admissibility. State v. Edwards, 918 S.W.2d 841,845 (Mo.App.W.D.1996). Moreover, even if appellant told that motion court when he offered the exhibit that it had testimony of Donald Wolff on his past racial discrimination, that testimony would not be relevant to a claim upon which no hearing had been granted (R.Tr.1356;Petitioner=s Exhibit 52 at 556-561). It would also be irrelevant for the same reasons as Wolff=s live testimony on this subject. This Court had already rejected appellant=s Batson claim. State v. Smulls, 935 S.W.2d 9,14-16 (Mo.banc 1996).

Appellant alleges that the motion court clearly erred when it refused to allow him to cross-examine Stormy White with an affidavit that she signed in 1990 in one of Maurice Byrd=s

cases that indicated that she believed that prosecutors in St. Louis County as a common practice struck all black venirepersons from jury panels (App.Br.1295-1297). However, affidavits are inadmissible hearsay. State v. Zimmerman, 886 S.W.2d 684,691 (Mo.App.S.D.1994), and appellant offered no reason for this evidence being admissible (R.Tr.1296-1297). Additionally, White=s belief was irrelevant to any claim that appellant was granted a hearing on and it invaded the province of the fact finder.

Appellant offered an affidavit from Bradford Kessler in which Kessler stated in 1990, in one of Maurice Byrd=s cases, that the St. Louis County Prosecutor=s Office removed blacks from venires based, in his opinion, solely on their race (Petitioner=s Exhibit 46;R.Tr.1311). Appellant offered it for the purpose of showing that the prosecutor=s office struck blacks based on race (R.Tr.1311). The prosecutor objected to this evidence on the grounds that it was offered as to a claim on which appellant had not been granted an evidentiary hearing, that the information predated the trial of appellant, that it was irrelevant, that the affidavit was a prior statement that was not inconsistent with anything Kessler said in court (R.Tr.1312-1314). The motion court then properly sustained these objections. It is obvious that this affidavit was inadmissible hearsay and inadmissible opinion evidence that was not relevant to any claim on which a hearing was granted. Appellant=s counsel did not even argue that it was relevant to a claim upon which a hearing was being held.

In addition to the above, the testimony of the defense attorneys as to whether they believed that racism occurred in jury selection in cases is irrelevant, because it does not matter what these witnesses believed. The question of whether improper jury selection occurred is for the courts to determine. Wolff=s proposed testimony that he discriminated in the 1960's has

nothing to do with this case. He did not testify in his offer of proof that he did so at the instruction of the prosecutor in the case at bar or the present elected prosecutor in St. Louis County. Moreover, these witnesses were merely speculating as to what they believed happened in other cases.

XI.

The motion court did not clearly err when it denied, without an evidentiary hearing, appellant=s allegation that the prosecutor sought the death penalty based on appellant=s race and his claim that he was denied effective assistance of counsel on the ground that his counsel failed to investigate and raise that claim because appellant=s first claim is not cognizable in post-conviction proceedings in that it could have been raised by appellant at trial and on direct appeal, appellant failed to allege facts that were not refuted by the record that would constitute exceptionally clear proof that the prosecutor=s decision was based on race, that show that reasonable counsel would have raised that claim, and the proper limits placed on discovery did not excuse appellant=s failure to plead such facts.

Appellant alleges that the motion court erred when it denied, without an evidentiary hearing, his claim that the prosecutor=s decision to seek the death penalty was the product of racial discrimination, his claim that he was denied effective assistance of counsel on the ground that his counsel failed to investigate and raise that claim, and when it denied him some requested discovery (App.Br.132).

A. Claim of discrimination in death penalty -- not cognizable

The fact that appellant withheld his claim that the prosecutor=s decision to seek the death penalty was a product of racial discrimination until his post-conviction proceeding is fatal to his claim. The post-conviction relief rules cannot be used to obtain review of matters could have been raised on direct appeal. State v. Six, 805 S.W.2d 159,168 (Mo.banc 1991); State v. Hunter, 840 S.W.2d 850,860 (Mo.banc 1992). Appellant has conceded that he could have raised

this issue at trial and on direct appeal (P.C.L.F.193-196). State v. Mallett, 732 S.W.2d 527,538-539 (Mo.banc 1987)(Claim raised on direct appeal). Thus, it cannot be litigated here as a claim of trial court error.

B. Merits of claim of discrimination in death penalty and related claim of ineffective assistance of counsel

Appellant=s post-conviction motion alleged the following conclusory allegations: that appellant is a poor St. Louis City African-American who was charged with a homicide committed against a Caucasian victim in one of America=s wealthiest predominately Caucasian suburbs in close proximity to a mall patronized primarily by affluent Caucasians; that unknown demographic data will be presented, that unknown evidence will be presented that in other factually similar St. Louis County and Chesterfield homicide cases involving defendant who were not African-Americans the State did not seek the death penalty; that the death penalty was sought because appellant was a poor St. Louis African-American; that reasonable counsel would have investigated this matter; and that appellant was prejudiced because a death penalty was imposed against him based on impermissible reasons (P.C.L.F.195-196).

The discretion of the prosecuting authority, while broad, cannot be deliberately based upon race or other arbitrary classifications. Wayte v. United States, 470 U.S. 598 (l985). In order to establish an equal protection violation, the proponent bears the burden of showing not only a discriminatory *effect* in his case, but also that it was motivated by a discriminatory *purpose*. Id. at 608-609; Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252,264-265 (l977).

A defendant who alleges discrimination by the prosecutor must present a *prima facie* case of discriminatory effect and purpose before the State is required to rebut this charge. Wayte v. United States, supra, at 608, n. l0. Because of the wide number of variables that may affect the decision to seek the death penalty, Aan inference drawn from the general statistics to a specific decision in a trial and sentencing@ is Aclearly insufficient@ to establish a prima facie case of discrimination. McCleskey v. Kemp, 481 U.S. 279, 292-297 (1987). To make a prima facie case, he must present Aexceptionally clear proof@ that the decision-makers in *his* case acted with discriminatory purpose. Id. at 292-293, 296-297.

For example, in State v. Taylor, 929 S.W.2d 209,221 (Mo.banc 1996), this Court stated:

> Only one of Taylor=s allegations pertains to decisions made in his case. The Jackson County and Missouri studies, assuming arguendo they are valid and reliable, apply to discriminatory effect of decisions, but do not show purposeful discrimination or any effect on his case, specifically. ATo prevail under the Equal Protection Clause, [defendant] must prove that the decision makers in his case acted with discriminatory purpose.@ Id. at 292,107 S.Ct. at 1767 (emphasis in original). The other allegations of discrimination within the prosecutor=s office were irrelevant because they did not involve decision makers, were remote in time, and did not show discriminatory purpose in his case.
>
> The allegation of discrimination specific to this case is the prosecutor=s refusal to exchange a recommendation of life without parole for Taylor=s guilty plea to first degree murder. Taylor charges the race of defendant and victim must be the reason for the prosecutor=s decision. More likely, the unique

> circumstances of Ann Harrison=s murder and the strength of the State=s case motivated the prosecutor=s decision. AWhere the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.@ Id. at 313,107 S.Ct. at 1778. Taylor failed to produce exceptionally clear proof of an equal protection violation in the prosecutor's decision to seek the death penalty.

In the case at bar, the motion court found that the prosecutor did not abuse his broad prosecutorial discretion and that the aggravating circumstances that were found by the jury refuted appellant=s claim that he was charged with the death penalty based on his race (2nd R.L.F.237). It found that appellant was the one who determined the race of his victim and the location of his crime (2nd R.L.F.237). It also found that this Court determined that this case was like other cases in which the death penalty was imposed (2nd R.L.F.237).

Appellant did not plead any facts showing the results of any studies or point to any other cases that involved similarly situated individuals. He merely made conclusory allegations in his Rule 29.15 motion and alleged that he was an African-American and that his murder occurred in an affluent predominantly Caucasian area (P.C.L.F.194-196). Appellant=s post-conviction motion did not plead facts constituting clear proof of an equal protection violation. Nor did appellant plead facts showing that reasonable counsel would have discovered evidence that could be used to prove appellant=s claim.

Additionally, the record shows that the prosecutor offered appellant the option of pleading guilty to murder in the first degree in exchange for a life sentence, and that the prosecutor=s decision to seek the death penalty was based on the overwhelming evidence, the

nature of the crime, and the fact that appellant had 11 prior felony convictions (Tr.892-896;R.Tr.1170-1171). See State v. Brooks, 960 S.W.2d 479,499-500 (Mo.banc 1997).

Appellant argues that he should not have been required to plead his claim because the motion court limited his discovery (App.Br.134). However, Rule 29.15's pleading requirements make no allowance for excuses. Smith v. State, 798 S.W.2d 152,153 (Mo.banc 1990).

Moreover, the motion court properly granted the State a protective order pursuant to Rule 56.01(c) from appellant=s interrogatories containing about 84 questions that required extensive analysis of all aspects of *all* St. Louis County homicide or potential homicide cases from 1977 through 1993, and appellant=s subpoena for Aall police homicide investigative files for homicides committed in Chesterfield during the period of 1977 to the present@ and all statistical data for homicides in Chesterfield during that time period because the discovery request was over-broad, included matters irrelevant to the claims, was unduly burdensome and expensive, and appellant wanted the prosecutor=s office do analysis of numerous files that appellant could get himself from the Circuit Court (P.C.L.F.31-39,46,49-50,98). Nor was there any evidence that the requested analysis could have been completed in time for appellant to file his amended post-conviction motion. The court sustained the State=s objections on August 17, 1993, and appellant=s amended post-conviction motion was due on about August 27, 1993 (P.C.L.F.1,98).

Additionally, the discovery in question was irrelevant because, as is discussed above, appellant=s claim of trial court error was not cognizable in a post-conviction motion because it could have been raised on direct appeal, and appellant=s claim of ineffective assistance of counsel would fail regardless of the discovery because appellant failed to plead facts showing

that reasonable counsel would have known to raise a claim of racial discrimination. If appellant=s post-conviction counsel did not know of such facts, appellant can not show that trial counsel should have been aware of them.

Appellant also mentions that he made numerous offers of proof, but offers of proof have nothing to do with whether he facts pled facts in his post-conviction motion entitling him to an evidentiary hearing (App.Br.136). Thus, his rejected offers of proof are irrelevant, and the motion court did not clearly err by denying appellant=s claims without an evidentiary hearing.

XII.

The motion court did not clearly err when it denied appellant=s allegation that he was denied effective assistance of counsel when his trial counsel did not introduce into evidence the stipulation between the State and the defense that the gunpowder residue tests performed on appellant and his accomplice indicated that no gunshot residues were detected on appellant and that the test on his accomplice was inconclusive as to the presence of gunshot residue, because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel in that the State had withdrawn its stipulation by the time of appellant=s trial.

Appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel did not call Donald Smith to testify about gunshot residue tests that he ran was waived by appellant because it was not pled in his post-conviction motion.

Appellant=s pro se motion alleged that he was denied effective assistance of counsel because they did not present gunshot residue evidence, though he did not specify the source of that evidence (P.C.L.F.10). In his amended motion, he specified that the evidence that his counsel should have presented was a stipulation (P.C.L.F.177-180). As can be seen below, however, appellant attempts to improperly expand his claims on appeal (App.Br.139-143).

A. Alleged failure to present a stipulation

Appellant alleges that the motion court clearly erred when it denied his claim that his trial counsel failed to offer into evidence a stipulation that gunpowder residue tests performed on appellant and Norman Brown, his accomplice, indicated that no gunshot residue was detected on appellant and that the results were inconclusive as to Norman Brown (App.Br.26;P.C.L.F.

177-180). However, the motion court properly found that no stipulation existed during the second trial, and counsel is not ineffective for failing to introduce evidence that does not exist (2nd R.L.F.310-311;R.Tr.602-603,123-1124).[13]

B. Alleged failure to present the testimony of Donald Smith

Appellant also alleges, on appeal, that his counsel was ineffective not finding Donald Smith, who could testify appellant or Brown could have been the shooter(App.Br.141;R.Tr. 1052).

However, this claim was waived because it was not pled in appellant=s post-conviction motion. Besides not pleading Smith=s name, appellant did not plead that Smith could have been located through reasonable investigation, what Smith would testify to if called, and that Smith=s testimony would have provided a viable defense. Morrow v. State, 21 S.W.3d 819, 823(Mo.banc 2000). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. State v. Harris, 870 S.W.2d 798,815(Mo.banc 1994). Thus, the motion court did not clearly err when it rejected these claims.[14]

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[13]The criminologist who performed the tests before appellant=s trial, Carl Rothove, could not say whether appellant or his accomplice was the shooter, and defense expert Robert Briner testified the same way at the appellant=s first post-conviction evidentiary hearing (R.Tr. 661-665;PCRTr. 201-202).

[14]The motion court found that this claim had not been pled in appellant=s post-conviction motion, but it gratuitously ruled on it and found that Smith=s testimony was argumentative, evasive, and lacking credibility, and his testing could have been excluded from evidence

because he did not attempt to duplicate conditions or the time delays in testing that existed in this case (2nd R.Tr.250-251). Further, Smith was uniformed about whether Brown had been sitting in a police car, where he could have picked up gunshot residue from prior occupants of the car for quite some time before his hands were swabbed, and he had not been told that appellant struggled with the police in wet grass during his arrest and that upon being arrested he continuously wiped his hands on his clothing before the test was conducted (R.Tr.1042-1046;2nd R.Tr.250-251).

XIII.

The motion court did not clearly err when it rejected appellant=s claim that he was denied effective assistance of counsel on the ground that his trial counsel did not call numerous mitigation witnesses because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

Appellant=s other claims raised in his thirteenth point should not be reviewed because they were waived in that appellant did not plead them in his post-conviction motion.

Appellant alleges that his counsel failed to call numerous mitigation witnesses in the penalty phase to testify about his Anonviolent personality@ and about a statement that his accomplice allegedly made (App.Br.143). Appellant never alleges that he pled these claims in his post-conviction motion. This is because most of his claims were not pled and were therefore waived by appellant. State v. Clay, 975 S.W.2d 121,141-142 (Mo.banc 1998). The claims that were not waived are his allegation that his counsel were ineffective for failing to call Randy Edwards, Maggie Cain, Willie Lee, Veronica Morris, and Anita Hennings (App.Br.126;P.C.L.F. 212-220). However, this Court cannot tell what these witnesses would have testified to from appellant=s brief, because he has mixed their testimony up with the testimony of witnesses for claims that were waived.

The motion court made findings as to all of alleged witnesses who could have testified about appellant, regardless of whether they were pled. It stated:

> Counsel has a duty to make a reasonable investigation of mitigating evidence or to make a reasonable decision that such investigation is unnecessary.

State v. Nunley, 923 S.W.2d 911,924 (Mo.banc 1996). However, trial counsel does not have an absolute duty to present mitigating character evidence at the penalty phase of a trial. State v. Shurn, 866 S.W.2d 447,472 (Mo.banc 1993). Trial counsel also has no duty to present evidence which is cumulative. Id. Further, the selection of witnesses is a virtually unchallengeable question of trial strategy. State v. Kreutzer, 928 S.W.2d 854, 857 (Mo.banc 1996).

Much of what Movant suggests would have been shown by the testimony of additional witnesses is cumulative to evidence adduced at trial. The jury was made aware of Movant=s home life, non-violent character, and abuse while in prison as such evidence was presented to the jury during the testimony of his five mitigation witnesses [(Tr.897-951)]. Movant=s mitigation evidence was sufficient for the trial court to submit each of Movant=s requested mitigating circumstances to the jury. Trial counsel will not be held ineffective in failing to present cumulative testimony. State v. Shurn, 866 S.W.2d at 472.

* * *

This Court finds the testimony of these witnesses to be cumulative to the testimony presented at trial. Further, this Court, in reviewing these witnesses= testimony and demeanor, finds them to be not credible based upon their limited contact with Movant, their lack of knowledge as to Movant=s complete criminal history, and their lack of awareness as to any of the underlying facts surrounding the present case [(R.Tr.355-361,407-417,443-447,491-497; Petitioner=s Exhibit

47 at 28-30)].[15] These witnesses testified to limited awareness of Movant; one of whom admitted to having face to face contact with Movant for a mere seventy-two (72) hours. Another proposed mitigation witness, Marsha Major, testified that she observed Movant the night of the murder and that he seemed Acalm@[(R.Tr.382)]. Dennis Brown, the first mitigation witness to testify, admitted that, had he known about Movant=s lengthy criminal record, his opinion as to Movant=s nonviolent nature would be different [(R.Tr.335-341)]. This Court makes special note that both Dennis Brown and another mitigation witness, Randy Edwards, entered the courtroom with typed sheets of proposed topics of examination purportedly given to them by an investigator of the Office of the

[15]These cites only address the testimony of witnesses who were pled in appellant=s post-conviction motion.

State Public Defender [(R.Tr.323-325,353-358)]. These witnesses' testimony is further diminished by their admission and possession of what appeared to this Court to be scripted topics of examination.[16]

Movant's trial counsel's indicated that they discussed what mitigation witnesses should be called. Letters were sent by their office attempting to contact additional witnesses. If responses were not received, trial counsel reasonably concluded that such witnesses were not available or helpful. Further, Karen Kraft testified that she remembered speaking with Versie Frazier and decided not to call her as a witness as her testimony would not be helpful to

[16]Dennis Brown testified about seeing an investigator for the Public Defender's Office handing similar papers to other witnesses (R.Tr.326). The document that Randy Edwards took with him to the witness stand had both proposed questions and proposed answers for Edwards (R.Tr.353-358). After this had been exposed, the Public Defender's Office started collecting the scripts or topic lists for their witnesses before the witnesses went into the courtroom (R.Tr.411-413,428,432).

Movant=s theory of the case. Had the above witnesses testified at trial, this Court finds no reasonable probability that the outcome of the case would have been different. This Court finds that Movant suffered no prejudice.

(2nd R.L.F.339-341).

In addition to the above analysis, the record shows that counsel chose carefully which mitigation witnesses to call, because some mitigating evidence can be seen as aggravating by a jury, and counsel wanted the witnesses testimony to be consistent with the mitigating circumstances that they sought to prove (R.Tr.1173-1176). Kraft said that witnesses may not be helpful if they did not know things about the defendant, because then it would look like appellant was trying to deceive his witnesses and this could affect the witnesses= credibility (R.Tr.1185). Kraft testified that with appellant=s 11 prior felony convictions and being in and out of prison for 20 years, the fact that someone could come to stand and not know about those 20 years of appellant=s life could be very stifling to the jury (R.Tr.1185). All of the witnesses who were pled in appellant=s post-conviction motion and who testified at appellant=s post-conviction hearing suffered from these problems because their testimony showed that appellant had hid his past from them, or that they simply did not know a lot about appellant=s background (R.Tr.355-361,407-417,443-447,491-497;Petitioner=s Exhibit 47 at 28-30).

Kraft said that appellant was a source of mitigation witnesses (R.Tr.1186). She tried to talk to anyone who had been talking to appellant (R.Tr.1186). Appellant failed to present

evidence showing that he told his counsel about the witnesses in question or that reasonable counsel would have been able to reach those witnesses.[17]

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[17]Appellant=s third cousin, Veronica Morris, was too sick to testify, because she was in the hospital, but she would have been willing to testify by deposition (R.Tr.497-489). Kraft believed that someone told her of a witness called Veronica, but appellant failed to show that this was a reference to Veronica Morris or that she could have been located by reasonable counsel (R.Tr.1136-1137). Nor did he ask his counsel whether they would have wanted to present mitigating testimony in the form of a deposition.

Similarly, Anita Hennings would not have been able to attend appellant=s trial, because she had a stroke (Petitioner=s Exhibit 47 at 5,26), and there was no evidence that appellant told

his counsel or that reasonable counsel would have known of Hennings or wanted to present her testimony in the form of a deposition. Moreover, Hennings also thought that appellant was visiting her during a period of time that he was incarcerated (Petitioner=s Exhibit 47 at 29-30).

The defense called five penalty-phase witnesses (Tr.897-851). Kraft said that she called Reverend Elmer Mitchell to testify about appellant being a loving son and a helpful neighbor (R.Tr.1189-1190). She called Dr. Wells Hively to testify about appellant=s alleged mental problems, schooling, and his physical disability (a gunshot wound in a hand) (R.Tr.1191;Tr.947). She called two witnesses from the county jail to show that appellant was a good prisoner (R.Tr.1190). She called appellant=s adopted father, who Kraft thought was a wonderful witness, to show his love and concern for appellant (R.Tr.1192-1193). He testified about appellant and his upbringing (Tr.943-949).

In light of the vicious nature of the murder, appellant=s lengthy criminal record, and the mitigating evidence that was presented by appellant=s counsel, appellant has failed to show that the motion court clearly erred when it found that a different result would not have occurred if appellant had presented additional cumulative evidence. See State v. Brown, 902 S.W.2d 278,298(Mo.banc 1994).

As to appellant=s claims concerning two statements that were allegedly made by Norman Brown against his penal interest to Crispin Smith and inmate James Kindell, the motion court properly rejected these claims on the ground they were not pled in appellant=s post-conviction motion (Petitioner=s Exhibit 49;R.Tr.501-528). Moreover, this was similar to testimony that this Court found was inadmissible in appellant=s direct appeal. State v. Smulls, 935 S.W.2d 9,20-21 (Mo.banc 1996).

XIV.

The motion court did not clearly err when it denied without an evidentiary hearing some of the claims in appellant=s post-conviction motions because appellant failed to allege facts that would entitle him to a relief if taken as true, or the facts alleged were refuted by the record.

A. Claim that counsel should not have called Dr. Hively and should have called some unnamed comprehensive mental health expert

Appellant claims that the motion court clearly erred when it denied without an evidentiary hearing his claim that he was denied effective assistance of counsel because his trial counsel called Dr. Wells Hively to testify in the punishment phase of his trial in that Dr. Hively Awas not the author of the psychological report filed with the court and had only minimal contact with [appellant] after the report had been filed@ (P.C.L.F. 207). A related claim is that his trial counsel failed to call an unnamed Acomprehensive mental health expert@ (P.C.L.F. 210).

The motion court made the following findings:

> Dr. Hively testified that his entire office was involved in the evaluation of Movant (T.p.903); that Movant was given numerous psychological tests and that he reviewed those results (T.p.903); that he also reviewed police reports and school records of Movant (T.pp.903-904); and that his office saw Movant a total of four times and worked together on the evaluation (T.p.905). Dr. Hively testified extensively regarding the findings of his staff including the fact that Movant possessed a dependent personality, was not an aggressive person, had a history of

feeling inferior, avoided direct expressions of anger, had been diagnosed as possessing borderline low intelligence, and that it was unlikely Movant could have planned this crime given the nature of his dependent personality.

The mere fact that the State effectively cross-examined a witness does not make that counsel ineffective. The findings of Dr. Hively were presented to the jury and failed to provide Movant with a defense. Movant has not alleged that the findings of any other specific doctor would have been different, would have resulted in additional evidence being produced, that such other doctor would not have been susceptible to the same cross-examination.

* * *

Trial counsel made reasonable efforts to investigate the mental status of Movant, as he was examined by both Dr. Del Duncan and Dr. Hively in addition to being tested by their graduate assistant. Trial counsel will not be held ineffective for not shopping for a psychiatrist who would testify in a particular way. State v. Mease, 842 S.W.2d at 114; Putney v. State, 785 S.W.2d 562,563 (Mo.App.1990). Trial counsel had no reason to dispute the findings of Dr. Del Duncan and Dr. Hively. Counsel is not effective for failing to get a second psychiatric examination when the first examination did not find defendant to be suffering from a mental disease or defect. Putney v. Sate, 785 S.W.2d 562 (Mo.App.1990). Movant has not alleged any different or more substantial mental deficiencies than those described by Dr. Hively at trial. Movant has never alleged

nor been found to be suffering from a mental disease or defect absolving him of responsibility.

Movant has not alleged facts which differ from those elicited in the testimony adduced at trial. Movant=s bare conclusions that had the evidence come from a different mental health care expert the outcome of Movant=s trial would have been different, is insufficient particularly in light of this Court=s previous discussion of Dr. Fleming=s testimony.

(2nd R.L.F.240-242).

Although appellant alleges that his counsel should not have called Dr. Hively, appellant failed to plead the name of any expert who could have testified instead of Dr. Hively. See State v. Ramsey, 864 S.W.2d 320,340 (Mo.banc 1993). He merely stated that some unnamed Acomprehensive mental health care expert@ should have been called (P.C.L.F.210). On appeal, appellant improperly attempts to amend his claim by citing to matters that were never admitted into evidence that pertain to other mental health experts (App.Br.151-152). In any event, it was reasonable for counsel to present the testimony of Dr. Hively, because appellant did not plead facts showing that any other expert would have been available and that would have testified to matters that would have been more helpful to appellant and would have caused a reasonable likelihood that a different result would have occurred in appellant=s trial.

Additionally, the most damaging impeachment of Dr. Hively was not his familiarity of the appellant, as appellant alleges. It was the fact that his diagnosis of appellant having a Adependant personality@ who was likely to be influenced by someone that he perceived was powerful, was not helpful to appellant under the facts of this case (Tr.922-923). Dr. Hively

admitted that a person with a dependent personality would not typically be influenced by a 15-year-old, such as appellant=s accomplice (Tr.923). This damage would have occurred, regardless of what expert stated that theory.

B. Opening statement

Appellant alleges that the motion court clearly erred when it denied, without an evidentiary hearing, his claim that his counsel was ineffective when she stated in penalty-phase opening statement that appellant had a difficult time getting a job following his hand injury, because of his limited intelligence, and that Ahe took the easy way out@ by pursuing a life of crime (App.Br.148;Tr.862;P.C.L.F.183). This was a reasonable effort to blunt the effect of the State=s evidence of appellant=s 11 prior felony convictions and to get sympathy for appellant by arguing that appellant=s choices were limited by factors beyond his control. The record refutes any notion that counsel was incompetent or that appellant suffered prejudice as defined in Strickland v. Washington, 466 U.S.668,687(1984)(2nd R.L.F.236-237).

C. Failure to request a mistrial -- note from jurors

Appellant alleges that his counsel failed to request a mistrial after jurors expressed concerns about security in a note to the court during guilt phase deliberations (App.Br.148;P.C.L.F.196;L.F. 513;Tr.844-846). He alleged that this note meant that the jury had already decided to sentence him to death (P.C.L.F.199). He assumes that the jury would believe that appellant and his Afriends@ would be pleased with them for convicting appellant and for sentencing him to life without the possibility for probation or parole, in that in such case the

jurors would have had no security concerns about their punishment verdict. This Court rejected this nonsensical suggestion on direct appeal. State v. Smulls, 935 S.W.2d 9,22 (Mo.banc 1996). This finding is buttressed by the fact that the jury deliberated for more than nine hours before reaching their verdict on punishment (Tr.972-973). Moreover, appellant did not plead that he had any evidence that proved that the jury had already decided punishment when it sent the note to the trial court.

D. Alleged failure object to instructions and present unknown evidence

Appellant alleges that his counsel failed to object to the punishment-phase instructions and present evidence such as was offered Ain United States ex rel. Free v. Peters, 806 F.Supp. 705(N.D.Ill.1992), demonstrating why these instructions are unconstitutional@ on the ground that they are confusing (P.C.L.F.130;App.Br.154). However, appellant did not suggest that his counsel should have used the same evidence as was used in Peters, since that jurisdiction uses different instructions, and appellant did not suggest exactly what evidence his counsel should have presented and who would have been willing to testify about that evidence. Thus, appellant has failed to pled facts which if true would entitle him to relief. Moreover, his claim is also without merit. State v. Kinder, 942 S.W.2d 313,339(Mo.banc 1996).

E. Alleged ineffective assistance of counsel -- voir dire

Appellant raises two claims concerning voir dire. First, he alleges that his counsel failed to object when the trial court told venireperson Macha, who did not sit on the case as a juror, that Atheoretically@ appellant did not have to prove that he should not be put to death (App.Br.149;P.C.L.F.133-134;Tr. 31).

The motion court properly found that A[i]n a long discussion had by the Court with Venireperson Macha, the Court made clear that the burden of proof rested entirely with the State [(Tr.30-31)]. The record clearly refutes Movant=s suggestion that the Court lowered the State=s burden of proof by its comment, when taken in the entire context of voir dire@ (2nd R.L.F.226). The motion court also found that venireperson Macha was eventually removed from the panel and that there was no evidence that any of the other venirepersons were tainted (2nd R.L.F.226).

On appeal, appellant ignores the fact that the statement in question was made in the context of a lengthy discussion during which it was made clear to all venirepersons present that the State had the burden of proof. Thus, it appears that he does not dispute the motion court=s finding that the record refutes his claim.

Appellant=s second claim of error in voir dire is his claim that his trial counsel failed to request that venireperson Hirsch be removed from the venire or not be permitted to answer any questions after he was stricken for cause, because Hirsch stated after he was stricken for cause that he would find it difficult to give life imprisonment to someone who intentionally killed someone (App.Br.27;P.C.L.F.137-139;Tr. 78-79).

This Court rejected this claim under another theory when it found that AMr. Hirsch=s statements did not infringe on defendant=s right to a fair trial.@ State v. Smulls, supra at 19.

XV.

The appellant=s claim that he was denied his right to effective assistance of counsel because his counsel refused to allow him to testify is unsupported by any evidence and refuted by the record.

Appellant alleges that he was denied effective assistance because his trial counsel refused to allow him to testify (App.Br.157;2nd R.L.F. 244-247). However, he did not testify as to what he would have said in his second trial if he testified, which could have been different from what he testified in his first trial. State v. Starks, 856 S.W.2d 334,336-337 (Mo.banc 1993).

He also neglects to mention that the record shows that during his trial he was informed by the trial court and by his counsel that he had the right to testify, counsel stated that appellant was waiving his right to testify, appellant did not protest this decision, and he refused to speak to the trial court about his discussions with his counsel on this matter in an attempt to give him an issue to appeal (2nd R.L.F.246-247;Tr.793-796). Post-conviction testimony of counsel showed that appellant was informed that he was the one who had to make that decision and that he made that decision (P.C.Tr.217-221,245). Appellant did not present any evidence that he was denied his right to testify. There is no evidence to support his assertion on appeal.

CONCLUSION

In view of the forgoing, respondent submits that this Court should affirm the denial of the appellant=s Rule 29.15 motion.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

BRECK K. BURGESS
Assistant Attorney General
Missouri Bar No. 34567
Post Office Box 899
Jefferson City, MO 65102-0899
Attorneys for Respondent

Certificate of Compliance and Service

I hereby certify:

1. That the attached brief complies with the limitations contained in Special Rule 1(b) of this Court and contains 26,603 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 6th day of June , 2001 to:

Mr. William J. Swift
Office of the State Public Defender
3402 Buttonwood
Columbia, Missouri 65201
Attorney for Appellant

JEREMIAH W. (JAY) NIXON
Attorney General

BRECK K. BURGESS
Assistant Attorney General
Missouri Bar No. 34567

Post Office Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
Attorneys for Respondent