No. 83106

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IN THE
MISSOURI SUPREME COURT

_____

BRANDON HUTCHISON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Lawrence County, Missouri
The Honorable J. Edward Sweeney, Judge

_____

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

_____

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHANIE MORRELL
Assistant Attorney General
Missouri Bar No. 52231

P. O. Box 899
Jefferson City, MO 65102
(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 Supreme Court Rule 29.15 in the Circuit Court of Lawrence County, Missouri. The convictions sought to be vacated were for two counts of murder in the first degree, §565.020, RSMo 1994, for which the sentence was death. Because of the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Brandon Hutchison, was convicted of two counts of first degree murder and sentenced to death for the killings of Ronald and Brian Yates in Lawrence County, Missouri (L.F.116,117). Viewed in light most favorable to the verdict, the following evidence was adduced:

Freddy Lopez (hereinafter Lopez) and his wife Kerry had a New Year's Eve party in the garage of their home in Verona, Missouri (Tr.1068-69). Appellant and Michael Salazar were among those attending the party (Tr.1068-71). Lopez, who was from California, had first lived in Missouri during the early 1990's (Tr.1072). After returning to California, he moved back to Missouri in March or April, 1995 (Tr.1070). Appellant and Lopez met within days of Lopez's return to Missouri (Tr.1077). Appellant was Kerry Lopez's cousin by marriage (Tr.1076). Lopez and appellant were friends and were together "most of the time." (Tr.1079,1507). Appellant frequently spent the night at Lopez's house (Tr.1078,1330). Shortly after Lopez returned to Missouri, Michael Salazar, a friend of Lopez's brother, moved in with him, at his brother's request (Tr.1069).

On December 31, 1995, Salazar helped the Lopez's prepare for the New Year's eve party (Tr.1965). Terry Farris and Tim Yates, the brother of the victims, were the first guests to arrive at the party (Tr.1081,1171). Farris had been invited and he brought Tim Yates along (Tr.1081). Lopez sold methamphetamine to Farris and the two left before others arrived at the party (Tr.1080-81,1199).

Appellant and his brother, Matt Hutchison, were the next to arrive at the party (Tr.1081,1174,1326). At that time only the Lopezes, Salazar and Gail Weldon, Kerry Lopez's mother, were present (Tr.1081-82,1327). Approximately nine other people arrived at the party during the evening hours of December 31, 1995, and the early morning hours of January 1, 1996 (Tr.1082,1281,1289).

Among them were Ronald and Brian Yates (Tr.1082).

The Yates brothers were not invited to the party and did not know the other party goers (Tr.1083,1178). They came to the party after midnight looking for Terry Farris and their bother Tim (Tr.1083,1091). They were told that their brother and Farris had left, but were invited to stay (Tr.1083-84).

Lopez had a .22 caliber handgun he received from appellant (State's Exhibit 34) (Tr.1092). Salazar owned a .25 caliber, semi-automatic handgun (State's Exhibit 35). Both guns were kept in an unlocked metal cabinet in Salazar's room so that they were away from the three Lopez children (Tr.1068-69,1092-93). At midnight on January 1, appellant, his brother, Lopez, and Salazar got the .22 caliber gun from Salazar's room (Tr. 1089-90). Each men fired a round, six shots, out of the back door of the Lopez house, into the air (Tr.1089-90). The .22 caliber was returned to the metal cabinet in Salazar's room (Tr.1090-91). Salazar had the .25 caliber on him during the remainder of the party (Tr.1176,1293).

A number of "unusual things" happened at the party (Tr.1284). Everyone at the party, including appellant and Lopez, were drinking (Tr.1184,1320-21). Appellant punched another party goer, Jeremy Andrews, in the head (Tr.1284-86). Appellant also held his hand out, so as to imitate a gun, and made a shooting motions at the Yates brothers (Tr.1288-89). Lopez and Ronald Yates did a line of methamphetamine at the party (Tr.1097,1181). Methamphetamine was left on the stereo in the garage and was finished off by someone else at the party (Tr.1097). At approximately 4:00 a.m., the hosts of the party, Kerry and Freddy Lopez, got into an argument in front of the guests (Tr.1097-98,1180-81,1185). They left the garage and went to their bedroom in the house (Tr.1098). When the Lopezes left, seven people remained in the garage (Tr.1102). But shortly thereafter, all of the guests, except appellant, Salazar and

the Yates brothers, left the party (Tr.1306-07).

Approximately twenty minutes after the Lopezes left the garage, appellant pounded on the door of their bedroom and said that "something bad had happened in the shop" (Tr.1101,1135,1163,1187). Lopez assumed it was something similar to the events that had occurred earlier in the evening and initially "brushed it off" (Tr.1101-02). Then Salazar came to the porch of the house and called for Lopez (Tr.1105). Salazar appeared nervous and scared and said that he had shot someone (Tr.1105-06). Salazar had the .25 caliber gun at that time (Tr.1190-91). Lopez went with Salazar to the garage where the Yates brothers were lying on the floor (Tr.1106-07,1191,1337-38). Appellant was also in the garage (Tr.1109). Salazar claimed that "the guy tried to stab him" (Tr.1109).

Brian Yates was shot in the chest and abdomen (Tr.1384). The chest wound was not very significant, because the bullet never entered the chest cavity (Tr.1384). While serious, the abdominal wound was not fatal (Tr.1396). Brian Yates could have survived several days without medical treatment (Tr.1412). The .25 caliber bullet that caused the abdominal wound was fired from the gun owned by Salazar (Tr.864-65,1422,1632-33). While still alive, Brian Yates also suffered a blunt trauma to the back of the head (Tr.1384,1392,1429).

Ronald Yates was shot in the back at point blank range (Tr.1434,1403). The bullet lodged in the spine and while it would have caused paralysis, it was not a fatal wound (Tr.1401,1410,1435-36). Ronald Yates could have survived for several days without medical treatment (Tr.1410). The bullet in Ronald Yates' spine came from Salazar's .25 caliber gun (Tr.1636). Ronald Yates also suffered abrasions to his legs and shoulders, bruised lips and was struck in the head (Tr.1408-09,1437).

There were three hospitals within 6 to 12 miles of the Lopez home (Tr.858). Had the appellant,

Lopez or Salazar (hereinafter collectively "the co-defendants") sought medical assistance for the Yates brothers they would have survived (Tr.1413). Lopez suggested that they call an ambulance, but appellant did not want to because "he wasn't going to take the rap or get penned for that . . . ." (Tr.1112-13). Appellant then stated that Ronald Yates was already dead (Tr.1110). Lopez, however, saw Ronald Yates gasp for air (Tr.1111). Appellant suggested that they move the Yates brothers out of the garage into Lopez's Honda Accord and Lopez agreed (Tr.1113).

Salazar backed the Lopez car into the garage (Tr.1116-17). The trunk of the Honda is small (Tr.1862-66). Appellant and Salazar first loaded Ronald Yates into the trunk (Tr.1118). While Salazar went to the house to get a drug scale and the .22 caliber gun, appellant drug Brian Yates by the shoulders to the back of the car and dropped him on the floor (Tr.1118,1120). Appellant then kicked Brian Yates in the upper part of the body (Tr.1120). When Salazar returned he and appellant loaded Brian Yates into the trunk (Tr.1121). Before leaving, appellant and Salazar removed evidence and cleaned the garage (Tr.1122).

Appellant drove the car (Tr.1123). The three co-defendants took the Yates brothers approximately six to nine miles to dirt road 2210, near Hoberg, Missouri (Tr.858,1126-29). The drive took approximately 10-15 minutes (Tr.1130). After coming to a stop, appellant got out of the car with the .22 caliber gun in his hand (Tr.1129). He stated "we got to kill them, we got to kill them" (Tr.1131). Salazar also got out of the car (Tr.1131). The trunk lid was raised and several shots were fired (Tr.1132-33). Brian Yates was shot once in the right ear and once in the right eye (Tr.864,867-68,393). Both were contact wounds (Tr.1393). Ronald Yates was shot in the back of the head and in both eyes (Tr.874,1406-08,1634). Although bullets removed from the Yates brothers heads were too fragmented for positive

identification, the bullets are consistent with those used in a .22 caliber gun (Tr.1627,1634).

Both brothers died of the gunshot wounds to the head (Tr.1396,1412). The autopsy of the victims and physical evidence were consistent with the Yates brothers being shot in the body first and then at some point later being killed by gunshot wounds to the head (Tr.1442-43).

The bodies were left sprawled on the side of the dirt road (Tr.997). Appellant and Salazar get back into the car. Appellant still had the .22 caliber gun (Tr.1151). After leaving the scene, Salazar leaned forward and mentioned that they needed the keys to the victim's car that was left at the Lopez house (Tr.1135). They went back to where the bodies were left to search for the keys (Tr.1135). All three co-defendants got out of the car, although only Salazar and appellant searched the victims' pockets (Tr.1135). They found no keys (Tr.1136).

The three then drove toward Hoberg, Missouri (Tr.1136). At a bridge over the Spring River they pulled off the road (Tr.1137). Lopez threw the remaining shells into the water while appellant and Salazar wrapped the .22 and .25 caliber guns in appellant's blue t-shirt and buried them near the river (Tr.1103,1139-40).

Appellant then suggested that they go to the house of a friend, Troy Evans (Tr.1140). Evans lived with Frankie Young in a trailer home only a quarter mile from the Spring River (Tr.1137). Appellant stayed with Evans in the past (Tr.1140,1507). It was approximately 5:00 a.m. on New Year's morning when appellant knocked on the window of the Evans' home (Tr.1536,1556,1141-42). When Evans let them in Lopez immediately asked to use the phone and went to Young and Evans' bedroom to make phone calls (Tr.1143,1539,1558). Appellant was "excited" (Tr.1509). Based on how he was acting, Evans believed appellant had been in a fight (Tr.1545).

Frankie Young noticed blood on appellant's hand (Tr.1511). Appellant asked to take a shower "to wash the blood off his hand" (Tr.1510, 1540). At first Evans refused, but appellant kept asking and finally he was allowed to shower (Tr.1541,1524). Appellant changed into some clothes he kept at the trailer (Tr.1144,1538,1541-42). Although Evans and Young didn't notice if he had changed shoes, several weeks later they realized that a pair of Evans' shoes were missing (Tr.1156).

After showering, appellant talked with Lopez and Evans in the kitchen (Tr.1551). Either appellant or Lopez asked Evans to look in the Honda to see if there was carpet in the trunk (Tr.1547,1550). When, after looking, Evans told them there was no carpet in the trunk appellant said they had "funked up" (Tr.1545). In response Lopez told him to "shut up" (Tr.1546). Before leaving, appellant burned some things in a trash can outside (Tr.1552). The three co-defendants were at the Evans' home approximately 30 or 45 minutes (Tr.1544).

After leaving Evans' home they drove back to Verona and they parked the Honda in the back of Lopez's house (Tr. 1150). Kerry Lopez noticed a large amount of blood on the back bumper (Tr.1347-48). Salazar and appellant left in the Yates brothers' car (Tr.1152). Salazar mentioned going to Arizona where he had a girlfriend (Tr.1152,1158). Appellant and Salazar arrived at the home of appellant's friend, Sandra Jett, in Monett, Missouri, around 7:00 a.m. on January 1, 1996 (Tr.1258). Appellant asked her to give them a ride to the bus station in Joplin (Tr.1258-59). Appellant claimed that their car had broken down in Monett (Tr.1259). They were carrying a trash bag full of clothes (Tr.1263). They said they were going to California to visit relatives (Tr.1259). Jett took them to the bus station in Joplin (Tr.1259). Two men fitting appellant's and Salazar's description bought tickets on the 9:50 a.m. bus to Yuma, Arizona (Tr.1446,1449).

The bodies of the Yates brothers were found sprawled on the side of the road at approximately 8:10 a.m (Tr.956). The police were notified and the police arrived at approximately 8:20 a.m. and secured the scene (Tr.806,959,996).

Appellant's convictions were affirmed by this Court on November 25, 1997. State v. Hutchison, 957 S.W.2d 757 (Mo.banc 1999).

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

POINTS RELIED ON

I.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIMS THAT THE PROSECUTOR ENGAGED IN PROSECUTORIAL MISCONDUCT BY ALLEGEDLY FAILING TO REVEAL A PLEA AGREEMENT WITH CO-DEFENDANT FREDDY LOPEZ AND BY MAKING THIS ALLEGED AGREEMENT NOT TO PURSUE THE DEATH PENALTY WITH LOPEZ FOR THE REASON THAT HE WAS ABLE TO PAY RESTITUTION TO THE VICTIM'S FAMILIES BECAUSE THESE CLAIMS ARE NOT COGNIZABLE IN A RULE 29.15 PROCEEDING IN THAT THEY COULD HAVE BEEN RAISED ON DIRECT APPEAL AND APPELLANT HAS NOT PLED ANY EXTRAORDINARY CIRCUMSTANCES WARRANTING REVIEW (Responds to appellant's Point I and II).

State v. Carter, 955 S.W.2d 548 (Mo.banc 1997), cert. denied 523 U.S. 1052 (1998);

State v. Tolliver, 839 S.W.2d 296 (Mo.banc 1992);

Schneider v. State, 787 S.W.2d 718 (Mo.banc 1990);

State v. White, 790 S.W.2d 467 (Mo.App.E.D. 1990).

II.

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

Skillicorn v. State, 22 S.W.3d 678 (Mo.banc 2000), cert. denied, 121 S.Ct. 630 (2000);

State v. Twenter, 818 S.W.2d 628 (Mo.banc 1991);

State v. Clay, 975 S.W.2d 121 (Mo.banc 1998), cert. denied, 525 U.S. 1085 (1999);

State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996), cert. denied, 117 S.Ct. 307 (1996).

III.

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

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

IV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TRIAL COUNSEL'S REQUEST FOR A CONTINUANCE BECAUSE COUNSEL'S DECISION NOT TO RAISE THIS CLAIM WAS REASONABLE APPELLATE STRATEGY IN THAT IT HAD LITTLE CHANCE OF SUCCESS. MOREOVER, APPELLANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TRIAL COUNSEL'S REQUEST FOR A CONTINUANCE IS NOT COGNIZABLE IN A RULE 29.15 PROCEEDING AND APPELLANT DOES NOT ALLEGE ANY EXTRAORDINARY CIRCUMSTANCES WARRANTING REVIEW (Responds to appellant's Point V).

State v. Tolliver, 839 S.W.2d 296 (Mo.banc 1992);

State v. Moss, 10 S.W.3d 508 (Mo.banc 2000);

State v. Middleton, 995 S.W.2d 443 (Mo.banc 1999), cert. denied, 528 U.S. 1054 (1999);

State v. Wise, 879 S.W.2d 494 (Mo.banc 1994), cert. denied, 513 U.S. 1093 (1995).

V.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT VARIOUS EVIDENCE AND TESTIMONY OF CO-DEFENDANT, FREDDY LOPEZ'S CONTROL AND DOMINATION OVER HIM BECAUSE APPELLANT HAS FAILED TO ESTABLISH THAT IT WAS NOT REASONABLE TRIAL STRATEGY NOT TO PRESENT MUCH OF THIS EVIDENCE IN THAT APPELLANT DID NOT ASK TRIAL COUNSEL IF THEY HAD A STRATEGIC REASON NOT TO PRESENT SOME OF THIS EVIDENCE AND APPELLANT WAS NOT PREJUDICED IN THAT MUCH OF THIS EVIDENCE WAS IRRELEVANT OR DAMAGING TO HIS THEORY AT TRIAL. (Responds to appellant's Point VI).

State v. Harris, 870 S.W.2d 798 (Mo.banc 1994), cert. denied, 115 U.S. 371 (1994); State v. Shafer, 969 S.W.2d 719 (Mo.banc 1998), cert. denied, 522 U.S. 969 (1998);

State v. Twenter, 818 S.W.2d 628 (Mo.banc 1991);

Morrow v. State, 21 S.W.3d 819 (Mo.banc 2000), cert. denied, 121 S.Ct. 1140 (2001).

VI.

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

State v. Lay, 896 S.W.2d 693 (Mo.App.W.D. 1995);

Sidebottom v. State, 781 S.W.2d 791 (Mo.banc 1989), cert. denied 497 U.S. 1032 (1990);

State v. Silvey, 894 S.W.2d 662 (Mo.banc 1995);

State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996), cert. denied, 117 S.Ct. 307 (1996);

Supreme Court Rule 29.15(i).

VII.

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

State v. Rousan, 961 S.W.2d 831 (Mo.banc 1998), cert. denied, 524 U.S. 961 (1998);

State v. Parker, 886 S.W.2d 908 (Mo.banc 1994), cert. denied, 115 S.Ct. 1827 (1995);

State v. Weaver, 912 S.W.2d 499 (Mo.banc 1995), cert. denied, 117 S.Ct. 153 (1996);

State v. Smith, 32 S.W.3d 532 (Mo.banc 2000), cert. denied, __ U.S. __ (February 26, 2001);

§565.035, RSMo. 1994.

VIII.

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

Lyons v. State, 39 S.W.3d 32 (Mo.banc 2001);

State v. Deck, 944 S.W.2d 527 (Mo.banc 1999), cert. denied, 528 U.S. 1009 (1999);

State v. Jones, 979 S.W.2d 171 (Mo.banc 1998), cert. denied, 525 U.S. 1112 (1999);

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

IX.

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

State v. Hunter, 840 S.W.2d 850 (Mo.banc 1991), cert. denied 509 U.S. 926 (1993);

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991);

Pennsylvania v. Finley, 481 U.S. 551, 95 L.Ed.2d 539, 107 S.Ct.1990 (1987);

State v. Clay, 975 S.W.2d 121 (Mo.banc 1998), cert. denied, 525 U.S. 1085 (1999);

Supreme Court Rule 29.16.

ARGUMENT

I.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIMS THAT THE PROSECUTOR ENGAGED IN PROSECUTORIAL MISCONDUCT BY ALLEGEDLY FAILING TO REVEAL A PLEA AGREEMENT WITH CO-DEFENDANT FREDDY LOPEZ AND BY MAKING THIS ALLEGED AGREEMENT NOT TO PURSUE THE DEATH PENALTY WITH LOPEZ FOR THE REASON THAT HE WAS ABLE TO PAY RESTITUTION TO THE VICTIM'S FAMILIES BECAUSE THESE CLAIMS ARE NOT COGNIZABLE IN A RULE 29.15 PROCEEDING IN THAT THEY COULD HAVE BEEN RAISED ON DIRECT APPEAL AND APPELLANT HAS NOT PLED ANY EXTRAORDINARY CIRCUMSTANCES WARRANTING REVIEW (Responds to appellant's Point I and II).

Appellant claims on his first point on appeal that the motion court clearly erred in denying, without an evidentiary hearing, his claim that the prosecutor allowed Freddy Lopez, appellant's co-defendant, to testify falsely at trial that he had no plea agreement (App.Br.35). Appellant claims that the prosecution made an agreement with Lopez, that in exchange for his testimony and $200,000 in restitution to the victim's families, he could plead guilty to two counts of second degree murder and receive two ten year sentences (App.Br.35). Appellant alleges in his second point on appeal that the State agreed to let Lopez plead to second degree murder if he paid the victim's families $200,000 and therefore, appellant was only subject to the death penalty because he was indigent and unable to pay the victims (App.Br.43). As these

claims are closely related, respondent will address these claims together.

Before trial, defense counsel requested the State to disclose any agreements with Lopez (Tr.141). The State informed defense counsel that they had had discussions with Lopez but had not "struck the final deal" and if Lopez did a good job as a witness they were probably going to recommend second degree murder with a sentence of thirty years for each count (Tr.141-142). The State agreed that if a deal was reached, they would give notice (Tr.142). At trial, during cross-examination, Lopez testified that he had no deal with the prosecution and although his attorney had told the prosecution what agreement Lopez wanted, the prosecution was not willing to make a deal at that time (Tr.1242-1243). Lopez stated that he was "pray[ing]" that he got a deal for his testimony against appellant and he prayed that his testimony against appellant would avoid a conviction for first degree murder for himself (Tr.1242-1243). During closing argument, the prosecutor stated that Lopez did not have a deal and was still charged with two counts of first degree murder (Tr.1820).

In denying appellant's claims, the motion court found that the claims were refuted by the record and because appellant had failed to raise these claims at the earliest opportunity, he could not raise the claims in a post-conviction proceeding (PCR.L.F.769,807).

This Court's review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. State v. Ervin, 835 S.W.2d 905, 928 (Mo.banc 1992), cert. denied, 507 U.S. 954 (1993). The motion court's findings are clearly erroneous if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. Id. In order to be entitled to an evidentiary hearing, a movant must 1) cite facts, not conclusions, which, if true, would entitle movant to relief; 2) the factual allegations

must not be refuted by the record; and 3) the matters complained of must prejudice the movant. State v. Blankenship, 830 S.W.2d 1, 16 (Mo.banc 1993).

The motion court did not clearly err in denying appellant's claims because appellant's claims are not cognizable in a post-conviction proceeding. In both his post-conviction motion and on appeal, appellant essentially claims that the State failed to disclose an alleged plea agreement with Lopez for his testimony. A claim that the State failed to disclose evidence is a claim of trial error which should have been raised on direct appeal. State v. Carter, 955 S.W.2d 548, 555 (Mo.banc 1997), cert. denied 523 U.S. 1052 (1998); Burgin v. State, 847 S.W.2d 836, 839 (Mo.App.W.D. 1992). Claims of trial error, even those implicating constitutional rights, should not be considered in a postconviction proceeding unless fundamental fairness requires it, and then only in rare and exceptional circumstances. State v. Tolliver, 839 S.W.2d 296, 298 (Mo.banc 1992); Carter, supra. A movant must demonstrate the exceptional circumstances warranting review. Schneider v. State, 787 S.W.2d 718, 721 (Mo.banc 1990).

Appellant has failed to demonstrate that fundamental fairness requires review of his claims in that he has pled no facts which demonstrate that he could not have raised these claims on direct appeal. Appellant did not raise these claims at trial or on direct appeal. Moreover, appellant only alleges that he was not informed prior to trial about the alleged plea agreement with Lopez (PCR.L.F.45). He does not allege that he was unaware of this alleged agreement during trial or that he could not have raised these issues on direct appeal. Because appellant's allegations that the State failed to disclose the alleged plea agreement and allowed a co-defendant to plead to a lesser crime because of his ability to pay restitution are claims of trial error and appellant has not shown that he could not have raised this issue on direct appeal, his claims are not cognizable in this proceeding. Tolliver, 839 S.W.2d at 298; State v. White, 790 S.W.2d 467, 474

(Mo.App.E.D. 1990). Appellant has failed to allege sufficient facts to show extraordinary circumstances warranting review, and the motion court was not clearly erroneous in denying his claim.

Appellant's points must fail.

II.

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

In appellant's third point on appeal, appellant raises several allegations of ineffective assistance of counsel for failure to investigate and present evidence of appellant's "background," including family members, school, medical, mental health, and jail records, and his childhood psychiatrist (App.Br.47-48). Appellant alleges if the jury had heard this mitigating evidence, there is a reasonable probability that the jury would have imposed a life sentence (App.Br.48).

During appellant's penalty phase, trial counsel presented four witnesses on appellant's behalf. Appellant's parents, Bill and Lorraine Hutchison, testified about their love for appellant, appellant's difficult childhood, his problem with hyperactivity as a child, his problems with special education, his problems with drugs and alcohol, the move to Missouri from California, and appellant's work in construction (Tr.1918-1935). Trial counsel presented Dr. Bland, a psychologist, hired by counsel to perform an evaluation of appellant (Tr.1876-1906). Dr. Bland testified regarding appellant's special education as a child, appellant's

borderline intellectual functioning, attention deficit disorder, bipolar disorder, discussed appellant's version of the night of the murders, and presented his report containing information about appellant's alleged sexual abuse (Tr.1876-1906). Frankie Young, appellant's friend, testified about appellant's willingness to help her family and appellant's respect for her and her family (Tr.1907-1913).

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

1) Dr. Parrish

Appellant pled that trial counsel was ineffective for failing to investigate and call Dr. Jerrold Parrish, appellant's childhood psychiatrist when he lived in California (PCR.L.F.80-82,134). Appellant pled that Dr. Parrish's testimony and records would have provided mitigating evidence showing that appellant suffered from Attention Deficit Hyperactivity Disorder, Bipolar Disorder, and that appellant was severely addicted to drugs (PCR.L.F.81). Parrish also would have testified about the effects of appellant's alleged sexual abuse (PCR.L.F.81).

Parrish testified by deposition at the evidentiary hearing and his medical records concerning appellant were also admitted into evidence. Parrish treated appellant from 1989 to 1993, ending when appellant was about sixteen years old, almost three years prior to the murders (Plaintiff's Exhibit 53 at 7). Parrish diagnosed appellant as suffering from conduct disorder, solitary type; attention deficit hyperactivity disorder; alcoholism; and bipolar disorder (Plaintiff's Exhibit 53 at 11). Parrish also stated that appellant had experienced episodes of depression (Plaintiff's Exhibit 53 at 12). Parrish prescribed an antidepressant, lithium and Ritalin (Plaintiff's Exhibit 53 at 15-16,26). Parrish testified that according to appellant, throughout treatment, he continued to use drugs including alcohol, speed, crystal

methamphetamine, and crack (Plaintiff's Exhibit 53 at 16). Parrish also testified that appellant told him that he had been subjected to sexual abuse as a child (Plaintiff's Exhibit 53 at 17). Parrish testified that appellant was a follower, but admitted, that by his definition, approximately half the population are followers (Exhibit 53 at 19, 29).

Parrish admitted that he had no knowledge of appellant's current criminal case and when presented with hypotheticals regarding the facts of appellant's crimes, he refused to offer an opinion on whether appellant's actions in the murders were relatively minor or that appellant was under the domination of the two co-defendants (Plaintiff's Exhibit 53 at 42-49). Trial counsel, Shane Cantin, testified that although he knew that appellant had seen a psychiatrist while he lived in California, he was not familiar with the identity of the psychiatrist and had not contacted him prior to trial (PCR.Tr.979). Cantin was aware, however, that the psychiatrist had diagnosed appellant with bipolar disorder (PCR.Tr.979-980). Trial counsel, William Crosby, testified that he was not personally aware of Dr. Parrish (PCR.Tr.1073).

In denying appellant's claim, the motion court held, in relevant part, that:

> First, Dr. Parrish admittedly was unfamiliar with the facts of movant's case. The State could have easily brought out this fact during cross-examination of Dr. Parrish had he testified during movant's penalty phase. Because Dr. Parrish knew nothing of the facts of the case, his opinion has little relevance. Further, whatever mitigating value Dr. Parrish's testimony might have had would have been undermined by its remoteness (Dr. Parrish last saw movant in 1993, almost three years before the murders).
>
> Secondly, Dr. Parrish either could not or would not offer any opinion in response to the hypotheticals posed by the prosecutor. Because Dr. Parrish did not consider those

hypotheticals, and the facts of the case embodied therein, his opinion about movant's various alleged disorders has little, if any relevance.

Third, and as discussed more fully below in connection with the testimony of movant's mother, Lorraine Hutchison, movant's family did not want details of sexual abuse within their family to be disclosed publicly during movant's trial. Testimony from Dr. Parrish regarding movant's disclosures about sexual abuse would therefore have contravened the family's wishes at the time of trial, and may have been violative of the patient-physician privilege.

Fourth, in regard to movant's alternative claim that counsel were ineffective for failing to present medical records from Dr. Parrish, a review of Dr. Parrish's notes (see Parrish Depo.Tr. At Exhibit A), reveal that they are virtually illegible. A jury would not have been able to make out much of the content of these records.

Further, some of the treatment notes that are part of the medical records at issue would have been detrimental to movant and could have been brought out by the State had they been used during the penalty phase. For example, there is a treatment note by a William Hahm, a social worker, contained within the medical records, that mentions that movant had been suspended from school for threatening a teacher. Another note from Mr. Hahm showed that movant was "ditching" school a lot because he did not like it anymore. Others talk about fighting. Facts like these could have also been brought out had these records been introduced. Such facts would have been harmful to movant.

Finally, during his deposition, Dr. Parrish indicated that the progress notes were

> incomplete and that there was an additional, three page, typed report by Mr. Haham that was also part of the records (Parrish Depo.Tr. at 8-9). This report, admitted at the deposition as Exhibit C, also contained information that would have been harmful to movant had it been adduced at trial. For instance, in Exhibit C, Mr. Hahm mentions that movant had vandalized a neighbor's car for which he displayed little remorse. Had movant attempted to introduce Dr. Parrish's progress notes, this and other unflattering information from Mr. Hahm could have been introduced as well.

(PCR.L.F.799-800).

This Court's review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Ervin, 835 S.W.2d at 928. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or a death sentence has two components. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Appellant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. 466 U.S. at 694. Appellant must also demonstrate that counsel failed in his duty to make a reasonable investigation or in his duty to make a reasonable decision that makes a particular investigation unnecessary. Id. 466 U.S. at 690-691.

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

First, much of the evidence Dr. Parrish would have testified to was presented during the penalty phase of the trial. Dr. Bland testified at the penalty phase of the trial for appellant and his report was also

admitted into evidence (Tr.1876-1907). Dr. Bland's report and testimony included evidence of appellant's diagnosis of Attention Deficit Hyperactivity Disorder and Bipolar Disorder, the effects of his drug and alcohol abuse and even his sexual abuse by a male family member (Tr.1876-1907; Defendant's Trial Exhibit A; Plaintiff's Exhibit 12). In fact, Bland's report was not only admitted into evidence at trial, but the jury specifically asked for the exhibit during their deliberation (Tr.1890,1956).

Dr. Parrish's testimony was merely cumulative of the evidence presented during the penalty phase by Dr. Bland. Trial counsel cannot be held ineffective for failing to introduce cumulative evidence. Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc 2000), cert. denied, 121 S.Ct. 630 (2000); State v. Johnson, 957 S.W.2d 734, 755 (Mo.banc 1997), cert. denied, 522 U.S. 1150 (1998).

Second, appellant was not prejudiced because Dr. Parrish's testimony would have added little, if anything, to the picture developed by trial counsel of appellant during the penalty phase. Trial counsel presented the jury with a complete picture of appellant's life, including testimony by his parents about his difficult childhood including his learning disabilities, his attention deficit disorder, his difficulty with his special education, and the move from Fillmore to Palmdale, California (Tr.1919-1921,1934-1936). Testimony was also presented showing appellant's loving family, the fact that he was engaged to be married, and his two young children (Tr.1916,1934-1936). Frankie Young testified about appellant's respect for other people, appellant babysitting her children, and appellant helping her family at any time (Tr.1910-1911). Finally, as discussed above, Dr. Bland testified extensively regarding appellant's borderline intellectual functioning, his substance abuse, his account of the night of the murders, and also presented his report which encompassed discussion of appellant's prior sexual abuse, his history of attention deficit disorder, bipolar disorder, and his learning problems (Tr.1882-1888; Defendant's Trial Exhibit A; Plaintiff's Exhibit 12).

Based on the comprehensive picture painted by trial counsel during the penalty phase, Dr. Parrish's testimony would have added little, if anything to the penalty phase. See Skillicorn, supra (counsel not ineffective for failing to put on cumulative evidence, where presented comprehensive portrait of defendant during penalty phase). Appellant could not have been prejudiced by trial counsel's failure to call this witness, as there is no reasonable probability that the result of the penalty phase would have been different.

Third, appellant could not have been prejudiced by counsel's failure to call Dr. Parrish because, as the motion court properly found (PCR.L.F.799-800), the State could have extensively cross-examined Dr. Parrish about appellant's treatment sessions, including evidence that appellant had vandalized a car and showed little remorse for his actions, that he was suspended from school for threatening and being abusive to a teacher, that appellant continually "ditched" school, appellant's continual fighting with others, his defiance towards his parents, and his reluctance to complete treatment for his drug and alcohol addictions (Plaintiff's Exhibit 15, Deposition Exhibit B,C). These things would have been harmful to appellant's defense and theory at trial because these records show appellant's prior violence and criminal activity. Given the damaging information contained in Dr. Parrish's records and his testimony, appellant cannot show that he was prejudiced by counsel's alleged failure in investigating and calling Dr. Parrish. See State v. Simmons, 955 S.W.2d 729, 749-750 (Mo.banc 1997), cert. denied, 522 U.S. 1129 (1998) (not ineffective for failing to present mental health mitigating evidence where report also contained damaging information); Rousan v. State, slip opinion, (Mo.banc May 15, 2001) (not ineffective for failing to introduce past prison and other records which although showed defendant worked well while in prison, they contained damaging information which could have been prejudicial).

Fourth, appellant was not prejudiced because Dr. Parrish would not or could not offer any opinion

regarding appellant's involvement in the murders when presented with hypotheticals regarding appellant's case (Plaintiff's Exhibit 15 at 42-49). Therefore, his discussion of appellant's childhood would have little relevance.

Fifth, in light of the evidence presented at trial, Dr. Parrish's testimony would not have changed the outcome. The evidence showed that the victims were rendered helpless by bullet wounds from Salazar's gun. State v. Hutchison, 957 S.W.2d 757, 766 (Mo.banc 1997). Ronald Yates would have been paralyzed from the initial wound and both brothers were most likely in shock. Id. Appellant failed to take them to a hospital or render them any aid, but instead, insisted that no one call the paramedics. Id. Appellant then dragged the brothers, kicking Ronald Yates, and shoved both of the victims into the trunk of Lopez's car. Id. Appellant drove the vehicle, looking for a place to dump the bodies. Id. After stopping the vehicle, appellant dragged the helpless victims out of the car, and proceeded to murder the Yates brothers, execution style, by shooting multiple bullets into their eyes and ears and then fled the State with his co-defendant. Id. During the penalty phase, John Galvan testified about appellant stabbing him and threatening him (Tr.1852-1853). Brandy Kulow testified regarding appellant's possession of a gun and pointing the gun at her (Tr.1858-1859). Detective Aleshire testified regarding the size of the trunk that the victims were stuffed into before appellant drug them out and shot them, leaving them on the side of a road (Tr.1862-1870). It is likely that the victims were still alive and conscious after they were stuffed into the trunk (Tr.1871). The victims' mother testified regarding the effect that their deaths have had on their family and their children (Tr.1872-1875).

Even assuming that Dr. Parrish's testimony would have been presented, there is no reasonable probability that the jury would have concluded that the balance of the aggravating and mitigating

circumstances did not warrant death. See State v. Kenley, 952 S.W.2d 250, 266 (Mo.banc 1997). Considering the totality of the evidence presented at the penalty phase, appellant was not prejudiced by Dr. Parrish's absence as the mitigating evidence would not have outweighed the aggravating circumstances. The motion court did not err in denying appellant's claim.

2) School, Medical, Mental Health and Jail Records

Appellant also claims that his trial counsel was ineffective for failing to present various records into evidence during the penalty phase (App.Br.47). Appellant alleges that the school, medical, mental health, and jail records would further document his troubled childhood, mental health problems, drug and alcohol addiction, sexual abuse, attention deficit disorder, learning disabilities, memory problems, and other social and emotional problems (App.Br.47). Appellant alleges that had this evidence been presented, there is a reasonable probability that the jury would not have sentenced him to death (App.Br.48).

a) School records

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

Trial counsel Cantin testified that he did not recall if he had obtained all of appellant's school records, although he did remember that he had obtained some grade reports from appellant's mother (PCR.Tr.974,976). Trial counsel Crosby testified that Cantin had run into difficulties obtaining records from

California (PCR.Tr.1067-1068). However, a teacher had informed them that appellant had a propensity to be a follower and latch onto a group of people as opposed to doing things entirely on his own (PCR.Tr.1067-1068). Trial counsel testified that they made a conscious decision to exclude evidence of appellant's problems in school, drug use, and sexual abuse the best they could while presenting other evidence that they knew would be useful (PCR.Tr.1046-1047).

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

The motion court was not clearly erroneous in denying appellant's claim. As the motion court found, appellant was not prejudiced by counsel's failure to obtain these school records because many of these records contained inadmissible hearsay (PCR.L.F.800). In fact, appellant does not even attempt to dispute the finding that these records contained inadmissible hearsay.[1] For example, appellant cites to Plaintiff's Exhibit 4 which contains a psychological report which discusses reports from teachers about appellant's behavior to the psychologist. These statements by the teachers in the reports would have been inadmissible hearsay in trial. Counsel is not ineffective for failing to introduce inadmissible evidence. State

[1]The fact that these records were offered as business records would not change the fact that much of the material and statements contained in the records are hearsay and would not be admissible. State v. Jordan, 664 S.W.2d 668, 672 (Mo.App.E.D. 1984); State v. Harry, 741 S.W.2d 743, 744-745 (Mo.App.E.D. 1987).

v. Twenter, 818 S.W.2d 628, 638 (Mo.banc 1991); State v. Gateley, 907 S.W.2d 212, 227 (Mo.App.S.D. 1995). There can be no ineffective assistance of counsel for failing to bring in evidence that would be subject to a meritorious hearsay objection. State v. Chambers, 891 S.W.2d 93, 110 (Mo.banc 1994), cert. denied, 119 S.Ct 2383 (1999). Therefore, since these records contained inadmissible hearsay, trial counsel could not have been ineffective for failing to attempt to introduce these records at trial.

Moreover, to the extent that some of these records were admissible, appellant could not have been prejudiced by counsel's failure to present appellant's school records because as the motion court found (PCR.L.F.800), the records contained detrimental information which would have been damaging to appellant's case. Many of the school records contained evidence of appellant's continuing defiance towards authority, his altercations with other students, appellant's tendency to deny wrongdoing; his negative attitude toward school, his blatant uncooperativeness; the fact that appellant was easily angered; he disregarded rules; and he had explosive verbal reactions (Plaintiff's Exhibit 4 at 2-3,22,32-33). One of the psychological reports described appellant's aggressive tendencies and discussed a test administered to appellant where he made stories up about pictures (Plaintiff's Exhibit 4 at 32). Appellant's stories were violent including stories about setting a house on fire, a hit and run incident with an intent to commit murder, hanging a boy in a tree, and boys engaging in a fight severe enough to require hospitalization (Plaintiff's Exhibit 4 at 33). Another record contained a "discipline chronology showing months of appellant's defiant, aggressive behavior at school including incidents where appellant slapped a student loud enough to be heard across the room, several fights, ditching school, wrestling in class, swinging his fist at a student, yelling, pushing chairs, kicking doors, trying to choke a student, and throwing objects at teachers (Plaintiff's Exhibit 5).

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

b) Medical Records

Appellant also claims that his medical records should have been admitted in the penalty phase as mitigating evidence (App.Br.51). In his amended motion, appellant alleged that the medical records would have shown evidence of appellant's sexual abuse, drug addictions, attention deficit disorder, and paranoia (PCR.L.F.83-85).

Appellant admitted three medical records into evidence including the records from Dr. Parrish, discussed earlier (Plaintiff's Exhibit 3A,7,10).[2]

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

In denying appellant's claim that trial counsel was ineffective for failing to investigate and introduce these records at the penalty phase, the motion court found that the records contained inadmissible hearsay, many of the records were remote in time, and the records contained detrimental information that would have damaged appellant's defense and theory of his case (PCR.L.F.801).

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

Moreover, as the motion court found (PCR.L.F.801), appellant could not have been prejudiced as these records contained damaging information which could have been presented and accentuated by the prosecution, including information regarding behavior difficulties, appellant described as a bully, and his parents found him difficult to control (Plaintiff's Exhibit 3A). Plaintiff's Exhibit 10 contained medical records regarding appellant's alleged drug induced hallucination in April, 1995. Appellant had come to the hospital stating that he had been shot in the back although he had not and appellant then admitted that he had not been attacked or shot, but rather had been taking methamphetamine for three days (Plaintiff's Exhibit 10).

Finally, much of the information contained in the medical records contained completely irrelevant information. For example, Plaintiff's Exhibit 3A mainly discussed appellant's asthma and his treatment thereof, only containing two brief discussions of his visits with the school psychologist, low school performance, and mention of his mother being inconsistent with her punishment (Plaintiff's Exhibit 3A). Plaintiff's Exhibit 10 included records relating to appellant slamming his hand in a door and a radiology

report from that injury. These records contained completely irrelevant information that would have been no benefit to appellant had trial counsel attempted to admit these records at trial.

This information would not have been beneficial to appellant at trial, as the records contained inadmissible, irrelevant, or damaging information. As the motion court found, appellant could not have been prejudiced by the absence of these records from the penalty phase.

c) Jail Records

Finally, appellant alleges in his brief on appeal that trial counsel should have obtained and admitted his jail records into evidence during the penalty phase (App.Br.47). Appellant did not plead in his post-conviction motion that his trial counsel failed to investigate his jail records. Therefore, this claim is waived as appellant is limited to his pleadings. State v. Clay, 975 S.W.2d 121, 141-142 (Mo.banc 1998), cert. denied, 525 U.S. 1085 (1999).

Even assuming this issue had been properly before this Court, appellant could not establish that he was prejudiced because the records only discuss that appellant was depressed and on medication, facts that were already presented in the penalty phase through Dr. Bland's report (Defendant's Exhibit A; Plaintiff's Exhibit 12). This evidence would have been cumulative and counsel cannot be ineffective for failing to present cumulative evidence. Skillicorn, 22 S.W.2d at 683-686.

3) Family Members

Finally, appellant alleges that trial counsel failed to investigate and present testimony from several of appellant's family members (App.Br.47). Appellant alleges that these witnesses would have testified about the family history of alcoholism, mental illness, appellant's childhood, sexual abuse, the effect of the move from Fillmore to Palmdale, California, appellant's drug and alcohol abuse, the family's financial

problems and Lopez's domination and influence on appellant (App.Br.48). Appellant alleges that had the jury heard their testimony, there is a reasonable probability that the jury would have imposed a life sentence (App.Br.48).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, movant must show 1) that trial counsel knew or should have known of the existence of the witness, 2) that the witness could be located through reasonable investigation, 3) that the witness would testify, and 4) that the witness's testimony would have produced a viable defense. State v. Harris, 870 S.W.2d 798, 817 (Mo.banc 1994) cert. denied, 513 U.S. 953 (1994). Appellant must plead the relevant facts in his post-conviction motion, and he bears the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i). Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless appellant clearly establishes otherwise. Clay, supra, at 143. To prove Strickland prejudice in the context of death penalty sentencing, appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. Kenley, 952 S.W.2d at 266.

a) Lorraine Hutchison

Lorraine Hutchison, appellant's mother, testified during the penalty phase of the trial about appellant being on baseball teams while a child and that appellant was a "very loving little boy," had a "big heart," and was close to his family (Tr.1918). He was diagnosed with hyperactivity, was prescribed Ritalin and was placed in special education (Tr.1918-1919). Appellant had attention deficit disorder which made it difficult for him to concentrate and he had problems with special education (Tr.1919-1920). Ms. Hutchison

also discussed their move to Palmdale and that appellant dropped out of school because he was frustrated (Tr.1921). Appellant had problems with drug and alcohol abuse and the family attended counseling (Tr.1921). Ms. Hutchison also testified that the family moved to Missouri because Palmdale was a bad area (Tr.1923). Appellant was in the apprentice program with his father for construction (Tr.1924). Ms. Hutchison stated that they did not have a lot of problems with appellant as a child, but rather "special problems" due to his hyperactivity (Tr.1924). Ms. Hutchison discussed appellant's problems with staying clean and sober (Tr.1926).

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

At the evidentiary hearing, Ms. Hutchison testified about anxiety attacks she suffered while pregnant with appellant and throughout her life and about her dependency on prescription drugs (PCR.Tr.246-2452). Ms. Hutchison described problems that various family members, including appellant, had with sexual abuse, mental illness, and alcoholism (PCR.Tr.248-250,254). Ms. Hutchison discussed appellant's childhood, problems with hyperactivity, drug and alcohol abuse, attention deficit disorder, appellant's problems with special education and the move to Palmdale, California (PCR.Tr.257-269). Ms. Hutchison discussed their move to Missouri and appellant's subsequent drug problems and overdose (PCR.Tr.272-277). Ms. Hutchsion believed that appellant "catered" to Lopez (PCR.Tr.277).

Ms. Hutchison admitted that she had discussed many of these topics in her penalty phase testimony and that, at trial, she denied having a lot of problems with appellant as a child (PCR.Tr.283-284). Ms. Hutchison also admitted that she did not testify about the sexual abuse at trial because she was in a courtroom full of people and reporters (PCR.Tr.286).

Trial counsel Cantin stated that they had met with the family on numerous occasions prior to the trial (PCR.Tr.1002). Cantin testified that when the family and appellant were questioned about the sexual abuse, they were not willing to talk about it (PCR.Tr.986). Moreover, the family gave trial counsel the impression that the sexual abuse was a one time incident and that appellant was removed from the situation (PCR.Tr.986). Cantin discussed with Ms. Hutchison appellant's learning disabilities, his employment, his sexual abuse, and other details about appellant's life (PCR.Tr.1003). Cantin and Crosby also expressed their feeling that the family and appellant were not forthcoming with information that may have been beneficial for the penalty phase (PCR.Tr.1003,1095,1109-1110).

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

The motion court was not clearly erroneous in denying appellant's claim. As the motion court found (PCR.L.F.806), Ms. Hutchison and her family were not willing to provide trial counsel this

information and did not want to testify about it. Trial counsel cannot be ineffective for failing to elicit testimony that the witness is not willing to provide. Walls v. State, 779 S.W.2d 560, 562-563 (Mo.banc. 1989), cert. denied, 494 U.S. 1060 (1990) (counsel's decision not to force reluctant witnesses to testify, where reasonable efforts showed that witnesses were opposed to testifying, is not unreasonable). Moreover, defense counsel presented much of appellant's life and problems through appellant's mother in the penalty phase. Trial counsel's actions were reasonable.

Much of what Ms. Hutchison testified to at the evidentiary hearing was cumulative to evidence and testimony presented at trial. As the motion court found (PCR.L.F.806), Ms. Hutchison's trial testimony consisted of evidence that movant was diagnosed with hyperactivity, that he was placed on Ritalin, that he was diagnosed with learning disabilities, that he had drug and alcohol problems, and that he was in special education classes (Tr.1921-1926), essentially the same items she testified to at the evidentiary hearing. Moreover, as discussed previously, evidence of appellant's sexual abuse and drug and alcohol abuse was also presented to the jury through Dr. Bland (Tr.1893-1894; Defendant's Exhibit A; Plaintiff's Exhibit 12). Trial counsel was not ineffective for failing to present cumulative evidence. Skillicorn, 22 S.W.2d at 683.

Finally, as the motion court found (PCR.L.F.806), Ms. Hutchison's testimony that appellant had difficulty living in Palmdale because of inner-city problems would have no effect on the jury's determination of appellant's sentence because many people live in such conditions. This would not explain why appellant committed murder. This testimony would not have changed the verdict and trial counsel was not ineffective for failing to present this additional testimony.

b) Bill Hutchison

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

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

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

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

In denying appellant's claim, the motion court found that the State could have cross-examined Mr. Hutchison similarly if he had testified more at the penalty phase of the trial and that Mr. Hutchison's

additional testimony would not have changed the outcome of the penalty phase (PCR.L.F.804-805).

The motion court was not clearly erroneous in denying appellant's claim. Although appellant asked trial counsel if they had discussed these issues with Mr. Hutchison, not once did appellant inquire about why trial counsel did not present Mr. Hutchison's testimony about these items during the penalty phase or if trial counsel had strategic reasons for presenting Mr. Hutchison's selected testimony at the penalty phase.[3]

"Trial counsel's actions are presumed to be trial strategy and appellant has the burden of overcoming the presumption that, under the circumstances, the challenged action was not "sound trial strategy." Strickland, 466 U.S. at 689. By refusing to inquire of counsel why they did not elicit the additional testimony from Mr. Hutchison, appellant, in effect, seeks to create a presumption of ineffectiveness. However, as recognized in State v. Tokar, 918 S.W.2d 753, 768 (Mo.banc 1996), cert. denied, 117 S.Ct. 307 (1996) and State v. Kreutzer, 928 S.W.2d 854, 874-75 (Mo.banc 1996), cert. denied 519 U.S. 1083 (1997), failure to make this inquiry signifies failure to meet his burden of proof. By

[3]Perhaps because they did not want to give defense counsel an opportunity to explain and defend their actions, appellant's postconviction attorneys repeatedly refused to ask trial counsel why they did not perform certain actions when the failure to so act was alleged to be ineffective assistance of counsel. See also 56,78-79,81,96-98, infra.

failing to make this inquiry, appellant has failed to show that trial counsel's actions were not strategic.

Second, as the motion court found (PCR.L.F.804-805), Mr. Hutchison's testimony would have added little, if anything to appellant's case. The State could have extensively cross-examined him regarding appellant's failure at drug rehabilitation and his drug and alcohol abuse, and Mr. Hutchison's lack of knowledge of his son's possession of weapons. Moreover, his testimony regarding the sexual abuse and the learning disabilities was cumulative to evidence already presented during the penalty phase (Tr.1921-1926,1893-1894; Defendant's Exhibit A; Plaintiff's Exhibit 12). The additional testimony would not have shifted the balance of the aggravating and mitigating circumstances. The motion court was not clearly erroneous in finding that appellant was not prejudiced by Mr. Hutchison's absent testimony.

c) Matt Hutchison

Matt Hutchison, appellant's older brother, was not a witness at trial. During the evidentiary hearing, Matt Hutchison testified that other children treated appellant like he was retarded while he was in special education (PCR.Tr.197). Appellant did not fit in with the other children in special education because they were "more special ed. than Brandon" (PCR.Tr.199). Matt Hutchison testified that appellant did not like special education and once they moved to Palmdale, the children teased appellant more than when they lived in Fillmore (PCR.Tr.198). He testified that, when they were young, appellant did not have many friends, but rather hung out with his friends (PCR.Tr.198). Matt Hutchison testified that he had been in special education as well (PCR.Tr.199).

According to Matt Hutchison, appellant told him about the alleged sexual abuse in Iowa (PCR.Tr.201-202). He testified that the move from Fillmore to Palmdale was not beneficial to the family (PCR.Tr.203-204). Palmdale school district was larger than Fillmore and the brothers did not like the new

school (PCR.Tr.206-207). Matt Hutchison testified he was also involved with the drugs and alcohol and also attended drug and alcohol treatment (PCR.Tr. 208-209).

Matt Hutchison stated, regarding Lopez's alleged domination over appellant, that appellant was the one to get the beer, put the beer in the trunk, break the ice, and that Lopez would order appellant around (PCR.Tr.213).

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

Trial counsel Cantin testified that he had discussed both the night of the murder and the family background with Matt Hutchison (PCR.Tr.995-997). Crosby testified that they had talked with Matt Hutchison about various topics including appellant's background, some of which they wanted to stay away from at trial (PCR.Tr.1070-1071). They decided, as a matter of trial strategy, not to call Matt Hutchison, because they concluded that he was not a very believable person (PCR.Tr.1071).

In denying appellant's claim, the motion court found that trial counsel had strategic reasons not to call him as a witness; counsel was not ineffective for failing to call him to testify about the sexual abuse as the family wanted to keep it private; evidence of appellant's alcohol and drug use would have been cumulative; and testimony that appellant and his brother had many of the same experiences growing up and yet appellant turned to crime while his brother did not could have been exploited by the State (PCR.L.F.803-804).

The motion court was not clearly erroneous in denying appellant's claim. In the context of counsel's performance, the selection of witnesses and the presentation of evidence are matters of trial strategy.

Leisure v. State, 828 S.W.2d 872, 874 (Mo.banc 1992), cert. denied, 506 U.S. 923 (1992). To demonstrate ineffectiveness for failing to present evidence, a movant must establish at the evidentiary hearing, among other things, that the attorney's failure to present the evidence was something other than reasonable trial strategy. State v. Pounders, 913 S.W.2d 901, 908 (Mo.App.S.D. 1996). Appellant has failed to prove that trial counsel's failure to present Matt Hutchison as a witness was anything other than trial strategy. As the motion court found (PCR.L.F.803-804), trial counsel had strategic reasons not to present Matt Hutchison as a witness because he was not a believable witness. Trial counsel's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness. Walls, 779 S.W.2d at 562. It was reasonable strategy not to present a witness that trial counsel felt was not believable.

Moreover, appellant was not prejudiced by Matt Hutchison's absence from the penalty phase. In order to establish prejudice, appellant must demonstrate that, but for, Hutchison's testimony, the result of the proceeding would have been different. Kenley, 952 S.W.2d at 266. Much of his testimony was cumulative to testimony and evidence already presented during the penalty phase. Appellant's mother and Bland testified about appellant's problems with alcohol and drugs (Tr.1921-1926;1893-1894). Bland's report, admitted into evidence, discussed not only appellant's alcohol and drug problems but also his alleged sexual abuse (Defendant's Exhibit A; Plaintiff's Exhibit 12). Appellant was not prejudiced and trial counsel cannot be held ineffective for failing to introduce cumulative evidence. Skillicorn, supra. Moreover, as the motion court found (PCR.L.F.803-804) and as discussed previously regarding appellant's mother and father, the family did not want the sexual abuse to be discussed at the trial and were not willing to discuss that information at trial.

Finally, his testimony could well have been detrimental to appellant and his theory during the penalty phase. As the motion court found (PCR.L.F.803-804), the fact that appellant had his brother had similar upbringings, were both involved in special education and both were addicted to alcohol and drugs, and yet his brother has not committed a double murder, unlike appellant, could have been exploited by the State. See State v. Simmons, 955 S.W.2d 752, 776 (Mo.banc 1997), cert. denied. 522 U.S. 1129 (1998) (for similar facts). If trial counsel had called Matt Hutchison during the penalty phase, the State could have highlighted the fact that Matt Hutchison had become a productive citizen while his brother had become a murderer. Appellant was not prejudiced by his brother's absence and the motion court was not clearly erroneous in denying his claim.

d) Marilyn Williamson

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

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

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

> Evidence of movant's boyhood in these respects would not have changed the outcome of the penalty phase. Ms. Williamson seemed to know very little about movant's activities once he moved to Missouri in 1994. Ms. Williamson could have provided marginally helpful information on direct examination. On cross-examination, the State would have brought out unflattering evidence of movant's drug involvement.

(PCR.Tr.802).

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

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

e) Shawna Alvery

Shawna Alvery did not testify at trial. During the evidentiary hearing, Alvery, appellant's cousin,

testified that appellant had been molested by his uncle in Iowa, that appellant was teased by others because he was overweight, and that she allowed appellant to babysit with her children (PCR.Tr.169-172). During cross-examination, Alvery admitted that she did not know how old appellant was, where his children lived, that he had committed violent acts in the past, that he had stabbed someone, that he sold drugs, and she admitted that she had not been around Brandon for awhile prior to the murders (PCR.Tr.175).

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

In denying appellant's claim regarding trial counsel's alleged ineffectiveness for failing to call Alvery, the motion court found that:

> Ms. Alvery's lack of knowledge about movant's activities could have been exploited by the State on cross-examination and diminished her credibility. Movant was not prejudiced by the absence of this testimony. Further, it is not at all clear that counsel was familiar with this witness' name. Counsel cannot be deemed ineffective for failing to call a witness about whom he was not notified. State v. Duckett, *supra*, 849 S.W.2d at 306.
>
> Moreover, in connection with the testimony of sexual abuse, movant's family did not want the fact that movant had been sexually abused by family members to be aired publicly at the time of movant's trial. That movant was teased about his weight and was a babysitter is relatively minor. In any event, this testimony came in through other

witnesses.

(PCR.L.F.802).

The motion court was not clearly erroneous in denying appellant's claim. Appellant was not prejudiced by counsel's alleged failure to call this witness as her testimony would have added little, if anything, to the penalty phase. As the motion court found (PCR.L.F.802), the fact that appellant was teased about his weight and that he babysat for her children was relatively minor. This evidence would not have affected the jury's determination of appellant's sentence. Moreover, appellant's case may have been damaged if Alvery would have testified because the State exploited Alvery's lack of knowledge about appellant's life and once again elicited evidence of appellant's prior stabbing and drug dealing. Appellant was not prejudiced by her absence during the penalty phase.

f) Jeff Beall

Jeff Beall did not testify at the trial. Beall, appellant's uncle, testified during the evidentiary hearing that he had attended special education just as appellant and he was also an alcoholic and methamphetamine user (PCR.Tr.156,162). He also testified about the family's move from Fillmore to Palmdale, California and that he had moved to the area himself (PCR.Tr.160). Beall testified that Palmdale was different than Fillmore because it was an urban area (PCR.Tr.160). He classified appellant as a follower (PCR.Tr.161). Beall admitted that he only knew Brandon "a little bit" while growing up (PCR.Tr.159).

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

In denying appellant's claim regarding Jeff Beall as a mitigation witness, the motion court found that:

Mr. Beall's background was irrelevant and would be irrelevant to any issues in a

penalty phase hearing for movant. Further, evidence that movant was in special education classes, and was a "follower" would not have changed the outcome of the penalty phase. Such information came in through other witnesses.

(PCR.L.F.802-803).

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

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

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

III.

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

Appellant claims on his fourth point on appeal that the motion court clearly erred in denying, after an evidentiary hearing, his claims that trial counsel was ineffective for calling Dr. Lester Bland, a psychologist, as an expert witness for the penalty phase (App.Br.65-72). Appellant alleges that Dr. Bland's testimony was inadequate for mitigation and that trial counsel should have presented expert testimony for mitigation purposes from:

1) Dr. Peterson, a psychiatrist;

2) Dr. Cowan, a neuropsychologist;

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

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

5) Dr. Alice Vlietstra, a child development psychologist

(App.Br.65-72).

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

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

Dr. Bland's evaluation of appellant took approximately three hours (Tr.1891). Dr. Bland took a complete life history of appellant and evaluated him (Tr.1880). Dr. Bland testified that he found appellant

to be cooperative and although slightly nervous, appellant answered every question posed by him (Tr.1881). Based on the educational background provided by appellant, Dr. Bland related that appellant had been in special education classes throughout elementary school and that appellant had dropped out of school in the tenth grade (Tr.1882). Based on various intellectual screening tests that measured appellant's verbal and language ability and his IQ, he found that appellant had an IQ of 78 (Tr.1882). According to Dr. Bland, appellant functioned in the bottom eight percent of the population (Tr.1883). Dr. Bland testified that appellant had some intellectual deficit (Tr.1882). He then administered the Wechsler Adult Intelligence Scale Revised, the verbal section, which revealed appellant's IQ to be 76 (Tr.1883). After administering another test, he found that appellant performed at the fourth-grade level for reading ability (Tr.1883). Dr. Bland testified that his personal, clinical observations of appellant were consistent with the test results (Tr.1884). He testified that appellant was competent to stand trial and that he did understand the charges against him (Tr.1885). Dr. Bland found that appellant suffered from borderline intellectual functioning and personality disorder, not otherwise specified (Tr.1887-1888). Dr. Bland testified about appellant's history with alcohol and drug use including an overdose of methamphetamine and appellant's use of alcohol and drugs the night of the murders (Tr.1894,1899). Dr. Bland also testified about appellant's version of the night of the murders, including appellant's assertion that he did not kill the Yates, and appellant's fear of his co-defendants, Lopez and Salazar (Tr.1904-1905).

Dr. Bland's report which was also admitted into evidence, discussed appellant's family life, including appellant's denial of any history of abuse or neglect by his family (Defendant's Exhibit A; Plaintiff's Exhibit 12). The report contained appellant's report of being diagnosed with Attention Deficit Hyperactivity Disorder, his diagnosis of "manic depressant" and appellant's alcohol problem (Defendant's

Exhibit A; Plaintiff's Exhibit 12). The report discussed his time in special education, appellant dropping out in tenth grade and appellant's problems in school (Defendant's Exhibit A; Plaintiff's Exhibit 12). Appellant also reported being sexually molested by a male family member at the age of 11 (Defendant's Exhibit A; Plaintiff's Exhibit 12). Appellant reported that he had a son, he tried to get a job, and reunite with his family (Defendant's Exhibit A; Plaintiff's Exhibit 12). The report discussed appellant's addiction to drugs and alcohol and his treatment with a social worker and psychiatrist (Defendant's Exhibit A; Plaintiff's Exhibit 12). Appellant also reported that he was not compliant with drug treatment (Defendant's Exhibit A; Plaintiff's Exhibit 12). The report also contained information about the move to Missouri and appellant's methamphetamine overdose (Defendant's Exhibit A; Plaintiff's Exhibit 12). Appellant reported that while in jail, he was prescribed Zantac and Elavil due to problems with sleeping and nightmares (Defendant's Exhibit A; Plaintiff's Exhibit 12). The report discussed appellant's two children and his common law wife (Defendant's Exhibit A; Plaintiff's Exhibit 12).

At the evidentiary hearing, trial counsel Mr. Cantin testified that he had used Dr. Bland as an expert before in cases regarding mental disease or defect, and he was confident that Dr. Bland was knowledgeable and would be a good witness before a jury (PCR.Tr.1026-1027). Mr. Cantin knew of other attorneys, both for the state and defense, who had used Dr. Bland and these attorneys had recommended the doctor to him (PCR.Tr.1027). Likewise, Mr. Crosby testified that he called a neuropsychologist that he knew and got Dr. Bland's name from that person (PCR.Tr.1069-1070). Mr. Crosby checked out Dr. Bland by calling other defense attorneys and prosecutors (PCR.Tr.1070). Mr. Cantin testified that after receiving Dr. Bland's report and having a conference with him, he did not feel a need to go further with other experts (PCR.Tr.1029-1030). He and Mr. Crosby discussed other experts and determined additional testing was

not needed (PCR.Tr.1029-1030). Mr. Cantin further testified that he did not see any manifestations of brain damage in movant, so he did not seek out the services of a neuropsychologist (PCR.Tr.1027). Significantly, Dr. Bland did not suggest other psychiatric care or treatment (PCR.Tr.1030). Trial counsel testified that, by presenting Dr. Bland's testimony and his report, they were able to present appellant's "story" without putting appellant on the stand to be subject to cross-examination (PCR.Tr.1082).

In denying appellant's claims that trial counsel acted unreasonably in hiring Dr. Bland, rather than hiring five additional experts, the motion court stated that trial counsel conducted a reasonable investigation in obtaining Dr. Bland and that Dr. Bland had an excellent reputation (PCR.L.F.788). Moreover, the motion court stated that trial counsel should not be required to find out-of-town experts when local experts are used and recommended to them by other attorneys and experts (PCR.L.F.788). The motion court found that presenting an expert "far from home" only amplifies the perception by the jury that the expert is a "hired gun" (PCR.L.F.788). Finally, the motion court found that trial counsel could not be ineffective for failing to shop for a more favorable expert and since there was no suggestion that appellant was mentally unstable, counsel could not be ineffective for failing to investigate appellant's mental condition further (PCR.L.F.788).

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

> "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's

> defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [citations omitted] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

Strickland, 466 U.S. at 689.

As the motion court found (PCR.L.F.788) and is evident from the record, by looking at trial counsel's actions at the time of trial, trial counsel reasonably decided to hire Dr. Bland as an expert for appellant's trial. Trial counsel contacted a neuropsychologist that they knew, they had used Dr. Bland in the past, and had consulted with other defense attorneys who had all recommended Dr. Bland. In making these inquiries, trial counsel made a reasonable strategic decision to hire Dr. Bland. Following Dr. Bland's report, and based on their knowledge of appellant, trial counsel determined that additional testing was not necessary. Through Dr. Bland, trial counsel was able to put on appellant's life history, his borderline functioning, his IQ, his history of attention deficit disorder and bipolar disorder, his drug and alcohol problems and his version of the murders. Trial counsel's actions in presenting penalty phase evidence was reasonable.

Even if it was proper to look in hindsight, appellant has not established that his counsel was ineffective for failing to call these experts. The motion court properly found that appellant was not prejudiced by the absence of these experts in the penalty phase (PCR.L.F.781-798). The motion court's made extensive findings regarding these experts including, among other things, that the experts were not credible, that since trial counsel had not heard of these experts, they could not be ineffective for failing to

hire them, trial counsel cannot be ineffective for failing to shop for a more favorable expert, and that much of their testimony mirrored that presented through Dr. Bland and the other penalty phase witnesses (PCR.L.F.781-798). The motion court's findings were not clearly erroneous.

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

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

IV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TRIAL COUNSEL'S REQUEST FOR A CONTINUANCE BECAUSE COUNSEL'S DECISION NOT TO RAISE THIS CLAIM WAS REASONABLE APPELLATE STRATEGY IN THAT IT HAD LITTLE CHANCE OF SUCCESS. MOREOVER, APPELLANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TRIAL COUNSEL'S REQUEST FOR A CONTINUANCE IS NOT COGNIZABLE IN A RULE 29.15 PROCEEDING AND APPELLANT DOES NOT ALLEGE ANY EXTRAORDINARY CIRCUMSTANCES WARRANTING REVIEW (Responds to appellant's Point V).

Appellant claims in his fifth point that the motion court clearly erred in denying his claims that the trial court abused its discretion in failing to grant trial counsel's motion for continuance and that his appellate counsel was ineffective for failing to assert this issue on appeal (App.Br.93). Appellant claims that there was a reasonable probability that this Court would have reversed, finding that counsel needed additional time to develop mitigating evidence (App.Br.93).

To the extent that appellant claims that the trial court erred in denying a continuance, his allegation of error is categorically unreviewable. As the motion court found (PCR.L.F.768-769), appellant's claim that the trial court abused its discretion is not cognizable in a Rule 29.15 proceeding. Onken v. State, 803 S.W.2d 139, 142 (Mo.App.W.D. 1991). Claims of trial error are generally not cognizable in a Rule 29.15

proceeding. State v. Redman, 916 S.W.2d 787, 793 (Mo.banc 1996). Rule 29.15 is not a substitute for a direct appeal. State v. Tolliver, 839 S.W.2d 296, 298 (Mo.banc 1992). As such, Rule 29.15 cannot be used to review issues which could have been raised on direct appeal. Id. Such claims are only cognizable where fundamental fairness requires it and, then, only in rare and exceptional circumstances. Id.

Appellant has alleged no rare and exceptional circumstances to warrant review here. He was aware of all of the facts prior to his direct appeal and has not alleged any circumstance which would have prohibited him from raising that issue there. Schneider, 787 S.W.2d at 721. Therefore, the motion court did not clearly err in denying his claim.

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

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

This Court's review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Ervin, 835 S.W.2d at 928. The motion court's findings are clearly erroneous if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. Id.

To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that

was so obvious from the record that a competent and effective appellate lawyer would have recognized it and asserted it. State v. Moss, 10 S.W.3d 508, 514 (Mo.banc 2000); State v. Edwards, 983 S.W.2d 520, 522 (Mo.banc 1999). The right to relief from ineffective assistance of appellate counsel follows the plain error rule in that no relief may be granted unless the error that was not raised on appeal was so substantial as to amount to a manifest injustice. Moss, supra, at 515.

Here, counsel testified that he believed that he would not have raised the continuance issue because the abuse of discretion standard is a difficult standard to overcome (PCR.L.F.628-629). Counsel "winnowed" out this claim, as it had little chance of success. State v. Shive, 784 S.W.2d 326, 328 (Mo.App.S.D. 1990), quoting Mallett v. State, 769 S.W.2d 77, 83-84 (Mo.banc 1989), cert. denied, 494 U.S. 1009 (1990). This was a reasonable strategy.

Moreover, appellant was not prejudiced. The decision to grant or deny a continuance is within the sound discretion of the trial court. State v. Middleton, 995 S.W.2d 443, 464-465 (Mo.banc 1999), cert. denied, 528 U.S. 1054 (1999). To receive relief on this issue, appellant must make "a very strong showing of abuse and prejudice." Id. quoting, State v. Taylor, 944 S.W.2d 925, 930 (Mo.banc 1997). Inadequate preparation does not justify a continuance where counsel had ample opportunity to prepare. Id.; State v. Chambers, 891 S.W.2d at 100-101; State v. Wise, 879 S.W.2d 494, 519 (Mo.banc 1994), cert. denied, 513 U.S. 1093 (1995).

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

As the record shows, appellant had ample opportunity to investigate and did not point to any facts which would necessitate a continuance. See Chambers, supra. (counsel had approximately ten months to prepare); Middleton, supra. (counsel had approximately sixteen months to prepare); State v. Griffin, 848 S.W.2d 464, 468 (Mo.banc 1993) (counsel had eight months to prepare). Because the trial court did not abuse its discretion in denying the continuance, appellate counsel was not ineffective for failing to brief this issue.

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

Appellant asserts that the "facts cried out for a continuance" (App.Br.96). The facts to which appellant points are his various assertions that trial counsel was ineffective for failing to present additional evidence (App.Br.96). As discussed, these claims have no merit. These facts were neither before the trial court or before appellate counsel when they made their decisions. The facts that were before the trial court, before appellate counsel, and the facts that would have been before this Court had the issue been raised, did not establish prejudice to appellant. Trial counsel had adequate time to prepare for trial and appellate counsel was not ineffective for failing to raise this nonmeritorious issue.

This point must fail.

V.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT VARIOUS EVIDENCE AND TESTIMONY OF CO-DEFENDANT, FREDDY LOPEZ'S CONTROL AND DOMINATION OVER HIM BECAUSE APPELLANT HAS FAILED TO ESTABLISH THAT IT WAS NOT REASONABLE TRIAL STRATEGY NOT TO PRESENT MUCH OF THIS EVIDENCE IN THAT APPELLANT DID NOT ASK TRIAL COUNSEL IF THEY HAD A STRATEGIC REASON NOT TO PRESENT SOME OF THIS EVIDENCE AND APPELLANT WAS NOT PREJUDICED IN THAT MUCH OF THIS EVIDENCE WAS IRRELEVANT OR DAMAGING TO HIS THEORY AT TRIAL. (Responds to appellant's Point VI).

Appellant claims that the motion court was clearly erroneous in denying, after an evidentiary hearing, his claim that his trial counsel was ineffective for failing to investigate and call as witnesses during the penalty phase, Frankie Young, Terry Farris, Brandy Kulow, Marcella Hillhouse and Phillip Reidle to testify about Freddy Lopez's alleged domination and control over appellant (App.Br.102). Appellant contends that this evidence would have refuted the State's theory that appellant was in charge and made the decision to kill the Yates, which would have supported a life sentence (App.Br.102).

1) Frankie Young

Frankie Young testified during the penalty phase of the trial for appellant and also testified as a State's witness during the guilt phase (Tr.1907). During the penalty phase, Young testified that her and appellant were close friends and she had known him for about 3½ years (Tr.1907-1909). Young also testified that appellant had stayed at her residence on occasion (Tr.1909). Young stated that appellant helped her by baby-sitting for her children, mowing the lawn, washing dishes, cooking, and burning the trash (Tr.1910-1911). Young stated that appellant was part of the family and that he never treated her with disrespect (Tr.1910-1911). Young stated she never felt threatened to have appellant with her family (Tr.1911).

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

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

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

In denying appellant's claim that trial counsel was ineffective for failing to investigate and question Young, the motion court found, in relevant part, that:

> Movant ignores the fact that evidence about Lopez's gang activity was presented at trial (Tr.1211-1217). While Ms. Young described movant as a "follower," she also admitted movant had no car and thus would go with Lopez when offered rides. She was not aware of other decisions made by Lopez. Even assuming that movant was a "follower," movant was not prejudiced by the failure to present such evidence because same is refuted by the facts of the case which showed that movant decided that the Yates had to be killed (Tr.1131), hid the guns (Tr.1139-1140), burned evidence (Tr.1552), showered off blood (Tr.1142-43, 1510-1511, 1526, 1540) and fled the State of Missouri to California (Tr.1259, 1446, 1449, 1716, 1719-1721).
>
> One of movant's trial attorneys, Mr. William Crosby testified that Ms. Young had been deposed. Movant has failed to show that the decision not to have the witness testify as movant suggests was not reasonable trial strategy. Therefore, this claim is denied. State

v. Tokar, 918 S.W.2d 753, 768 (Mo.banc 1996).

(PCR.Tr.756).

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

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

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

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

2) Terry Farris

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

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

In denying appellant's claim that Terry Farris should have been called, the motion court found that Farris's testimony that Lopez sold drugs would have been cumulative to testimony provided at trial by Lopez and trial counsel cannot be ineffective for failing to present cumulative evidence and that appellant failed to prove by a preponderance of the evidence that he was prejudiced by the failure to call Farris (PCR.L.F.757).

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

Moreover, there were reasonable strategic reasons not to call Farris. First, Farris's testimony that Lopez sold drugs was cumulative to Lopez's own testimony at trial, as the motion court found (PCR.L.F.757). Second, Farris's testimony as elicited on cross-examination would have actually prejudiced appellant's theory that he was under the control of Lopez. Farris stated that Lopez did not have complete control over appellant and appellant made his own decisions. This testimony would have benefitted the State's theory that appellant made the decision to kill the Yates. Finally, the mere fact that Lopez made the decisions of what appellant and Lopez would do and where they would go would have added nothing to the theory that appellant was under the domination and control of Lopez. This would not have changed the balance of the aggravating and mitigating circumstances. Kenley, supra. Appellant has

not established that it was not reasonable strategy not to call Farris as a witness, nor has he established that he was prejudiced by Farris's absence.

3) Brandy Kulow

With the exception of threats and violence by Salazar, nothing from Kulow's testimony at the evidentiary hearing was pled in his post-conviction motion (PCR.L.F.25-26,103). As recognized repeatedly by this Court, post-conviction pleadings cannot be amended by evidence presented during the evidentiary hearing. Harris, 870 S.W.2d at 815; State v. Shafer, 969 S.W.2d 719, 738 (Mo.banc 1998), cert. denied, 522 U.S. 969 (1998). Appellant's post-conviction motion only alleged that Kulow would testify that Salazar came to her house and threatened to shoot people (PCR.L.F.25-26). Appellant never alleged that Kulow would testify regarding Lopez, her fear or lack thereof of appellant, or as appellant now alleges on appeal, that appellant was dominated by Lopez. Appellant cannot now change his theory on appeal regarding Kulow's testimony and the information she should have provided to defense counsel. State v. Perry, 820 S.W.2d 570, 575 (Mo.App.E.D. 1991) (where issue is not raised in motion, evidence relating to claim now raised on appeal is irrelevant).

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

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

4) Marcella Hillhouse

Hillhouse testified at the evidentiary hearing that she had known appellant for approximately a year prior to the murders (PCR.Tr.97). Hillhouse testified about an incident at the Hoberg Bridge with appellant and Lopez (PCR.Tr.99). According to Hillhouse, appellant and Lopez came to her house, picked her up and took her to the bridge (PCR.Tr.100). They had an argument about some money that was taken out of appellant's wallet (PCR.Tr.100). At the bridge, Lopez got out of the car on three occasions, wanting to know if Hillhouse took the money (PCR.Tr.101). Lopez then told appellant to shoot her (PCR.Tr.101). Appellant refused, gave the gun back to Lopez and then they got in the car and drove Hillhouse home (PCR.Tr.101). Lopez had told appellant three times to shoot her while at the Hoberg Bridge (PCR.Tr.119). Hillhouse stated that she had told her mother about the incident at the bridge but had not told anyone else until she was questioned for the post-conviction proceeding (PCR.Tr.120-121). During cross-examination, Hillhouse stated that she had purchased drugs from Lopez (PCR.Tr.112).

Defense counsel testified that they had never heard of Hillhouse's name prior to seeing the pleadings in the post-conviction motion (PCR.Tr.1015,1065). Cantin was also unaware of an incident where Lopez told appellant to shoot Hillhouse (PCR.Tr.1017). Cantin admitted that incident could have been another piece of evidence showing appellant with a weapon (PCR.Tr.1018). Cantin also stated that the incident could have shown that appellant was making his own decisions and was not under the control of Lopez (PCR.Tr.1018). Crosby stated that if he had known about the incident at the bridge, he would have wanted to investigate it, but he did not know if he would have wanted to present the evidence because it had "haunting similarities" to the case that was tried (PCR.Tr.1067). Crosby stated that the information could have hurt or helped them (PCR.Tr.1067).

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

The motion court was not clearly erroneous in denying appellant's claim. First, trial counsel testified that they had no knowledge of Hillhouse. Trial counsel cannot be deemed ineffective for failing to call a witness that they have no knowledge of. Twenter, 818 S.W.2d at 639. Attorneys are not expected to be clairvoyant and cannot investigate something that they have no knowledge of. See McDonald v. State, 758 S.W.2d 101, 105 (Mo.App.E.D. 1988); Nave v. State, 757 S.W.2d 249, 251 (Mo.App.E.D. 1988), cert. denied, 489 U.S. 1059 (1989). Moreover, appellant has failed to allege or prove how reasonable investigation would have uncovered Hillhouse and her testimony. Appellant never told his counsel about the incident and according to Hillhouse she only told her mother and the investigator for the post conviction hearing. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691. Trial counsel cannot be clairvoyant and could not possibly have asked appellant to identify witnesses to testify about an event that they had no knowledge of. Moreover, appellant cannot establish that he was prejudiced by Hillhouse's absence. As the motion court found (PCR.L.F.757-758), Hillhouse's testimony actually would have destroyed the defense's theory. The Hoberg incident showed that appellant had control and made decisions for himself, even when Lopez asked appellant to shoot Hillhouse three times. Contrary to appellant's assertion, this evidence would not have aided the defense. Appellant was not dominated by Lopez. Hillhouse's testimony was not mitigating evidence but rather disproved the defense's theory.

5) Philip Reidle

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

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

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

The motion court's findings are not clearly erroneous. First, as the motion court found (PCR.L.F.760), trial counsel cannot be ineffective for failing to present testimony that they have no knowledge of. Appellant fails to plead or make any showing of how a reasonable investigation would have uncovered Reidle or what further investigation trial counsel should have done. Morrow v. State, 21 S.W.3d 819, 824 (Mo.banc 2000), cert. denied, 121 S.Ct. 1140 (2001). Furthermore, trial counsel cannot be held ineffective for failing to present cumulative evidence. Skillicorn, 22 S.W.3d at 683-686. The pathologist testified that the Yates' had drugs in their systems. Reidle's testimony would have been merely cumulative.

Moreover, appellant was not prejudiced by Reidle's absence. Reidle's testimony consisted merely

of the fact that the Yates used drugs (PCR.Tr.90-93). He knew nothing of the murder or nothing about the Yates after 1992 (PCR.Tr.90-93). His testimony would not have had any effect on the jury's sentence determination.

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

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

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

VI.

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

Appellant claims that the motion court was clearly erroneous in denying appellant's claim that his trial counsel was ineffective for failing to object and preserve various issues for appeal (App.Br.116).

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

Since appellant also alleges that trial counsel was ineffective for failing to object to the allegedly

improper evidence and allegedly improper comments by the prosecution, on the theory that such objections would have been sustained had they been made, these claims are discussed below (App.Br.116).

1) John Galvan, State Penalty Witness

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

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

(PCR.L.F.38).

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

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

concerned that the incident might affect his probation and because he had been threatened by appellant (Tr.1469,1472,1853). Galvan stated that he had not gone to the hospital until approximately two days after the incident and at that time he did not report that he had been stabbed, instead telling hospital personnel that he had fallen against a sharp object (Tr.1471,1854). On cross-examination, appellant attempted to establish that he had stabbed Galvan because Galvan was beating up his girlfriend, Sandra Rowe (Tr.1855-1858).

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

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

In denying appellant's claim that trial counsel was ineffective for failing to ask for a continuance to investigate Galvan, the motion court found that appellant had failed to prove prejudice because he failed to call Roe and Kerry Lopez at the evidentiary hearing (PCR.L.F.766-767). Therefore, the motion court

found, it was impossible to know what information these witnesses may have provided (PCR.L.F.766-767).

This Court's review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Ervin, 835 S.W.2d 905. To prove Strickland prejudice, appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. Kenley, 952 S.W.2d at 266.

The allegations contained in a post-conviction motion are not self-proving and a movant has the burden of proving his asserted grounds for relief by a preponderance of the evidence. State v. Silvey, 894 S.W.2d 662, 671 (Mo.banc 1995); Supreme Court Rule 29.15(i). "A hearing court is not clearly erroneous in refusing to grant relief on an issue which is not supported by evidence at the evidentiary hearing." Silvey, supra.

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

Now, on appeal, appellant alleges that Hillhouse's testimony in an offer of proof established the prejudice that he suffered from trial counsel's failure to request a continuance to investigate the Galvan

stabbing (App.Br.122). During an offer of proof, Hillhouse testified that she was present during the stabbing and that appellant stabbed Galvan after Lopez told him too (PCR.Tr.104-105). Hillhouse also stated that appellant felt bad and stayed to help nurse Galvan's wound (PCR.Tr.106).

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

Gratuitously, respondent notes that even if Hillhouse's testimony could be considered, appellant has not established that he was prejudiced by counsel's failure to request a continuance and investigate the stabbing. As this Court stated in the direct appeal, "[t]he level of aggravating circumstances in this case overcomes any reasonable probability that the outcome of the sentencing phase would have been any different had Galvan's testimony been kept out." Hutchison, 957 S.W.2d at 764. Therefore, if the aggravating circumstances were so overwhelming that the sentencing would have been the same had Galvan not testified at all, it follows that any investigation and presentation of witnesses to "soften the blow" of appellant stabbing Galvan would not have shifted the balance of the aggravating and mitigating circumstances, thereby warranting a life sentence. Therefore, appellant's claim must fail.

2) Opening Statement

Appellant also alleges that trial counsel was ineffective for failing to object during the State's opening statement when the prosecutor stated that "Ronald Yates was sprawled out like Christ crucified on the cross on that roadway" (App.Br.119; PCR.L.F.14).

This Court on direct appeal found that no manifest injustice or miscarriage of justice resulted from

this statement. Hutchison, 957 S.W.2d at 765.

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

The motion court was not clearly erroneous in denying appellant's claim. First, appellant cannot establish Strickland prejudice. It is well settled that a finding of no "plain error" on direct appeal forecloses a movant from relitigating the same issue in a post-conviction motion under the guise of "ineffective assistance of counsel." State v. Davis, 936 S.W.2d 838, 842 (Mo.App.W.D. 1996); State v. Clark, 913 S.W.2d 399, 406 (Mo.App.W.D. 1996); State v. Anderson, 862 S.W.2d 425, 437 (Mo.App.E.D. 1993). The finding of no manifest injustice under the "plain error" standard on direct appeal serves to establish a finding of no prejudice under the test of ineffective assistance of counsel enunciated under Strickland supra. See also Sidebottom v. State, 781 S.W.2d 791, 796-797 (Mo.banc 1989), cert. denied 497 U.S. 1032 (1990). Since this Court found no manifest injustice resulted from this statement, appellant cannot relitigate this issue in a post-conviction proceeding.

Second, respondent gratuitously observes that as the motion court found, trial counsel had reasonable strategic reasons not to object to this statement (PCR.L.F.762). During the evidentiary hearing, trial counsel Cantin testified that he did not generally object during the State's opening statement unless it got too far out of line, and that he did not want to give more attention to the statement by objecting (PCR.Tr.944). Cantin stated that it was just the beginning of the trial, only five minutes in, and he did not want to engender sympathy for the prosecutor and victim (PCR.Tr.946). These are all reasonable strategic reasons for not objecting to this statement.

Appellant cannot relitigate this issue after a finding of no manifest injustice on direct appeal. Therefore, the motion court's findings were not clearly erroneous and appellant's claim must fail.

3) Closing Argument–Destroying the Shoes

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

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

(Tr.1815). Appellant alleges that the above statements by prosecutor referred to Troy Evans, who was dead at the time of trial, and that the State implied that appellant had "destroyed" Troy Evans (App.Br.119; PCR.L.F.41).

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

The motion court was not clearly erroneous in denying appellant's claim. Review of a Rule 29.15 judgment begins with the strong presumption that counsel is competent and movant has the "heavy burden" of proving counsel's ineffectiveness by a preponderance of the evidence. Leisure v. State, 828 S.W.2d at 874; Amrine v. State, 785 S.W.2d 531, 534 (Mo.banc 1990). To make a valid ineffective assistance of

counsel claim, defendant must show both that his counsel failed to use the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, and that the defendant was thereby prejudiced. White v. State, 939 S.W.2d 887, 893 (Mo.banc 1997); Strickland, 466 U.S. at 687.

The mere failure to object does not constitute ineffective assistance of counsel. State v. Lumpkin, 850 S.W.2d 388 (Mo.App.W.D. 1993). Counsel's failure to make a useless or meritless objection is not grounds for an ineffective assistance of counsel claim. Strickland, supra, at 687. There is a presumption that the failure to object was a strategic choice by competent counsel. Tokar, 918 S.W.2d at 768.

It is presumed that it was reasonable trial strategy for trial counsel to not object to the State's closing argument. Appellant did not question his trial counsel on why he did not object to the statement[4]. In order to overcome the presumption of reasonable trial strategy, evidence must be presented. Without presenting any evidence on this claim, appellant can offer no evidence to overcome that presumption.

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

[4]Appellant claims that the motion court incorrectly found that he did not question trial counsel regarding this claim. Appellant cites to page 966 of the evidentiary hearing. However, upon inspection of this cite, there is no questioning about this statement in closing argument.

what would link all the defendants to the crime scene.

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

4) Closing Argument--Lopez Had No Deal

Appellant alleges that trial counsel was ineffective for failing to object during the State's closing argument when the prosecutor stated that Freddy Lopez did not have an agreement with the State and was still charged with two counts of first degree murder (App.Br.119-120). Relying on his allegation in his motion that the State had a plea agreement with Freddy Lopez for his testimony, appellant alleges that trial counsel knew or should have known about the alleged deal and therefore, the State improperly argued to the jury that there was no plea agreement (App.Br.124).

Before trial, defense counsel requested the State to disclose any deals with Lopez (Tr.141). The State informed trial counsel that they had discussions with Lopez's attorney and that they might make a deal if he testified truthfully but they had not "struck the final deal" (Tr.141). The State had not decided whether to have Lopez testify (Tr.142). The State then stated that if Lopez did a good job as a witness, that they were probably going to recommend second degree murder on him with a range of punishment and a term of thirty years (Tr.142). The State also agreed that if a deal was reached, they would give defense counsel notice (Tr.142).

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

statement (PCR.Tr.993).

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

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

5) Cross-examination of Dr. Bland

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

During the penalty phase, defense counsel called Dr. Bland to testify (Tr.1876). Bland testified during direct examination that he had been hired by defense counsel to evaluate issues such as competency, responsibility, presence of mental disease or defect, and mental status (Tr.1880). Defense counsel asked

Dr. Bland about his evaluation of appellant to determine competency and whether appellant was in fact, competent to stand trial and understand the charges against him (Tr.1884-1885). Dr. Bland's report was also admitted into evidence (Tr.1890).

During cross-examination, the State asked Dr. Bland if the results of any of the tests performed on appellant would lead him to believe that appellant was legally relieved of his responsibility for his actions (Tr.1902). Dr. Bland stated that based on the tests, appellant could not be legally relieved of his responsibility for his actions and that in his opinion, appellant understood the charges against him, appellant was aware and understood what he was doing on January 1, 1996, and he was capable and competent to stand trial (Tr.1903).

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

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

The mere failure to object does not constitute ineffective assistance of counsel. State v. Lumpkin, 850 S.W.2d 388 (Mo.App.W.D. 1993). Counsel's failure to make a useless or meritless objection is not

grounds for an ineffective assistance of counsel claim. Strickland, supra, at 687. There is a presumption that the failure to object was a strategic choice by competent counsel. Tokar, 918 S.W.2d at 768. These strategic choices by trial counsel are virtually unchallengeable. Strickland, supra, at 690-691.

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

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

VII.

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

Appellant claims that the motion court clearly erred in denying his claim that this Court's proportionality review is unconstitutional and appellant's sentence is disproportionate (App.Br.126). Specifically, appellant alleges that this Court fails to consider codefendants' sentences; that this Court's database does not comply with §565.035.6, RSMo. 1994; that this Court fails to consider all similar cases as required by §565.035.3(3), RSMo. 1994; and that appellant did not have adequate notice and opportunity to be heard (App.Br.126).

In denying appellant's claim, the motion court found, in relevant part, that:

> Movant claims that the Missouri Supreme Court proportionality review is inadequate, relying on Harris v. Blodgett, 853 F. Supp. 1239, (W.D. Wash. 1994). The Missouri Supreme Court has considered Harris v. Blodgett and the claim movant advances here and has rejected same. State v. Clay, 975 S.W.2d 121, 146 (Mo.banc 1998).

(PCR.L.F.768).

The motion court was not clearly erroneous in denying this claim. First, appellant argues that this Court fails to consider co-defendant's sentences when determining proportionality. This Court has repeatedly held that co-defendant's pleas, convictions for other crimes other than first degree murder, and sentences are not considered in proportionality review. Clay, 975 S.W.2d at 146; State v. Rousan, 961 S.W.2d 831, 854 (Mo.banc 1998), cert. denied, 524 U.S. 961 (1998).

Second, appellant claims that this Court's database does not comply with §565.035.6 and is inadequate to properly conduct proportionality review (App.Br.126). This claim has been rejected as well. State v. Parker, 886 S.W.2d 908, 933 (Mo.banc 1994), cert. denied, 115 S.Ct. 1827 (1995). Appellant also argues that this Court's proportionality review denies him his due process right to meaningful notice of the procedures to be followed and a meaningful opportunity to be heard (App.Br.126). This claim has also been rejected. State v. Weaver, 912 S.W.2d 499, 522 (Mo.banc 1995), cert. denied, 117 S.Ct. 153 (1996); Clay, supra; State v. Smith, 32 S.W.3d 532, 559 (Mo.banc 2000), cert. denied, __ U.S. __ (February 26, 2001). In sum, "[t]he Court's method of proportionality review does not violate [appellant's] due process rights, his right to a fair trial or his right to be free from cruel and unusual punishment under the state or federal constitutions." Weaver, supra.

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

VIII.

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

Appellant claims on his ninth point on appeal that the motion court was clearly erroneous in denying his claim that trial counsel was ineffective for failing to provide to the trial court, Dr. Wiener's study regarding jury comprehension of penalty phase instructions in their objections regarding penalty phase instructions (App.Br.131). Appellant alleges that it was necessary for trial counsel to include Dr. Wiener's study which allegedly proves that jurors' comprehension is low, the instructions are redundant, complex, and ambiguous (App.Br.131).

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

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

pursue further objections to the instructions when they would have been meritless. (PCR.L.F.761).

The motion court was not clearly erroneous in denying appellant's claim. Trial counsel cannot be deemed ineffective for failing to raise a meritless issue. Clay, 975 S.W.2d at 136. This Court on numerous occasions has found that the MAI-CR instructions are constitutional and Dr. Wiener's study should be discounted. Lyons v. State, 39 S.W.3d 32, 43-44 (Mo.banc 2001); State v. Deck, 944 S.W.2d 527, 542-543 (Mo.banc 1999), cert. denied, 528 U.S. 1009 (1999); State v. Jones, 979 S.W.2d 171, 181 (Mo.banc 1998), cert. denied, 525 U.S. 1112 (1999) (Counsel's failure to object to possible jury misunderstanding of instructions does not support claims of ineffective assistance of counsel).

Counsel's failure to more exhaustively pursue their objections to the penalty phase instructions by including Dr. Wiener's study would not have been successful and their objections would have had not merit. Counsel's failure to object to the juror's possible misunderstanding of the instructions based on Dr. Wiener's study does not support a claim of ineffective assistance of counsel.

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

IX.

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

Appellant claims on his final point on appeal that the motion court was clearly erroneous in denying his claim that the Public Defender failed to provide reasonable and necessary litigation expenses to prepare for his post-conviction proceeding (App.Br.135). Appellant relies on Supreme Court Rule 29.16(d) which states that the State Public Defender shall provide post-conviction counsel with reasonable and necessary litigation expenses.

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

reasonable and necessary litigation expenses (PCR.Tr.99).

The motion court denied this claim, finding that:

> Movant's claim, in essence, is that the State Public Defender denied him effective assistance of postconviction counsel by failing to unquestioningly provide the money requested. Claims of ineffective assistance of postconviction counsel, are categorically unreviewable. State v. Hunter, 840 S.W.2d 850, 871 (Mo.banc 1992); State v. Ervin, 835 S.W.2d 905, 928-929 (Mo.banc 1992); Pollard v. State, 807 S.W.2d 498, 502 (Mo.banc 1991).
>
> Finally, this Court notes that movant called many witnesses during more than a week of testimony, including several highly paid expert witnesses. Specifically, movant called the following experts: Drs. Peterson, Cowan, O'Donell, Vlietstra, and Ms. Teri Burns. Several of these witnesses testified about the fees they charged in this case. Testimony at the hearing showed that, in total, postconviction counsel spent over $27,000 on expert testimony alone in support of movant's postconviction motion. Movant cannot credibly suggest that "reasonable and necessary" litigation expenses were withheld.

(PCR.L.F.808).

The motion court was not clearly erroneous in denying appellant's claim. Appellant's claim is essentially that he did not receive effective assistance of post-conviction counsel. There is no constitutional right to counsel in a post-conviction proceeding and therefore, no right to effective assistance of post-conviction counsel. Clay, 975 S.W.2d at 140 (appellant's claim that he was denied funds to pay witness fees, from State Public Defender, to accompany subpoenas for witnesses, denied as there is no

constitutional right to counsel in a post-conviction proceeding); State v. Hunter, 840 S.W.2d 850, 871 (Mo.banc 1991), cert. denied 509 U.S. 926 (1993); Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Pennsylvania v. Finley, 481 U.S. 551, 557, 95 L.Ed.2d 539, 107 S.Ct.1990 (1987). Therefore, there can be no claim of ineffective assistance of post-conviction counsel. Hunter, supra. Claims of ineffective assistance of post-conviction counsel are categorically unreviewable. Id.

Appellant alleges that the motion court's finding that claims of ineffective assistance of postconviction counsel are categorically unreviewable is erroneous because no cases have held that since the enactment of Rule 29.16 which provides minimum standards for death penalty post-conviction counsel (App.Br.136). Appellant's assertion is incorrect. Supreme Court Rule 29.16 became effective July1, 1997. In State v. Owsley, 959 S.W.2d 789, 799 (Mo.banc 1997), opinion dated December 23, 1997, and Clay, supra, opinion dated August 25, 1998, this Court again held that claims of ineffective assistance of post-conviction counsel claims are categorically unreviewable. Rule 29.16 provides guidelines and minimum requirements for post-conviction counsel but it does not by its terms create a guarantee or entitlement that post-conviction counsel will provide "effective assistance."

Notably, appellant has made no effort to specify in his amended motion or now on appeal what additional investigation he claims was needed. If he truly believed that more investigation was "reasonable and necessary" for his post-conviction proceeding, he could have sought to enforce Supreme Court Rule 29.16(d) by means of an extraordinary writ. Appellant failed to do so.

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

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

CONCLUSION

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

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHANIE MORRELL
Assistant Attorney General
Missouri Bar No. 52231

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of June, 2001.

Melinda Pendergraph
Office of State Public Defender
3402 Buttonwood
Columbia, MO 65201

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHANIE MORRELL
Assistant Attorney General
Missouri Bar No. 52231

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent

No. 83106

_____

IN THE
MISSOURI SUPREME COURT

_____

BRANDON HUTCHISON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Lawrence County, Missouri
The Honorable J. Edward Sweeney, Judge

_____

RESPONDENT'S APPENDIX

_____

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHANIE MORRELL
Assistant Attorney General
Missouri Bar No. 52231