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JURISDICTIONAL STATEMENT

The appellant, Angel Dequesne, appeals from a final order entered on November 15, 1999, by the Honorable David W. Shinn, Judge of Division No. 1 of the Circuit Court of Jackson County, 16th Judicial Circuit, denying the appellant**'s motion under Rule 29.15 (PCR L.F. 27-34). The appellant's motion sought to vacate his convictions and consecutive life sentences for murder in the second degree (§ 565.021, RSMo 1994) and armed criminal action (§ 571.015.1, RSMo 1994) that were imposed on November 22, 1996, by Judge Shinn, following jury verdicts returned on October 3, 1996 (PCR L.F. 27). On January 27, 2000, after obtaining permission from the Court of Appeals to file a late notice of appeal,** the appellant **timely filed his notice of appeal from this judgment (PCR L.F. 37-38).**

Jurisdiction of this appeal originally was vested in the Missouri Court of Appeals, Western District, pursuant to Art. V, § 3 of the Constitution of Missouri. However, on April 24, 2001, following an opinion by the Court of Appeals affirming the denial of his motion under Rule 29.15, this Court sustained the appellant's application to transfer and ordered this case transferred from the Court of Appeals to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Art. V, § 10, of the Constitution of Missouri and Rule 83.03.

STATEMENT OF FACTS

A. Procedural History

On October 3, 1996, the appellant, Angel Dequesne, was found guilty of murder in the second degree (§ 565.021, RSMo 1994) and armed criminal action (§ 571.015.1, RSMo 1994), following a jury trial in the Circuit Court of Jackson County, Missouri, 16th Judicial Circuit (PCR L.F. 27). On November 22, 1996, he was sentenced by the Honorable David W. Shinn, Judge of Division No. 1 of the Circuit Court to two consecutive terms of life imprisonment.

On July 15, 1997, the appellant**'s convictions and sentences were affirmed by the Court of Appeals in a *per curiam* order and unpublished memorandum opinion. *State v. Dequesne*, 948 S.W.2d 272 (Mo.App. W.D. 1997).**[1]

On September 24, 1997, the appellant **filed a *pro se* motion under Rule 29.15, seeking to vacate his convictions and sentences (PCR L.F. 3-10). On January 22, 1998, an amended motion was filed on the appellant's behalf**

[1]A copy of that opinion has been attached to this brief as the respondent's "Appendix A."

(PCR L.F. 17-25). On November 15, 1999, the appellant's motion was denied by Judge Shinn without an evidentiary hearing (PCR L.F. 27-33).[2]

[2]A copy of Judge Shinn's findings of fact and conclusions of law has been attached to this brief as the respondent's "Appendix B."

On February 13, 2001, a three-judge panel of the Missouri Court of Appeals, Western District, issued a *per curiam* order and not-to-be-published memorandum opinion, affirming the denial of the appellant's motion under Rule 29.15.[3]

The appellant's alternative motion for rehearing or transfer was denied by the Court of Appeals on March 27, 2001, but on April 24, 2001, this Court sustained the appellant's application to transfer and ordered the case transferred to this Court pursuant to Rule 83.03.

B. Trial Evidence

On August 9, 1995, Anthony Liggins agreed to give a ride to Kindall Owens to a local park in exchange for some drugs that Ms. Owens was trying to sell (Tr. 186-187, 188, 369).[4] While the two sat in Liggins' car, Ms. Owens noticed that the appellant, with whom she had been romantically involved, was watching her (Tr. 188). Within minutes, the appellant approached the car and told Ms. Owens that he did not want her to be with Liggins and that she should get out of the car (Tr. 189-190, 375).

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[3]A copy of the published *per curiam* order, together with a copy of the unpublished memorandum opinion, have been attached to this brief as the respondent's "Appendix C."

[4]**The designation "Tr." refers to the trial transcript.**

At that point, the appellant and Liggins began to argue and a struggle ensued, with the appellant standing outside of the car and Liggins sitting in the driver's seat (Tr. 220, 375). Liggins started the car and began to drive off with the appellant hanging on to the door of the car and Liggins holding the appellant's arm (Tr. 195-197, 376-377). As Liggins drove the car down the street, the two men struggled over a knife (Tr. 375-376). At some point, the knife was knocked to the floor, where the appellant retrieved it and proceeded to slash at Liggins, wounding him several times (Tr. 377-378).

The car then passed a group of individuals who were sitting on their front porch (Tr. 234-237, 241, 258-261, 264, 283-285, 291). Several in the group observed that the appellant and Liggins were fighting one another (Tr. 236-237, 259-260, 285-286). Two of these individuals saw the appellant hanging on to the car with his right hand while he repeatedly used his left hand in a striking motion toward Liggins (Tr. 236-237, 286). Liggins then slowed the car enough (or possibly stopped it) and the appellant fell off of the car into the street (Tr. 239, 261-262, 287, 379).

Liggins accelerated and drove past the group on the porch and through an intersection, where he finally stopped the car (Tr. 239, 261-262, 380-381). As the car passed, one of the members of the group observed that the driver was bleeding from a cut behind his ear (Tr. 287-288). Two other members of the group watched as the appellant got up from the street and picked up something silver and placed it in his pocket (Tr. 239-241, 263-264, 288, 292). Another member **of the group observed that the object was actually a pocketknife (Tr. 288-290). At trial, the appellant admitted that it was a knife and that he did pick it up and place it in his pocket (Tr. 380).**

After putting the knife in his pocket, the appellant started down the street toward the victim's car (Tr. 241, 265, 289). When the appellant reached the car, Liggins got out of the car and the two men resumed fighting (Tr. 242, 264, 292). The appellant struck several blows at Liggins with the knife as Liggins struck at the appellant with his fists (Tr. 383). The two then fell to the ground with the appellant still striking with the knife (Tr. 383-384). As Liggins sat up, they both saw that the knife was sticking out of his chest (Tr. 384).

Liggins got up and went back to his car and again tried to drive off (Tr. 243-244, 267, 293). The appellant, however, went to the car as it was driving away and jumped onto the roof of the car (Tr. 267, 293, 284). As Liggins accelerated down the street, he drove from side to side, throwing the appellant from the car and then crashed the car into a light pole (Tr. 204, 245, 267-268, 294, 384-385).

After the car hit the light pole, the appellant got up and said to Ms. Owens, "Look what you made me do," and then started down the street (Tr. 246). Ms. Owens then started saying, "Somebody help my boyfriend" (Tr. 247, 269). After a few minutes, Ms. Owens also started walking down the street in the same direction that the appellant had gone (Tr. 247, 271, 297). By the time an officer from the Kansas City Police Department arrived on the scene, Liggins was dead (Tr. 231).

The appellant testified that he knew that Liggins had been doing crack cocaine on the day of the altercation and was aware that drugs tended to make Liggins "[v]iolent and angry" (Tr. 372-374). He was afraid that Liggins might become violent or aggressive toward Ms. Owens, so he

ordered her to get out of the car when he saw that she was with Liggins (Tr. 375).

Liggins, he said, grabbed him by the arm, said "Fuck you, Cuban," and attempted to reach for an object that was between the seats of the vehicle (Tr. 375). When the appellant saw that the object was a knife, he struck Liggins with his arm and knocked the knife onto the back seat (Tr. 376).

Liggins, while still holding the appellant's arm, started the car (Tr. 376). The appellant held on to the vehicle as it drove down the street (Tr. 377). He asked Liggins to stop the car, but Liggins, he said, responded by saying "the same bad word," and told Ms. Owens to forget about him (Tr. 377). The appellant realized that the knife was still on the back seat, so he grabbed it and started stabbing Liggins "slightly" in an effort to force him to stop the vehicle (Tr. 378-379).

When Liggins finally stopped the car, the appellant released his grasp of the vehicle and told Ms. Owens to get out of the car (Tr. 380). Liggins, however, took off again with Ms. Owens still in the vehicle (Tr. 380). The appellant picked up the knife off the ground and was walking home when he saw that the vehicle had stopped again about a block away (Tr. 380).

The appellant said he walked to the car and shouted for Ms. Owens to get out of the car (Tr. 381). Then he observed Liggins walk to the back of his car as if he were looking for something and then began advancing toward him (Tr. 382). The appellant heard the words "Kill you," or something like that (Tr. 382). He told Liggins that he didn't want any problems with him, and that he just wanted him to let Ms. Owens get out of the car (Tr. 382).

According to the appellant, Liggins adopted a "karate" or "judo" position and took several swings at him (Tr. 382). Aware, he said, that Liggins was much younger and stronger than he was, and remembering that Liggins had previously tried to stab him with a knife and run him over with his car, the appellant testified that he elected to "strike [a] blow with the knife," and stabbed Liggins in the chest (Tr. 383).

The appellant went on to testify that after he stabbed the victim in the chest, Liggins "punch[ed] back at [him]," knocking the appellant to the ground (Tr. 383). According to the appellant, Liggins, with the knife firmly embedded in his chest, jumped on the appellant's chest and began "striking blows" at him (Tr. 384). The appellant covered up his face until Liggins got off of him and walked back toward his car (Tr. 384).

The appellant said he walked back toward Liggins' car and attempted to open the door so that Ms. Owens could get out, but at that moment Liggins drove away again (Tr. 384). The appellant said he climbed on to the roof of the car and remained there until Liggins drove his vehicle into a utility pole (Tr. 385-386). He then said to Ms. Owens, "Look what you made me do" (Tr. 388). He asked someone to dial 911 and then walked away because he had not realized that he had killed Liggins (Tr. 388).

C. Rule 29.15 Proceedings

On September 24, 1997, the appellant **filed a *pro se* motion under Rule 29.15, seeking to vacate his convictions and sentences (PCR L.F. 3-10). The appellant's *pro se* motion alleged that trial counsel had been ineffective in failing to call Carl Martin to testify and in failing to call an expert witness to testify regarding the effects of cocaine on a person (PCR L.F. 6). The *pro***

_se_ motion also raised a claim of ineffective assistance of appellate counsel (PCR L.F. 7).

On November 4, 1997, the motion court granted the appellant's court-appointed counsel an extension of time of until January 4, 1998, within which to file an amended motion (PCR L.F. 15).[5] Although the certificate of service on counsel's first amended motion was dated January 2, 1998, that motion was not stamped "filed" by the clerk of the circuit court until January 22, 1998, 18 days out of time (PCR L.F. 17-25). The amended motion also alleged that trial counsel had been ineffective in failing to present the testimony of Martin, and also raised several other claims of ineffective assistance of trial counsel that were not included in the appellant's _pro se_ motion, including the allegation that trial counsel had been ineffective in failing to request an instruction on voluntary manslaughter (PCR L.F. 17-25).

On November 15, 1999, the appellant's motion was denied by Judge Shinn without an evidentiary hearing (PCR L.F. 27-33). Although Judge Shinn noticed that the appellant's amended motion had been filed out of time, the court considered the merits of, and issued findings of fact and

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[5]**Although the judge's order of November 4, 1997, stated that appointed counsel had "until January 4, 1997" in which to file his motion, this was clearly a typographical error (PCR L.F. 15).**

conclusions of law on, all of the issues contained in both the appellant's *pro se* and amended motions (PCR L.F. 27-33).

On January 27, 2000, after obtaining leave of court to file his notice of appeal out of time, the appellant **filed his notice of appeal from this judgment (PCR L.F. 37-38).**

POINTS RELIED ON

I.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY REJECTING THE APPELLANT'S CLAIM THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO CALL CARL MARTIN AS A DEFENSE WITNESS, BECAUSE THE SELECTION OF WITNESSES IS A MATTER OF TRIAL STRATEGY THAT IS "VIRTUALLY UNCHALLENGEABLE." MOREOVER, MARTIN'S PROPOSED TESTIMONY THAT ANTHONY LIGGINS WAS BIGGER THAN THE APPELLANT AND HAD "PINNED [HIM] TO THE GROUND AND WAS SITTING ON HIS CHEST" WOULD NOT HAVE PROVIDED THE APPELLANT WITH A VIABLE DEFENSE, SINCE IT WAS CUMULATIVE TO OTHER EVIDENCE IN THE CASE AND INVOLVED FACTS WHICH OCCURRED *AFTER* THE APPELLANT, ACCORDING TO HIS TRIAL TESTIMONY, HAD ALREADY FATALLY STABBED LIGGINS IN THE CHEST.

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

State v. Jones, 921 S.W.2d 28 (Mo.App. W.D. 1996);

***State v. Johnston*, 957 S.W.2d 734 (Mo. banc 1997), *cert. denied*, 522 U.S. 1150, 118 S.Ct. 1171, 140 L.Ed.2d 181 (1998).**

II.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY REJECTING THE APPELLANT'S CLAIM THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO OBJECT TO A PORTION OF THE ASSISTANT PROSECUTOR'S CLOSING ARGUMENT, IN WHICH HE COMMENTED ON KINDALL OWENS' DEMEANOR IN THE COURTROOM DURING *VOIR DIRE* EXAMINATION, BECAUSE (1) A MERE FAILURE TO OBJECT TO IMPROPER ARGUMENT DOES NOT RISE TO THE LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND (2) THERE WAS NOTHING IMPROPER ABOUT THE PROSECUTION'S REMARKS, SINCE IT INVOLVED CONDUCT THAT OCCURRED IN THE IMMEDIATE PRESENCE OF THE JURY PANEL.

***Jones v. State*, 784 S.W.2d 789 (Mo. banc 1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 175 (1990);**

***State v. Sumlin*, 915 S.W.2d 366 (Mo.App. S.D. 1996);**

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

III.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY REJECTING THE APPELLANT'S CLAIM THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO REQUEST AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER, SINCE SUCH AN INSTRUCTION WOULD HAVE CONFLICTED WITH THE APPELLANT'S SELF-DEFENSE THEORY. THE APPELLANT TESTIFIED THAT HE HAD STABBED THE VICTIM IN SELF-DEFENSE WHILE DEFENDING HIMSELF FROM A MUCH BIGGER MAN WHO WAS BENT ON KILLING HIM; HE DID NOT MAINTAIN THAT HE HAD ACTED OUT OF "SUDDEN PASSION" OR THAT HE HAD LOST HIS CAPACITY FOR REASON AND SELF-CONTROL WHEN HE FATALLY STABBED THE VICTIM. FURTHERMORE, SINCE THE JURY SELECTED THE MAXIMUM PUNISHMENTS OF LIFE IMPRISONMENT AS PART OF ITS GUILTY VERDICTS, IT IS CLEAR THAT THE JURY WOULD NOT HAVE CONVICTED THE APPELLANT OF VOLUNTARY MANSLAUGHTER, EVEN IF GIVEN THE OPPORTUNITY TO DO SO.

State v. Dexter, 954 S.W.2d 332 (Mo. banc 1997);

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

State v. Boyd, 913 S.W.2d 838 (Mo.App. E.D. 1995);

State v. Butler, 904 S.W.2d 68 (Mo.App. E.D. 1995).

IV.

THE MOTION COURT DID NOT ERR IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL TRACY COBY AND CATHY FLOWERS AS DEFENSE WITNESSES, SINCE THE APPELLANT DID NOT ALLEGE IN HIS MOTION THAT TRIAL COUNSEL HAD BEEN INFORMED OF THE EXISTENCE OF THESE WITNESSES OR THE NATURE OF THEIR PROPOSED TESTIMONY. NOR DID HE EXPRESSLY ALLEGE THAT HE WAS AWARE OF THE VICTIM'S REPUTATION FOR VIOLENCE AND TURBULENCE.

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

***State v. Buckles*, 636 S.W.2d 914 (Mo. banc 1982);**

***State v. Johnston*, 957 S.W.2d 734 (Mo. banc 1997), *cert. denied*, 522 U.S. 1150, 118 S.Ct. 1171, 140 L.Ed.2d 181 (1998).**

V.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN FAILING TO OBJECT TO THE ADMISSION OF STATE'S EXHIBIT NO. 39, A VIDEOTAPED STATEMENT BY KINDALL OWENS IN WHICH CERTAIN PORTIONS HAD BEEN REDACTED, BECAUSE (1) THE MERE FAILURE TO OBJECT TO PARTICULAR EVIDENCE DOES NOT RISE TO THE LEVEL OF "INEFFECTIVE ASSISTANCE OF COUNSEL," AND (2) THE REDACTED PORTION OF THE VIDEOTAPE (IN WHICH OWENS MENTIONED THE VICTIM'S INITIAL POSSESSION OF THE KNIFE) WOULD NOT HAVE AIDED THE APPELLANT'S DEFENSE TO ANY EXTENT, SINCE IT WAS CUMULATIVE TO THE APPELLANT'S TESTIMONY AND INVOLVED AN ISSUE THAT WAS ESSENTIALLY IRRELEVANT TO THE QUESTION OF WHETHER THE APPELLANT HAD ACTED IN SELF-DEFENSE WHEN HE STABBED THE VICTIM IN THE CHEST.

***Jones v. State*, 784 S.W.2d 789 (Mo. banc 1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 175 (1990);**

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

State v. Kinder, 942 S.W.2d 313 (Mo. banc 1997), *cert. denied*, 522 U.S. 854, 118 S.Ct. 149, 139 L.Ed.2d 95 (1997).

VI.

SINCE THE MOTION COURT CONSIDERED AND REJECTED ALL OF THE APPELLANT'S CLAIMS--EVEN THOSE CONTAINED IN HIS UNTIMELY AMENDED MOTION--ON THEIR MERITS, A REMAND FOR A *SANDERS-LULEFF* "ABANDONMENT" HEARING WOULD NOT BE NECESSARY *UNLESS* THIS COURT WERE TO DETERMINE THAT ONE OR MORE OF THE CLAIMS CONTAINED IN THE UNTIMELY AMENDED MOTION WOULD, IF TIMELY FILED, HAVE ENTITLED THE APPELLANT TO AN EVIDENTIARY HEARING.

***Ziegler v. State*, 799 S.W.2d 161 (Mo.App. S.D. 1990);**

***Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991);**

***Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991).**

ARGUMENT

I.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY REJECTING THE APPELLANT'S CLAIM THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO CALL CARL MARTIN AS A DEFENSE WITNESS, BECAUSE THE SELECTION OF WITNESSES IS A MATTER OF TRIAL STRATEGY THAT IS "VIRTUALLY UNCHALLENGEABLE." MOREOVER, MARTIN'S PROPOSED TESTIMONY THAT ANTHONY LIGGINS WAS BIGGER THAN THE APPELLANT AND HAD "PINNED [HIM] TO THE GROUND AND WAS SITTING ON HIS CHEST" WOULD NOT HAVE PROVIDED THE APPELLANT WITH a VIABLE DEFENSE, SINCE IT WAS CUMULATIVE TO OTHER EVIDENCE IN THE CASE AND INVOLVED FACTS WHICH OCCURRED *AFTER* THE APPELLANT, ACCORDING TO HIS TRIAL TESTIMONY, HAD ALREADY FATALLY STABBED LIGGINS IN THE CHEST.

The appellant, under Point I of his brief, maintains that the motion court was "clearly erroneous" (Rule 29.15(k)) in overruling his Rule 29.15 motion without an evidentiary hearing insofar as it alleged that the appellant's trial attorney, Mr. Horton Lance, was ineffective in failing to call Carl Martin as a witness to support his "justification defense," *i.e.*, his claim of self-defense (App.Br. 22-28).[6]

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[6]**The designation "App.Br." refers to the appellant's original brief. He chose not file a substitute brief with this Court.**

According to the appellant's amended motion, Martin would have testified that the victim, Anthony Liggins, was the "bigger male," and that the appellant had been "faring very poorly in the fight, and that Liggins had pinned [the appellant] to the ground and was sitting on his chest" (PCR LF. 18-19).

However, this testimony involved matters which either were undisputed or which occurred *after* the appellant had already fatally stabbed Liggins in the chest. It was not disputed by any of the witnesses that Liggins was substantially larger than the appellant, and the conduct that Martin mentioned to police occurred, according to the appellant's testimony, *after* the appellant had already stabbed Liggins in the chest.

Since Martin 's testimony would have added nothing to the appellant's case, the appellant's trial attorney could not be justifiably accused of ineffectiveness in failing to call him as a defense witness, and the motion court correctly ruled to that effect (PCR L.F. 29-30).

A. Standard of Review

Appellate review of the motion court's denial of post-conviction relief is not a de novo review; rather, the findings of fact and conclusions of law are presumptively correct. *State v. Gilpin*, 954 S.W.2d 570, 575[1] (Mo.App. W.D. 1997); *State v. Colbert*, 949 S.W.2d 932, 939[1] (Mo.App. W.D. 1997). Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the hearing court are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822[1] (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585[1] (Mo. banc 2000); *State v. Jones*, 979 S.W.2d 171, 180 (Mo. banc 1998), *cert. denied*, 525 U.S. 1112, 119 S.Ct. 886, 142 L.Ed.2d 785 (1999); *State v. Clay*, 975 S.W.2d

121, 140[71] (Mo. banc 1998), *cert. denied*, 525 U.S. 1085, 119 S.Ct. 834, 142 L.Ed.2d 690 (1999)**; Rule 29.15(k). Findings and conclusions are "clearly erroneous" only if after a review of the entire record the court is left with the definite and firm impression that a mistake has been made. *Morrow*, 21 S.W.3d at 822[2]; *Hall*, *id.*; *Clay*, *id.*; *State v. Taylor*, 929 S.W.2d 209, 224[46] (Mo. banc 1996), *cert. denied*, 519 U.S. 1152, 117 S.Ct. 1088, 137 L.Ed.2d 222 (1997).**

No evidentiary hearing is required if the motion court determines that the files and records of the case conclusively show that the movant is not entitled to relief. ***Morrow***, 21 S.W.3d at 822[3]; ***Jones***, 979 S.W.2d at 180[16]; ***State v. Smith***, 944 S.W.2d 901, 922[68] (Mo. banc 1997), *cert. denied*, 522 U.S. 954, 118 S.Ct. 377, 139 L.Ed.2d 294 (1997); Rule 29.15(h).

To be entitled to an evidentiary hearing, the movant (1) must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters must have resulted in prejudice to the movant. ***Morrow***, 21 S.W.3d at 822-823[4]; ***Hall***, 16 S.W.3d at 585[2]; ***State v. Brooks***, 960 S.W.2d 479, 497[42] (Mo. banc 1997), *cert. denied*, 524 U.S. 957, 118 S.Ct. 2379, 141 L.Ed.2d 746 (1998); ***State v. Carter***, 955 S.W.2d 548, 553-554[1] (Mo. banc 1977), *cert. denied*, 523 U.S. 1052, 118 S.Ct. 1374, 140 L.Ed.2d 522 (1998). With respect to claims related to ineffective assistance of counsel, to obtain an evidentiary hearing the movant must allege facts, not refuted by the record, showing that counsel's performance did not conform to the degree of skill and diligence of a reasonably competent attorney and that the movant was thereby prejudiced. ***Morrow***, 21 S.W.3d at 823[5]; ***Hall***, 16 S.W.3d at 585[3]; ***Jones***, 979 S.W.2d at 180; ***Brooks***, 960 S.W.2d at 497[43]; ***Carter***, 955 S.W.2d at 554[2].

To show the required prejudice, the facts alleged must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Morrow***, 21 S.W.3d at 823[6]; ***Carter***, 955 S.W.2d at 554[3], *both citing* ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). The specific facts alleged must be sufficient to overcome the presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Jones***, 979 S.W.2d at 180[17].

B. Discussion

As noted at the outset of this point, the appellant's initial complaint concerning the effectiveness of trial counsel is that his attorney failed to call as a witness Carl Martin, who, according to a police report, told the police that he had witnessed the altercation between the appellant and Liggins, that Liggins was the "bigger male," that the appellant had been "faring very poorly in the fight," and that Liggins "had pinned [the appellant] to the ground and was sitting on his chest (PCR L.F. 12-13). In his *pro se* motion, the appellant alleged that Mr. Horton Lance, his trial attorney "was clearly aware of" the witness, yet failed to call him (PCR L.F. 5).

The selection of witnesses for trial is strictly a matter of trial strategy. ***Gilpin***, 954 S.W.2d at 576[8]. The decision not to call a particular witness is, as a mater of trial strategy, "virtually unchallengeable." ***Gilpin***, *id.* The decision not to call a witness to testify is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the movant clearly alleges and proves otherwise. ***State v. Miller***, 981 S.W.2d 623, 634[28] (Mo.App. W.D. 1998).

Accordingly, to be entitled to an evidentiary hearing regarding defense counsel's failure to call a witness, the movant must allege that (1) the decision involved something other than reasonable trial strategy; (2) that the witness could have been located through reasonable investigation; (3) that, if called, the witness would have testified; and (4) that the witness's testimony would have provided the defendant with a "viable defense." ***Miller***, 981 S.W.2d at 633-634[28]; ***Gilpin***, *id.*

In the present case, the appellant's motion failed to allege that counsel's failure to call additional witnesses was *not* a matter of reasonable trial strategy, and it would appear from the appellant's *pro se* motion that it *was* a tactical decision, since that motion indicates that Mr. Lance was aware of Martin's proposed testimony from reading the police report, yet declined to call him as a witness (PCR L.F. 5).

Since the *pro se* motion alleged that counsel was aware of this witness (PCR L.F. 5), and since his attorney called or attempted to call several defense witnesses, including the appellant, as part of the defense case,[7] there is nothing in the record--including the appellant's motions--to rebut the presumption that counsel's failure to call Martin was a matter of reasonable trial strategy.

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[7]**Although the appellant was the only witness to actually testify for the defense, Mr. Lance unsuccessfully attempted to present the testimony of two additional defense witnesses, Steve Slagle and Sherry Rogers, but their testimony was excluded by the trial judge (Tr. 355-365).**

Where, as here, the defendant fails to clearly allege "that counsel's decision not to call the witnesses was something other than trial strategy," he is not entitled to an evidentiary hearing. ***State v. Jones***, 921 S.W.2d 28, 35[23] (Mo.App. W.D. 1996). *See also* ***State v. Bolds***, 913 S.W.2d 393, 397[8-9] (Mo.App. W.D. 1986) (no evidentiary hearing required where defendant failed to allege "that the witnesses were not called for reasons other than trial strategy"). For this reason alone, the appellant was not entitled to an evidentiary hearing in connection with this aspect of his ineffective-assistance-of-counsel claim.

But even if the appellant had alleged in his motion that counsel's failure to call these extra witnesses was attributable to mistake or neglect, rather than reasonable trial strategy, he still would not have been entitled to an evidentiary hearing with respect to this claim, since he failed to allege *facts* demonstrating that this testimony would have provided him with a "viable defense" and would not merely have been cumulative to the testimony of other witnesses.

According to the appellant's motion, Martin could have testified that Liggins was the bigger of the two men, that the appellant was losing the fight, and that Liggins had pinned the appellant to the ground and was sitting on his chest (PCR L.F. 18-19).

But both Kindall Owens, the State's first witness, and the appellant testified essentially to the same facts. Ms. Owens testified that, after Liggins stopped the car in which she was riding, Liggins "started running up the street toward" the appellant and swung at the appellant possibly as many as four times and then "put him in a headlock" (Tr. 222). She testified that Liggins was "way bigger than him," *i.e.*, the appellant (Tr. 222).

The appellant testified that, immediately prior to stabbing Liggins in the chest, Liggins had adopted a "karate" or "judo" position and took several swings at him (Tr. 382). Aware that Liggins was much younger and stronger than he was, and remembering that he had previously tried to stab him with a knife and run him over with his car, the appellant said he elected to "strike the blow with the knife", and stabbed Liggins in the chest (Tr. 383).

The appellant went on to testify that after he stabbed the victim in the chest, Liggins "punch[ed] back at [him]," knocking the appellant to the ground (Tr. 383). According to the appellant, Liggins, with the knife firmly embedded in his chest, jumped on the appellant's chest and began "striking blows" at him (Tr. 384). The appellant covered up his face until Liggins got off of him and walked back toward his car (Tr. 384).

In other words, the activity that the police report indicated Martin had observed actually occurred *after* Liggins, according to the appellant's testimony, had already suffered the stab wound to his chest that proved fatal. As far as the record shows, then, Martin did not observe anything that occurred *prior to* the stabbing, and therefore could not have provided the appellant with a viable defense of "justification."

The remainder of Martin's proposed testimony, *i.e.*, that Liggins was getting the better of the appellant in the fight and was the bigger of the two men, was undisputed, and was already in evidence through the testimony of Ms. Owens and the appellant. Trial counsel will not be deemed to have been ineffective in failing to present cumulative testimony or evidence. *State v. Johnston*, 957 S.W.2d 734, 755[55] (Mo. banc 1997), *cert. denied*, 522 U.S. 1150, 118 S.Ct. 1171, 140 L.Ed.2d 181 (1998); *Carter*, 955 S.W.2d

at 555[7]; *Wickman v. State*, 693 S.W.2d 862, 867[6] (Mo.App. S.D. 1985); *Baker v. State*, 670 S.W.2d 597, 599[4] (Mo.App. E.D. 1984); *Porter v. State*, 596 S.W.2d 480, 482[4] (Mo.App. E.D. 1980).

Martin's proposed testimony does, however, suggest that the appellant might have unnecessarily used deadly force when some lesser degree of force might have been called for. His proposed testimony indicates that the appellant was losing a fistfight or wrestling match with Liggins and elected to end the confrontation by fatally stabbing Liggins. A person is not privileged to use deadly force to repel a simple assault and battery, even if he is "losing" the fight. *State v. Albanese*, 920 S.W.2d 917, 924[13] n. 3 (Mo.App. W.D. 1996); *State v. Sprake*, 637 S.W.2d 724, 726[3] (Mo.App. W.D. 1982).

If counsel believes that a witness's testimony would not unqualifiedly support the defense, the decision not to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel. *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995); *State v. Dixon*, 969 S.W.2d 252, 258[11] (Mo.App. W.D. 1998); ***State v. Broseman***, 947 S.W.2d 520, 527-528[18] (Mo.App. W.D. 1997). So, if an attorney chooses not to call a particular witness because the attorney fears that the testimony would actually harm his client's case, his choice not to call the witness is a proper strategic and tactical decision that will not support a claim of ineffective assistance of counsel. ***Gilpin***, 954 S.W.2d at 576[9]; ***State v. Williams***, 853 S.W.2d 371, 377[21] (Mo.App. E.D. 1993).

In the present case, the appellant's Rule 29.15 motion not only suggested that Mr. Lance's failure to call Martin was a matter of deliberate trial strategy (by alleging that he was aware of this witness, yet chose not to call him), but

implicitly provided a legitimate *reason* for this strategy, *i.e.*, that Martin's testimony would have caused the jury to believe that the appellant had used excessive force to defend himself from a unarmed person who was merely sitting on his chest in an effort to subdue him.

And since, as previously noted, his testimony was otherwise cumulative to that of Ms. Owens and the appellant himself, it is clear that Mr. Lance's failure to call Martin as a witness, for whatever reason, could not rise to the level of ineffective assistance of counsel, inasmuch as testimony from Mr. Lance would not, and could not have changed, the outcome of the trial.

In his brief. the appellant argues that, even if Martin's testimony might have been cumulative to that of Ms. Owens and the appellant, it nevertheless should have been presented because the prosecution argued that both Ms. Owens and the appellant were biased (App.Br. 26-28). But since the appellant's Rule 29.15 motion provided no information regarding Martin's background, vantage point, possible prior inconsistent statements or his relationship to the accused or to Ms. Owens, there is simply no way of determining whether he would have been any more or less credible than the appellant or Ms. Owens.

Thus, despite what the appellant argues in his brief, his bare allegation that Mr. Lance was ineffective in failing to call Martin as a defense witness did not entitle him to an evidentiary hearing. Point I of the appellant's brief, then, is devoid of merit and entitles him to no relief on this appeal.

II.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY REJECTING THE APPELLANT'S CLAIM THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO OBJECT TO A PORTION OF THE ASSISTANT PROSECUTOR'S CLOSING ARGUMENT, IN WHICH HE COMMENTED ON KINDALL OWENS' DEMEANOR IN THE COURTROOM DURING *VOIR DIRE* EXAMINATION, BECAUSE (1) A MERE FAILURE TO OBJECT TO IMPROPER ARGUMENT DOES NOT RISE TO THE LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND (2) THERE WAS NOTHING IMPROPER ABOUT THE PROSECUTION'S REMARKS, SINCE IT INVOLVED CONDUCT THAT OCCURRED IN THE IMMEDIATE PRESENCE OF THE JURY PANEL.

Under Point II of his brief, the appellant contends that the motion court was "clearly erroneous," Rule 29.15(k), in failing to afford him an evidentiary hearing in connection with his claim that his trial attorney was ineffective in failing to object during the prosecution's closing argument, when the State unfavorably commented on the demeanor of one of its own witnesses, Kindall Owens.[8]

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[8]This issue, like the issues raised under Points III, IV and V of the appellant's brief, was first raised in the appellant's amended motion, which

appears to have been filed out of time. *See* Point VI, *infra*, of the State's brief. However, since the motion court addressed each of these claims on its merits, and found that they did not entitle the appellant to an evidentiary hearing, the State has addressed each claim on their merits, too.

Mr. James Kanatzar, the assistant prosecutor who was trying the case for the State, noted during his closing argument that his witness "stared down this Judge and she stared down th[e] prosecutor," and that "she finally moved to the back of the courtroom and [then] stood, her hands on her hips, towering over those jurors in the back row" (Tr. 433). Mr. Kanatzar went on to argue that her demeanor indicated that she was willing to come into court and say anything and do anything to help the appellant escape conviction (Tr. 433).

The appellant now contends that this argument was objectionable, and that the outcome of the trial might have been different if his trial attorney had objected to it. Although the motion court noted that a party may always comment on the demeanor of a witness (PCR L.F. 30-31), the appellant argues that this rule should apply only to the demeanor of the witness while he or she is testifying, and that a party should be precluded from commenting on the demeanor of a witness before or after he or she takes the witness stand (App.Br. 32).

Neither the law nor common sense supports the distinction the appellant attempts to draw in this respect. Obviously, then, his trial attorney cannot be faulted for having failed to make a meritless objection.

Decisions concerning whether or when to object during trial are left to the judgment of counsel. *State v. Colbert*, 949 S.W.2d 932, 940[14] (Mo.App. W.D. 1997); *State v. Radley*, 904 S.W.2d 520, 525 (Mo.App. W.D. 1995); *State v. Suarez*, 867 S.W.2d 583, 587[10] (Mo.App. W.D. 1993). Ineffective assistance of counsel is not to be determined by a post-trial academic determination that counsel could have successfully objected to

evidence or argument in a given number of instances. *Colbert*, 949 S.W.2d at 940[15]; *Radley*, *id.*; *Suarez*, 867 S.W.2d at 587[11].

The failure to object to objectionable evidence or argument does not establish ineffective assistance of counsel unless the evidence or argument resulted in a substantial deprivation of the accused's right to a fair trial. *Colbert*, 949 S.W.2d at 940-941[16]; *Radley*, 904 S.W.2d at 525; *Suarez*, 867 S.W.2d at 587[12]. Counsel's failure to object to particular evidence or argument normally is "mere trial error" not arising to constitutional proportions and thus not cognizable in a post-conviction motion. *Colbert*, 949 S.W.2d at 941[17]; *Radley*, *id.*; *Suarez*, 867 S.W.2d at 587[13]. An appellate court will not permit motion counsel to convert unpreserved error into viable error by arguing incompetence. *Jones v. State*, 784 S.W.2d 789, 793[7] (Mo. banc 1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 175 (1990); *State v. Love*, 963 S.W.2d 236, 247 (Mo.App. W.D. 1997); *Colbert*, 949 S.W.2d at 941[18].

Rather, to demonstrate that his attorney was ineffective in failing to object to this evidence or argument at trial, the appellant must show that "`counsel's overall performance fell short of established norms and that this incompetence probably affected the result.'" *State v. Williams*, 945 S.W.2d 575, 583[20] (Mo.App. W.D. 1997), *quoting Jones*, 784 S.W.2d at 793[9]. Otherwise, the attorney's failure to object "constitutes a procedural default, precluding appellate or collateral relief." *Jones*, 784 S.W.2d at 793[7].

The appellant makes no real effort to argue that counsel's failure to object to this small portion of the State's closing argument caused his "overall performance" to fall so short of established norms that it "probably affected" the result of the trial. Consequently, even if the assistant

prosecutor's argument was improper, it was "trial error" which was waived when trial counsel failed to object and which cannot be litigated in a Rule 29.15 motion.

In any event, trial counsel's failure to object is hardly surprising in view of the fact that there was nothing even marginally improper about the argument. The assistant prosecutor's comments referred to an incident which had occurred in the presence of the jury panel and the attorneys for both parties and which involved an individual who later testified at trial. As the motion court noted (PCR L.F. 42), a witness's demeanor is always assumed to be in evidence. *State v. Sumlin*, 915 S.W.2d 366, 369[7] (Mo.App. S.D. 1996); *State v. Davis*, 877 S.W.2d 669, 674[7] (Mo.App. S.D. 1994).

The fact that the assistant prosecutor's comments referred to her demeanor prior to her testimony did not make his comment improper, since it referred to conduct that occurred in the jury's presence, even though it was prior to their having been selected and sworn as jurors. Since the jurors were in a position to observe Ms. Owens staring at the judge and assistant prosecutor during the *voir dire* proceedings, there was nothing even remotely improper about the prosecution commenting on that conduct.

Consequently, an objection to the prosecution's comments would not have been availing. It is not ineffective assistance of counsel for an attorney to fail to make a meritless objection or to preserve a meritless claim. *State v. Link*, 965 S.W.2d 906, 912[19] (Mo.App. S.D. 1998).

Finally, it should be noted that trial counsel's failure to object to the assistant prosecutor's comment could not have been "outcome determina-

tive" even if the remark was improper. The jury was aware that Ms. Owens was, or at least had been, the appellant's girlfriend who had made inconsistent statements about the crime and who had, in fact, gone home with the appellant after the murder (Tr. 246; State's Exh. No. 39). In fact, during her trial testimony, when she was asked if she told the police she was "terrified" of the appellant, she answered, "No," and added, "I love him" (Tr. 207). She also told the jury, "He's a nice man" (Tr. 207).

Mr. Kanatzar, in other words, did not have to mention the incident involving Ms. Owens during *voir dire* to make his point that she was a biased witness who had changed portions of her testimony to aid the appellant. Therefore, it is clear from the record that trial counsel's failure to object to Mr. Kanatzar's comments regarding the *voir dire* incident, even if improper, did not alter the outcome of the trial.

Consequently, this allegation did not entitle the appellant to an evidentiary hearing, either. Point II of the appellant's brief has no merit, and must be rejected.

III.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY REJECTING THE APPELLANT'S CLAIM THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO REQUEST AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER, SINCE SUCH AN INSTRUCTION WOULD HAVE CONFLICTED WITH THE APPELLANT'S SELF-DEFENSE THEORY. THE APPELLANT TESTIFIED THAT HE HAD STABBED THE VICTIM IN SELF-DEFENSE WHILE DEFENDING HIMSELF FROM A MUCH BIGGER MAN WHO WAS BENT ON KILLING HIM; HE DID NOT MAINTAIN THAT HE HAD ACTED OUT OF "SUDDEN PASSION" OR THAT HE HAD LOST HIS CAPACITY FOR REASON AND SELF-CONTROL WHEN HE FATALLY STABBED THE VICTIM. FURTHERMORE, SINCE THE JURY SELECTED THE MAXIMUM PUNISHMENTS OF LIFE IMPRISONMENT AS PART OF ITS GUILTY VERDICTS, IT IS CLEAR THAT THE JURY WOULD NOT HAVE CONVICTED THE APPELLANT OF VOLUNTARY MANSLAUGHTER, EVEN IF GIVEN THE OPPORTUNITY TO DO SO.

The appellant's third point on appeal involves the trial court's failure to submit an instruction on voluntary manslaughter. Instead of asserting that the trial judge erred in failing to submit such an instruction, a claim that clearly would not be cognizable in a Rule 29.15 proceeding, *Morrow v. State*, 21 S.W.3d 819, 829[27] (Mo. banc 2000), the appellant couches his claim in terms of ineffective assistance of counsel: He asserts that his trial attorney was ineffective in failing to *request* an instruction on voluntary manslaughter, and that he was entitled to an evidentiary hearing to prove this allegation (App.Br. 24).

Although the appellant appears to concede that it was likely that his trial attorney, Mr. Horton Lance, chose not to request such an instruction as a matter of trial strategy, he asserts that he was nevertheless entitled to an evidentiary hearing to determine if that, in fact, was the reason Mr. Lance elected not to request such an instruction (App.Br. 39-41). Although both the motion court and the Court of Appeals rejected this contention on the theory that Mr. Lance's decision not to request an instruction on manslaughter was clearly trial strategy, the appellant successfully convinced this Court to transfer the case, arguing that he was entitled to an evidentiary hearing to determine whether that strategy was reasonable.

To begin with, it is doubtful that the prohibition against raising claims of instructional error in a Rule 29.15 motion can be sidestepped merely by recasting the claim as "ineffective assistance of counsel." In *Morrow*, this Court condemned such "attempt[s] to circumvent the well-established law that holds that claims of instructional error are matters for direct appeal." *Id.*, 21 S.W.3d at 829[27].

But even if such a claim were cognizable, it would not provide the appellant with grounds for relief. Significantly, the appellant did not allege in his amended motion that Mr. Lance's decision not to request an instruction on the lesser-included offense was *not* a matter of considered trial strategy. Rather, he asserted only that Mr. Lance "unreasonably failed" to request a manslaughter instruction, and that "[a] reasonable probability exist[ed] that the outcome of [his] trial would have been better had counsel requested a[ ] voluntary manslaughter instruction" (PCR L.F. 21).

Numerous cases, however, hold that defense attorneys frequently and reasonably decide, as a matter of reasonable trial strategy, not to request instructions on lesser-included offenses in criminal cases, including homicide prosecutions, particularly where the instruction is contrary to their defense. Furthermore, an examination of the punishments recommended by the jury--the maximum terms of life imprisonment on both second-degree murder and armed criminal action--conclusively demonstrates that the jury would not have convicted the appellant of voluntary manslaughter even if given the opportunity, since the maximum sentence they could have imposed would have been a mere 15 years' imprisonment.

Generally, counsel's decision not to request an instruction on a lesser-included offense is a matter of trial strategy that is binding upon an accused. ***State v. Dexter***, 954 S.W.2d 332, 344[13] (Mo. banc 1997). a defendant will not be allowed to refrain from requesting an instruction on a lesser-included offense, and then, following conviction, attempt to second-guess that choice, either by requesting "plain error" review on direct appeal, or as in this case, attempting to convict counsel of ineffectiveness in a post-conviction proceeding. *See* ***Dexter***, 954 S.W.2d at 344[14].

Numerous cases have held that an objectively reasonable choice not to submit an available instruction does not constitute ineffective assistance of counsel. ***Love v. State***, 670 S.W.2d 499, 502[2] (Mo. banc 1984); ***State v. Butler***, 904 S.W.2d 68, 73[15] (Mo.App. E.D. 1995); ***State v. Kelley***, 901 S.W.2d 193, 204-205[41] (Mo.App. W.D. 1995); ***Ellis v. State***, 773 S.W.2d 194, 199[11] (Mo.App. S.D. 1989). Further, the reasonableness of employing an all-

or-nothing strategy in a homicide prosecution is not affected by the failure of the jury to acquit. ***Love***, 670 S.W.2d at 502[3].

Trial counsel will not be convicted of ineffective assistance of counsel for employing the best defense for his client by not offering the jury "a middle ground for conviction" that might lead to a compromise verdict. ***Love***, 670 S.W.2d at 502; ***State v. Theus***, 967 S.W.2d 234, 242[18] (Mo.App. W.D. 1998). If a request for an instruction on a lesser-included offense would be "out of phase with trial strategy" and inconsistent with the defense theory that "defendant was innocent of anything," trial counsel will not be faulted for failing to request an instruction on a lesser-included offense. ***Love***, 670 S.W.2d at 502[4]. Such "all or nothing" strategy--designed "to exclude the possibility of a compromise verdict on a lesser charge"--is frequently a "successful tactic." ***Buskuehl v. State***, 719 S.W.2d 504, 505[2] (Mo.App. E.D. 1986). And it is "neither uncommon nor is it ineffective assistance of counsel." ***Buskuehl***, *id.*

In the present case, as the motion court noted (PCR L.F. 43), the appellant's defense was that he had stabbed the victim in self-defense, and a "request [for] an instruction on voluntary manslaughter resulting [from] sudden passion would [have been] inconsistent with his strategic claim of self-defense" (PCR L.F. 43).

Although the appellant takes the position that he was entitled to an evidentiary hearing to establish that counsel's strategy was "unreasonable," his motion failed to indicate what, if anything, was "unreasonable" about it. Since numerous cases hold that such "all-or-nothing" strategy is not unreasonable, and since, as will be demonstrated, *infra*, a manslaughter instruction would have been inconsistent with the appellant's defense of self-defense, nothing in the record even remotely suggests that this strategy was "unreasonable."

At the very least, in order to be entitled to an evidentiary hearing, a movant should be required to allege in his motion what made counsel's trial strategy unreasonable in that particular case. In the instant case, the appellant does not allege that Mr. Lance was unaware that he could have requested a voluntary manslaughter instruction, or that he negligently failed or forgot to request one. He merely asserts that counsel's decision in failing to obtain the instruction was "unreasonable" without even attempting to explain *why* counsel's strategy was not reasonable under the circumstances (aside from the fact that he claimed it was supported by the evidence).

Furthermore, it is clear that, even under the appellant's version of events, there was no evidence that he committed the homicide while under the influence of sudden passion. Accordingly, the trial judge could not have submitted an instruction on voluntary manslaughter, even if one had been requested.

To be sure, voluntary manslaughter is a lesser-included offense of murder in the second degree. ***State v. Redmond***, 937 S.W.2d 205, 208[1] (Mo. banc 1996); § 565.025.2(2), RSMo 1994. The crime of voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute murder in the second degree, except that the death was caused "under the influence of sudden passion arising from adequate cause." ***Redmond***, 937 S.W.2d at 208[3]; § 565.023, RSMo 1994. The theory, obviously, is that the presence of "sudden passion" prevents the defendant from acting "knowingly" in causing the death of another, the only element that separates second-degree murder from voluntary manslaughter. § 565.021.1(1), RSMo 1994; § 565.023.1(1). The defendant has the burden of injecting the

issue of influence of sudden passion arising from adequate cause. ***Redmond***, *id.*; § 565.023.

"Sudden passion" is defined as "passion directly caused by and acting out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." ***Redmond***, 937 S.W.2d at 208[5]; § 565.002(7), RSMo. 1994. "Adequate cause" is "cause that would reasonably produce a degree of passion in a person of ordinary temper sufficient to substantially impair an ordinary person's capacity for self-control." § 565.002(1). The offense must have been committed in sudden passion, and not after there has been time for the passion to cool. ***Redmond***, 937 S.W.2d at 208[5].

The passion may be rage, anger, or terror, but it must be so extreme that, for the moment, the action is "being directed by passion, not reason." ***State v. Boyd***, 913 S.W.2d 838, 842 (Mo.App. E.D. 1995), *quoting* ***State v. Simmons***, 751 S.W.2d 85, 91 (Mo.App. E.D. 1988).

In his brief, the appellant, in arguing that there was evidence of "sudden passion," points to evidence that the appellant knew that Liggins had been using drugs and feared that he might become violent toward his girlfriend, and mentions the fact that Liggins cursed the appellant, attempted to grab a knife, and drove away with the appellant still hanging on to Liggins' vehicle (App.Br. 43-44).

But all of these incidents occurred well *before* the fatal confrontation that occurred between the appellant and Liggins. After Liggins drove away, the appellant, according to his testimony, picked the knife off the ground and began walking home (Tr. 380). Therefore, the prior incidents and remarks by Liggins,

although relevant to the issue of self-defense, could not support a finding of "sudden passion." ***Redmond***, 937 S.W.2d at 208[5].

If sudden passion were to exist, it would have to be based on the actions of Liggins *after* he drove away the first time. **According to the appellant's testimony, when he noticed that Liggins' vehicle had stopped again, he walked to the car and shouted for Kindall Owens, his girlfriend, to get out of the car (Tr. 381). Then he observed Liggins walk toward the back of his car as if he were looking for something and then began advancing toward him (Tr. 382). The appellant said he heard the words "Kill you," or something like that (Tr. 382). The appellant calmly informed Liggins that he didn't want any problems with him, and that he just wanted him to let Ms. Owens get out of the car (Tr. 382).**

The appellant said that Liggins, despite the appellant's conciliatory attitude, adopted a "karate" or "judo" position and took several swings at him (Tr. 382). Aware, he said, that Liggins was much younger and stronger than he was, and remembering that Liggins had previously tried to stab him with a knife and run him over with his car, the appellant testified that he elected to "strike [a] blow with the knife," and stabbed Liggins in the chest (Tr. 383). Later during his testimony, the appellant explained that he "felt fear" and "was afraid" because he heard Liggins threaten to kill him and he "believed him because he had already tried it twice" (Tr. 387, 388).

In other words, although there was evidence that the appellant was in "fear" and felt "afraid" of Liggins and stabbed him in self-defense after Liggins took several swings at him, there was no evidence that the appellant's actions were being directed by passion rather than reason. There is certainly no evidence that the presence of "sudden passion" prevented the appellant from

"knowingly" causing Liggins' death. On the contrary, the appellant's testimony was that he made a reasoned decision to stab Liggins because he feared for his life. That is to say, the appellant admitted that he knowingly caused the death of Liggins by stabbing him, which constituted the crime of second-degree murder *unless* he acted in lawful self-defense. § 565.021.1(1).

To paraphrase ***Boyd***, then, in the instant case there was no evidence "in the record to support the contention that [the] appellant was acting out of sudden passion when he shot [the victim]." ***Boyd***, 913 S.W.2d at 842[5]. "Nowhere [is there] any evidence [the] appellant was experiencing `rage, anger, or terror directing his actions beyond his control.'" ***Boyd***, *id.* And there certainly is no evidence that the appellant's mental state was such that he was unable to "knowingly" cause Liggins' death.

In fact, the appellant admitted that he "knowingly" stabbed Liggins, which resulted in his death; nowhere in the record is there even an iota of evidence that the appellant, while in the throes of "sudden passion," lost control and mindlessly stabbed Liggins.

Rather, the appellant's testimony on which he now claims a voluntary manslaughter instruction could have been based showed that he was making a controlled, reasoned response to what he perceived was the need to use deadly force to protect himself. That testimony justified a self-defense submission, but it certainly did not constitute evidence of "sudden passion."

Where, as here, the evidence fails to support the submission of a lesser-included offense, counsel will not be deemed to have been ineffective in failing to request such an instruction. ***White v. State***, 939 S.W.2d 887, 901[31] (Mo. banc 1997), *cert. denied*, 522 U.S. 948, 118 S.Ct. 365, 139 L.Ed.2d 284 (1997); ***State v. Holcomb*, 956 S.W.2d 286, 294[6] (Mo.App. W.D. 1997)**; ***State v.***

Kobel, 927 S.W.2d 455, 461[20] (Mo.App. W.D. 1996); ***State v. Clark***, 914 S.W.2d 441, 443[2] (Mo.App. E.D. 1996).

But even if the evidence of "sudden passion" had been sufficient to justify the submission of the a voluntary manslaughter instruction, that still did not mean that Mr. Lance had been ineffective in failing to request an instruction that was at odds with his trial strategy. As previously emphasized, Mr. Lance's theory of defense was that the appellant had acted in justifiable self-defense, not that, as a result of sudden passion, he was out of control when he stabbed the victim.

Although the defenses of self-defense and "sudden passion" are not *always* inconsistent, ***Redmond***, 937 S.W.2d at 209[9-12], the two defenses will be inconsistent in the vast majority of self-defense cases, including this one. Obviously, it will be the rare case where a defendant's theory is that, as a result of a sudden provocation, he lost his capacity for self-control to such an extent that his actions were being directed by passion, not reason, but somehow was still acting in lawful self-defense.

As the Court noted in ***State v. McCoy***, 971 S.W.2d 861, 864[6] (Mo.App. W.D. 1998):

> Frequently, defense counsel will decide whether or not to submit jury instructions for strategic reasons. The strategy for not submitting a sudden passion or a voluntary manslaughter instruction, even if the evidence would warrant such submission, is left to the judgment of the parties. Thus, a defendant may not complain of prejudice when the court has conducted the trial in harmony with his apparent strategy and intent in not seeking an instruction.

The appellant argues that, although it is possible that Mr. Lance's failure to request an instruction on voluntary manslaughter *might* have been reasonable trial strategy, an evidentiary hearing is necessary to allow him to overcome the presumption that this strategy was "reasonable." But, it was incumbent upon the appellant to *allege*, not only that Mr. Lance's failure to request the instruction was *not* a matter of trial strategy was unreasonable, but to explain *why*, under the particular circumstances of the case, it was supposedly unreasonable. This, of course, the appellant utterly failed to do.

Furthermore, where, as here, a consideration of the entire record establishes that a supposed dereliction was, in fact, a part of trial strategy, no evidentiary hearing is necessary. ***Butler***, 904 S.W.2d at 73[17]; ***State v. Lacy***, 851 S.W.2d 623, 632[25] (Mo.App. E.D. 1993). If, as in the present case, a "consideration of the record as a whole can demonstrate that an alleged dereliction [*e.g.*, not to submit an available instruction] was in fact a part of trial strategy[,] . . . no evidentiary hearing is necessary." ***Butler***, *id.*

Since is doubtful that an instruction on voluntary manslaughter was supported by the record, but clearly apparent that a lesser-included offense instruction would have been inconsistent with the appellant's claim of self-defense, counsel cannot be faulted for having failed to request such an instruction.

However, even assuming that there had been some basis for submitting an instruction on voluntary manslaughter, and even assuming that counsel's failure to request such an instruction could not be justified as sound trial strategy, there is still *another* reason why the appellant could not prevail on this issue: It is clear that defense counsel's supposed dereliction could not have prejudice the appellant. Quite obviously, the record shows that there is simply

no basis for concluding that there exists a reasonable probability that the jury would have convicted the appellant of voluntary manslaughter, rather than second-degree murder, even if given the opportunity to do so.

Generally, a defendant cannot prevail on a claim of ineffectiveness based upon counsel's failure to request an instruction on a lesser-included offense, if for no other reason than it is virtually impossible for the movant to meet his burden of establishing that there is a "reasonable probability" that the jury would have convicted the defendant of the lesser offense. ***Young v. State***, 761 S.W.2d 725, 727[5] (Mo.App. E.D. 1988).

In ***Young***, the defendant, who was convicted of capital murder, complained because trial counsel elected not to request an instruction on felony murder. Since the defendant's defense was that she did not participate in the robbery, defense counsel decided "that it would be unreasonable" to request an instruction on some lesser offense. ***Young***, 761 S.W.2d at 727[5]. The Court of Appeals stated that it could not "speculate nor c[ould] the movant speculate as to what the jury might have done if the instruction on first degree murder, had been given." ***Young***, *id.*

In some cases, however, an appellate case can determine, with a reasonable degree of precision, that the jury *would not have* convicted a defendant of a lesser-included offense, based upon the sentences recommended by the jury. ***Love***, 670 S.W.2d at 503. In ***Love***, the defendant complained of his trial attorney's failure to request a manslaughter instruction in a case where the defendant was convicted of two counts of second-degree murder; the jury recommended sentences of 150 years on both counts.

This Court in ***Love*** observed that "the recommended punishment belies any indication that the jury would [have] avail[ed] themselves of the

opportunity to convict of a lesser offense and accordingly assess a less severe punishment." ***Love***, 670 S.W.2d at 503.

The same is true in the present case. The jury had the option of imposing a sentence as low as ten years on the second-degree murder charge (Dir.App.L.F. 25), yet elected to impose the maximum term of life imprisonment (Dir.App.L.F. 39). The jury also imposed the maximum punishment (life imprisonment) for the offense of armed criminal action (Dir.App.L.F. 38).

Under these circumstances, it is sheer fantasy for the appellant to even suggest, as he does in his brief, that a reasonable probability existed that the jury might have found him guilty of voluntary manslaughter if given the opportunity to do so. On the contrary, the jury's decision to recommend life sentences for both offenses conclusively shows that they would not, even if given the opportunity, have found the appellant guilty of voluntary manslaughter, which, as a class B felony, § 565.023.3, carried a maximum punishment of only 15 years' imprisonment. § 558.011.1(2), RSMo 1994.

It is, therefore, readily apparent, as it was in ***Love***, that "the [jury's] recommended punishment belies any indication that the jury would [have] avail[ed] themselves of the opportunity to convict of a lesser offense and accordingly assess a less severe punishment." ***Love***, 670 S.W.2d at 503.

In summary, then, the appellant was not entitled to an evidentiary hearing in connection with this claim, since it is clear from the record that (1) the appellant's version of events did not support a finding that he had acted out of "sudden passion"; (2) even if there was sufficient evidence of "sudden passion" to warrant an instruction on voluntary manslaughter, such an instruction was contrary to counsel's self-defense theory; and (3) the jury's recommendation of life sentences for both offenses negated any possibility that

the jury, if given the opportunity, would have found the appellant guilty of some lesser offense, such as voluntary manslaughter.

For any and all of these reasons, Point III of the appellant's brief does not entitle him to any relief on this appeal.

IV.

THE MOTION COURT DID NOT ERR IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL TRACY COBY AND CATHY FLOWERS AS DEFENSE WITNESSES, SINCE THE APPELLANT DID NOT ALLEGE IN HIS MOTION THAT TRIAL COUNSEL HAD BEEN INFORMED OF THE EXISTENCE OF THESE WITNESSES OR THE NATURE OF THEIR PROPOSED TESTIMONY. NOR DID HE EXPRESSLY ALLEGE THAT HE WAS AWARE OF THE VICTIM'S REPUTATION FOR VIOLENCE AND TURBULENCE.

Point IV of the appellant's brief raises the claim that trial counsel failed to locate and call two witnesses, Tracy Coby and Cathy Flowers, to testify that Anthony Liggins, the murder victim, had a "violent and turbulent reputation" (PCR L.F. 21). The appellant asserts that such testimony would have bolstered his self-defense claim by showing that the victim, and not the appellant, was the aggressor in the confrontation that led to the victim's death (App.Br. 45).

However, the appellant's amended motion merely stated that "counsel failed to produce other witnesses to show th[e] violent and turbulent reputation [of Mr. Liggins], such as Tracy Coby and Cathy Flowers, all of whom could have testified" (PCR L.F. 21). The motion failed to allege who these two individuals were, where they lived, their relationship to the appellant or the victim, or that defense counsel had been advised of their existence and the nature of their expected testimony (PCR L.F. 21-22). The motion also failed to specifically allege that the appellant was aware of the victim's alleged "violent and turbulent reputation" (PCR L.F. 21-22).

As in *Morrow v. State*, 21 S.W.3d 819, 824[10] (Mo. banc 2000), the appellant's amended motion was deficient because it failed to allege that he had provided trial counsel with pertinent and sufficient information regarding how to contact these potential witnesses, or that such information was otherwise readily available. As *Morrow* goes on to explain, such a requirement stems from the principle that counsel's actions are generally based, quite properly, on informed strategic choices made by the defendant and on information supplied to trial counsel by the defendant. *Morrow*, *id.*

As in *Morrow*, the appellant's motion "did not allege that he [had] provided trial counsel with names or other information that reasonable counsel could have used to discover the facts and witnesses listed in [the] appellant's motion." *Morrow*, *id.* The appellant "did not allege that a reasonably competent attorney, in the course of a reasonable investigation, should have discovered the facts and witnesses listed in [his] motion." *Morrow*, *id.*

The appellant's pleading, even if accepted as true, "does not reflect that the extent of trial counsel's investigation in this case was unreasonable, considering `all the circumstances' and `applying a heavy measure of deference' to counsel's decision." *Morrow*, *id.* Furthermore, the "[a]ppellant did not allege, nor is it apparent from the record, that the facts trial counsel allegedly failed to discover were readily available." *Morrow*, *id.*

As earlier noted, the appellant's motion mentions the two witnesses' names, but does not otherwise describe them, either by address, location or their relationship to the victim or the accused. The motion does not

allege that the appellant informed defense counsel of the existence of these witnesses or asked counsel to locate and call them as part of the appellant's case. Nor does the motion allege that these witnesses, or the nature of their proposed testimony, was readily discoverable.

The motion asserts that counsel failed to "adequately adduce evidence from [the appellant] that [he] was aware of that violent and turbulent reputation," but did not specifically allege that the appellant *was*, in fact, aware of the witness's reputation for having a violent or turbulent disposition, or how the appellant came to acquire that information, if he did at all (PCR L.F. 21). Evidence of a defendant's turbulent and violent disposition is admissible only if the defendant was aware of that reputation at the time of the incident, *State v. Buckles*, 636 S.W.2d 914, 922[14] (Mo. banc 1982), *State v. White*, 909 S.W.2d 391, 394[7-8] (Mo.App. W.D. 1995), and, in this case, there was no allegation that the appellant possessed sufficient knowledge to render such evidence admissible, even if it were offered.

The appellant did testify at trial that it was "common knowledge" that when the victim was on drugs he tended to exhibit a "[v]iolent, angry" attitude toward others (Tr. 374). His girlfriend, Kindall Owens, who was called as a witness for the State, also testified that the victim had been using crack cocaine immediately prior to the incident, and that his ingestion of crack made him "real fidgety or high strung and stuff" (Tr. 217-218).

In other words, although there was evidence from both witnesses that the victim was known to become violent, angry or "high strung" after he had been using drugs, and although it was clear that the victim had been using drugs on the day of his death, neither witness testified that they were

aware of the victim's general reputation for violence or turbulence, and, as earlier noted, the appellant's Rule 29.15 motion also failed to clearly and unequivocally allege that he was aware of that reputation.

Nor could it be argued that the appellant's knowledge could have been inferred from the scant facts pleaded in that motion. "As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." *Morrow*, 21 S.W.3d at 822[3].

Since the appellant's motion failed to allege that he had advised his attorney of the existence of these two witnesses and their proposed testimony, or even that he was aware of the victim's reputation for turbulence and violence, these omissions, by themselves, were sufficient to justify the motion court's summary denial of this allegation.

This Court, therefore, need not determine whether even counsel's *negligent* failure to call witnesses to testify regarding a victim's reputation for violence and turbulence could ever constitute ineffective assistance of counsel, in view of the requirement that counsel's dereliction in this regard must deprive his client of a "viable defense." *See State v. Miller*, 981 S.W.2d 623, 633-634[28] (Mo.App. W.D. 1998); *State v. Gilpin*, 954 S.W.2d 570, 576[8] (Mo.App. W.D. 1997). Although evidence concerning a deceased's reputation for violence turbulence might be *relevant* to a defendant's claim of justification, such testimony, by itself, does not make out a "viable defense" of self-defense.

In his brief, the appellant cites *Cotton v. State*, 25 S.W.2d 507 (Mo.App. E.D. 2000), as authority for the proposition that a bare allegation that trial counsel was ineffective in failing to present witnesses to testify

regarding the decedent's reputation for violence and turbulence is sufficient to warrant an evidentiary hearing. However, in that case, the State confessed error, so the Court of Appeals did not have occasion to consider the question regarding whether such testimony would have provided the defendant with a "viable defense." *Cotton* is, in any event, distinguishable, since there was no issue in that case regarding the sufficiency of the movant's Rule 29.15 pleadings, and no contention that the witnesses' proposed testimony was merely cumulative to other evidence in the case.

Furthermore, as the motion court noted (PCR L.F. 43), further testimony by witnesses regarding the victim's reputation for violence and turbulence would have added little or nothing to the appellant's case, since both the appellant and Ms. Owens--a prosecution witness--both testified that the victim had been using drugs, and that he tended to become violent, angry, agitated and "high-strung" when he used drugs. As noted under Point I, *supra*, of the State's brief, a defendant will not be faulted for failing to present cumulative evidence on a particular point or issue. *State v. Johnston*, 957 S.W.2d 734, 755[55] (Mo. banc 1997), *cert. denied*, 522 U.S. 1150, 118 S.Ct. 1171, 140 L.Ed.2d 181 (1998); *State v. Carter*, 955 S.W.2d 548, 555[7] (Mo. banc 1977), *cert. denied*, 523 U.S. 1052, 118 S.Ct. 1374, 140 L.Ed.2d 522 (1998).

For all of these reasons, then, the motion court properly determined that this claim did not entitle the appellant to an evidentiary hearing. Point IV of his brief has no merit and must be ruled against him.

V.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN FAILING TO OBJECT TO THE ADMISSION OF STATE'S EXHIBIT NO. 39, A VIDEOTAPED STATEMENT BY KINDALL OWENS IN WHICH CERTAIN PORTIONS HAD BEEN REDACTED, BECAUSE (1) THE MERE FAILURE TO OBJECT TO PARTICULAR EVIDENCE DOES NOT RISE TO THE LEVEL OF "INEFFECTIVE ASSISTANCE OF COUNSEL," AND (2) THE REDACTED PORTION OF THE VIDEOTAPE (IN WHICH OWENS MENTIONED THE VICTIM'S INITIAL POSSESSION OF THE KNIFE) WOULD NOT HAVE AIDED THE APPELLANT'S DEFENSE TO ANY EXTENT, SINCE IT WAS CUMULATIVE TO THE APPELLANT'S TESTIMONY AND INVOLVED AN ISSUE THAT WAS ESSENTIALLY IRRELEVANT TO THE QUESTION OF WHETHER THE APPELLANT HAD ACTED IN SELF-DEFENSE WHEN HE STABBED THE VICTIM IN THE CHEST.

Under Point V of his brief, the appellant maintains that he was entitled to an evidentiary hearing in connection with his claim that his trial attorney was ineffective in failing to object to the admission of State's Exhibit No. 39, a videotaped statement of Kindall Owens, because it was edited to delete her reference to the fact that the victim, Anthony Liggins, originally had the knife the appellant used to fatally stab Liggins (App.Br. 50). The appellant also asserts that trial counsel was ineffective in failing to produce this evidence during his cross-examination of the witness (App.Br. 50).

However, as previously noted under Point II, *supra*, of the State's brief, defense counsel's failure to object to evidence is generally mere "trial error" that is not cognizable in a Rule 29.15 proceeding. A failure to object may accurately be characterized as "ineffective assistance of counsel" only

if it rendered counsel's overall performance so deficient that it is reasonably probable that, but for the failure to object, the defendant would have been acquitted.

The issue of who initially had the knife, the appellant or Liggins, was essentially a moot point. Although the appellant testified that Liggins originally had possession of the knife--evidence which was undisputed--it also was undisputed that the appellant quickly seized the knife from Liggins, slashed him in the head with it and then, several minutes later, plunged the knife into Liggins' chest, causing his death. Since the fatal assault occurred at a location and point in time considerably removed from the victim's original possession of the knife, the issue of who first produced the knife was of little significance.

The appellant's argument assumes, of course, that the portion of Ms. Owens' videotaped statement, in which she told police that Liggins initially had possession of the knife, should not have been redacted from the exhibit prior to its submission to the jury. Assuming that this claim is correct, it does not follow that his attorney's failure to object to the videotaped statement, as edited, constituted ineffective assistance of counsel.

The cases cited and discussed under Point II of the State's brief are equally applicable to this point: Decisions concerning whether or when to object during trial are left to the judgment of counsel. *State v. Colbert*, 949 S.W.2d 932, 940[14] (Mo.App. W.D. 1997); *State v. Radley*, 904 S.W.2d 520, 525 (Mo.App. W.D. 1995); *State v. Suarez*, 867 S.W.2d 583, 587[10] (Mo.App. W.D. 1993). Ineffective assistance of counsel is not to be determined by a post-trial academic determination that counsel could have successfully

objected to evidence or argument in a given number of instances. *Colbert*, 949 S.W.2d at 940[15]; *Radley*, *id.*; *Suarez*, 867 S.W.2d at 587[11].

The failure to object to objectionable evidence or argument does not establish ineffective assistance of counsel unless the evidence or argument resulted in a substantial deprivation of the accused's right to a fair trial. *Colbert*, 949 S.W.2d at 940-941[16]; *Radley*, 904 S.W.2d at 525; *Suarez*, 867 S.W.2d at 587[12]. Counsel's failure to object to particular evidence or argument normally is "mere trial error" not arising to constitutional proportions and thus not cognizable in a post-conviction motion. *Colbert*, 949 S.W.2d at 941[17]; *Radley*, *id.*; *Suarez*, 867 S.W.2d at 587[13]. An appellate court will not permit motion counsel to convert unpreserved error into viable error by arguing incompetence. *Jones v. State*, 784 S.W.2d 789, 793[7] (Mo. banc 1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 175 (1990); *State v. Love*, 963 S.W.2d 236, 247 (Mo.App. W.D. 1997); *Colbert*, 949 S.W.2d at 941[18].

Rather, to demonstrate that his attorney was ineffective in failing to object to this evidence or argument at trial, the appellant must show that "`counsel's overall performance fell short of established norms and that this incompetence probably affected the result.'" *State v. Williams*, 945 S.W.2d 575, 583[20] (Mo.App. W.D. 1997), *quoting Jones*, 784 S.W.2d at 793[9]. Otherwise, the attorney's failure to object "constitutes a procedural default, precluding appellate or collateral relief." *Jones*, 784 S.W.2d at 793[7].

Once again, the appellant's "failure to object" claim relates to an isolated failure to object to evidence that made little difference in the context of the case. Although Ms. Owens may have told the police that Liggins, the victim, originally had the knife, that issue was of little or no

significance, since it was undisputed that the appellant had sole possession of the knife for some time when he stabbed Liggins, and that Liggins was unarmed when the appellant plunged the knife into his chest.

To be sure, the appellant's attorney might have used the statement to contradict her trial testimony, when she stated that she had not seen the knife until she observed it sticking out of Liggins' chest (Tr. 226). But, for the most part, Ms. Owens' testimony was extremely favorable to the appellant, even though she was called as a State's witness. Obviously, Mr. Lance elected, as a matter of reasonable trial strategy, not to impeach her testimony with any prior inconsistencies that her prior statement might have contained.

Appellate courts will not review or reassess the judgment of trial counsel on questions of strategy, trial tactics or trial decisions. ***State v. Burnett***, 931 S.W.2d 871, 876[17] (Mo.App. W.D. 1996). Questions concerning the impeachment of witnesses are matters of trial strategy that normally will not support a claim of ineffective assistance***.*** ***State v. Roe***, 845 S.W.2d 601, 606[5] (Mo.App. E.D. 1992); ***Lytle v. State***, 762 S.W.2d 830, 847[16] (Mo.App. W.D. 1988). Likewise, the general rule is that the extent of cross-examination and the subjects covered must in virtually every case be left to the judgment of counsel. ***State v. Kinder***, 942 S.W.2d 313, 335[72] (Mo. banc 1997), *cert. denied*, 522 U.S. 854, 118 S.Ct. 149, 139 L.Ed.2d 95 (1997); ***Colbert***, 949 S.W.2d at 945[51]; ***State v. Broseman***, 947 S.W.2d 520, 526[10] (Mo.App. W.D. 1997).

Here, defense counsel's decision not to impeach Ms. Owens' testimony on an issue of minimal significance clearly did not amount to ineffective assistance of counsel. Nor, for that matter, did his decision not to object to the

prosecution's redaction of State's Exhibit No. 39, since the fewer contradictions the statement contained, the better the witness looked in the eyes of the jury. And, as earlier noted, Ms. Owens' testimony was clearly slanted toward the appellant.

Unquestionably, defense counsel's handling of this matter was not "outcome-determinative" and did not constitute ineffective assistance of counsel. Point V of the appellant's brief lacks even arguable merit and does not entitle him to relief.

VI.

SINCE THE MOTION COURT CONSIDERED AND REJECTED ALL OF THE APPELLANT'S CLAIMS--EVEN THOSE CONTAINED IN HIS UNTIMELY AMENDED MOTION--ON THEIR MERITS, A REMAND FOR A *SANDERS-LULEFF* "ABANDONMENT" HEARING WOULD NOT BE NECESSARY *UNLESS* THIS COURT WERE TO DETERMINE THAT ONE OR MORE OF THE CLAIMS CONTAINED IN THE UNTIMELY AMENDED MOTION WOULD, IF TIMELY FILED, HAVE ENTITLED THE APPELLANT TO AN EVIDENTIARY HEARING.

As the appellant correctly observes in his brief (App.Br. 55-58), all of the issues advanced under Points II through V of his brief were first raised in an apparently untimely amended Rule 29.15 motion filed by the appellant's court-appointed counsel. Although the appellant's post-conviction counsel had obtained an extension of time until January 4, 1998, in which to file an amended motion, and although he apparently mailed that motion to the circuit court two days before that deadline, the amended motion was not, in fact, stamped "filed" by the circuit clerk's office until January 22, 1998, more than two weeks out of time (PCR L.F. 10, 15).

An untimely amended motion under Rule 29.15 is a nullity and presents nothing for appellate review. *Ziegler v. State*, 799 S.W.2d 161, 166[7] (Mo.App. S.D. 1990). Accordingly, *if* the amended motion was untimely filed, and *if* the appellant's attorney was not responsible for the untimeliness, the motion court should not have considered the merits of the claims discussed under Points II through V of the appellant's brief.

At this point, it should be noted that it is not entirely clear that the appellant's motion was, in fact, untimely filed. Although the motion was

stamped "Filed" on January 22, 1198, more than two weeks out of time, a motion is deemed filed when it is *received* by eihter the clerk of the judge of the circuit court. ***Euge v. Golden***, 551 S.W.2d 929, 931[2] (Mo.App. St.L.D. 1997). The critical date, in other words, is when the document is actually received, not when it is stamped "Filed" by the clerk's office. ***Euge***, 551 S.W.2d at 932[2-3]. *See also* ***State v. Spicuzza***, 806 S.W.2d 719, 722[3] (Mo.App. E.D. 1991) (motion is "deemed filed when it is lodged in the circuit clerk's office"). **Accordingly, it is possible that the appellant's motion was actually delivered to the clerk's office on January 3rd or 4th, but file-stamped much later.**

The motion court, although noting the apparent untimeliness of the appellant's motion, nevertheless undertook to consider the new issues raised in the amended motion on their merits (PCR L.F. 29), and correctly concluded that none of these claims, even if accepted as true, would entitle the appellant to an evidentiary hearing (PCR L.F. 29-33). Assuming the motion court was correct in this assessment--and it is clear that he was--the appellant was not prejudiced by the apparent untimeliness of counsel's amended motion, and the cause for that seeming untimeliness is simply a moot point for purposes of this appeal.

As a result, this Court need not undertake the type of "abandonment" inquiry discussed in *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), and *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), *unless* this Court were to somehow conclude that one or more of the claims presented under Points II through V of the appellant's brief entitled him to an evidentiary hearing.

In that unlikely event, this case would have to be remanded to the trial court for a *Sanders-Luleff* hearing to determine whether (1) the appellant's motion was, in fact, untimely filed, and (2), if so, the cause of that late filing. If the motion court were to determine both that the amended motion was filed out of time, *and* that the appellant was not at fault in connection with the late filing, then the motion court should consider the motion as timely filed and afford the appellant an evidentiary hearing on those claims, if any, which this Court might conclude entitles the appellant to such a hearing.

In this case, however, as the State had thoroughly demonstrated under Points II through V of its brief, *none* of the issues the appellant presented in his amended motion entitled him to an evidentiary hearing, regardless of its timeliness. Since the motion court considered all five claims on their merits, and issued findings and conclusions of law persuasively demonstrating that none of the issues in the appellant's amended motion merited an evidentiary hearing, no *Sanders-Luleff* hearing is required in this case, and the denial of both the appellant's *pro se* and amended Rule 29.15 motions should be affirmed without further proceedings.

CONCLUSION

For the reasons presented under Points I through VI, *supra*, of the State's substitute brief, the motion court's summary denial of the appellant**'s motion under Rule 29.15, was not "clearly erroneous," Rule 29.15(k), and should be affirmed.**

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 14,324 words, excluding the cover, this certification, the signature block and the appendices, as determined by WordPerfect 6.1 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 4th day of July, 2001, to:

Mr. Craig A. Johnston
Office of the State Public Defender
3402 Buttonwood
Columbia, MO 65201

_____
Philip M. Koppe