No. SC85119

IN THE MISSOURI SUPREME COURT

LEON TAYLOR,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Jackson County, Mo.
Sixteenth Judicial Circuit, Division 10
The Honorable Charles Atwell, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Rule 29.15 in the Circuit Court of Jackson County. The sentence sought to be vacated was for death and it pertained to the appellant's conviction for murder in the first degree, §565.020, RSMo 2000. This Court has jurisdiction over this appeal because of its order effective July 1, 1988, that all death penalty post-conviction appeals be heard here, pursuant to this Court's power under Rule 83.06.

STATEMENT OF FACTS

A. The appellant's first trial, post-conviction relief action and appeal

The appellant, Leon Taylor, was charged by indictment on May 6, 1994, with murder in the first degree, robbery in the first degree, assault in the first degree, and three counts of armed criminal action (L.F. 11-14).[1] This cause went to trial before a jury on February 27, 1995, in the Jackson County Circuit Court, the Honorable William F. Mauer presiding (Tr. 2).

[1]**The record on appeal cited in this brief consists of the transcript from the appellant's first trial ("Tr."), the legal file from appellant's first trial ("L.F."), the transcript from appellant's new penalty-phase trial ("P.Tr."), the legal file from appellant's new penalty-phase trial ("P.L.F."), the transcript from the appellant's new post-conviction relief action ("P.C.Tr."), the legal file from appellant's new post-conviction relief action ("P.C.L.F."), and various exhibits as designated.**

At the conclusion of the penalty phase, the jury was unable to decide on punishment (Tr. 1554). The trial court sentenced the appellant to death for the murder and imposed sentences of life in prison plus 315 years for the other convictions (Tr. 1583-1585; L.F. 781-785).

The appellant filed a Rule 29.15 motion, and the appeal from the denial of that motion was consolidated with his direct appeal. State v. Taylor, 944 **S.W.2d** 925, 940 (Mo.banc 1997). In the appellant's consolidated appeal, this Court affirmed appellant's convictions and sentences, except for the sentence of death. This Court remanded this cause for a new penalty phase for the conviction of murder based on an improper closing argument by the prosecutor. Id. This Court affirmed the denial of the appellant's Rule 29.15 motion.

B. The appellant's new penalty-phase trial

1. State's evidence

On November 19, 1998, the new penalty phase began with the Honorable Charles E. Atwell presiding (P.Tr. 177). At that trial, the following was adduced by the State: On April 14, 1994, Willie and Tina Owens, who were brother and sister, were drinking and smoking marijuana at the apartment where they lived (P.Tr. 1697).[2] Sometime between 6:00 and 7:00 p.m., the appellant, who was their half-brother, joined the party (P.Tr. 1697). At some point, the appellant, Willie and Tina went out riding in Tina's car, discussing the possibility of robbing a drug dealer (P.Tr. 1698-1699; State's Exhibit 45). The appellant, however, suggested a gas

[2]**Respondent will refer to Willie and Tina Owens by their first names because they have the same last names.**

station in Independence where he knew there would only be one person working (P.Tr. 1699). They drove to that gas station (P.Tr. 1699; State's Exhibit 45). While at the gas station, the appellant and Willie used the restroom (P.Tr. 1700, 1913-1914). When Willie returned, the appellant was standing outside and Tina was coming out of the gas station after paying for some gas (P.Tr. 1700). The trio left, but only a few blocks away from the gas station, the oil light came on and they turned around and went back (P.Tr. 1701; State's Exhibit 45). Willie woke up Tina, who had already dozed off, and asked for money to pay for the oil (P.Tr. 1702). She gave him a one dollar bill and four quarters, and Willie went inside to get the oil (P.Tr. 1702). The only people in the store were Robert Newton, who was fifty-three years old, and his eight-year-old stepdaughter, Sarah Yates (P.Tr. 1898-1899, 1914).

Willie, Mr. Newton and Sarah went to the back room to get the oil, and while they were there, the appellant came inside and stated that they needed a different weight of oil (P.Tr. 1702). The appellant was standing with one arm behind his back, and after asking for the oil, he pulled his arm around and was holding a 9 millimeter semi-automatic pistol (P.Tr. 1702, 1915). Mr. Newton asked the appellant not to shoot because he had his little girl there and he did not want her to have to see him dead (P.Tr. 1702-1703, 1915). The appellant told Mr. Newton to get the money or he would shoot (P.Tr. 1703; State's Exhibit 45). Mr. Newton complied and placed the money in the bag (State's Exhibit 45). Willie stated that he did not want anything to do with this and placed the money Tina had given him on the counter (P.Tr. 1703; State's Exhibit 31). However, Willie took the money from Mr. Newton and returned to the car, leaving the appellant inside the gas station (P.Tr. 1703, 1916; State's Exhibit 45).

The appellant asked Mr. Newton if there was a back room and the three of them went there (P.Tr. 1916). The appellant stood in the door frame facing Mr. Newton, and asked if there was a lock on the door (P.Tr. 1917; State's Exhibit 45). Sarah turned away to look for another way out of the room, and while she was looking away, she heard a loud boom (P.Tr. 1917; State's Exhibit 45). When Sarah turned back, her father was on the floor (P.Tr. 1917). The appellant then turned to Sarah and pointed the gun at her (P.Tr. 1917). Sarah raised her hands and pleaded for the appellant not to shoot her, offering to do anything he wanted (P.Tr. 1918; State's Exhibit 45). She did not hear the appellant's response because she still could not hear anything after the noise of the gun (P.Tr. 1918). However, the appellant pulled the trigger of the pistol while it was pointed at Sarah, but it did not fire (P.Tr. 1917-1918). The appellant looked at the gun in a "funny" way and then left, locking the door (P.Tr. 1918; State's Exhibit 45).

The appellant came out of the store, pulling on the gun's slide and stating, "[t]he motherfucker jammed" (P.Tr. 1704-1705). The appellant reported that he had shot the man in the head, and then said he had to go get the little girl (P.Tr. 1705). The appellant asked if there was another gun in the car, but the others wanted to get away, so they drove off (P.Tr. 1704-1705). As they were driving away, the appellant said that the little girl had been standing there "[w]atching her daddy bleed," and then put her hands in the air offering to do anything he wanted (P.Tr. 1705). The appellant said that Sarah's pleading for her life aggravated him, and stated that he should have choked her (P.Tr. 1707).

Meanwhile, Sarah prayed by her father's body, and then left the room a few minutes later (P.Tr. 1918). Sarah called 911 and then hid under a table (P.Tr. 1919).

Officer Halsey, of the Independence Police Department, arrived at approximately 9:58 p.m., and found Sarah on the telephone (P.Tr. 1746-1747). Officer Halsey found Mr. Newton lying on his back on the floor with massive head trauma (P.Tr. 1749; State's Exhibits 13, 14, 16 & 30). The victim died from his head wound (P.Tr. 1773).

Several days after the murder, Officer Kenneth Cavanah, of the Independence Police Department, received a TIPS hot line implicating the appellant (P.Tr. 1868-1869). The appellant was arrested the next day at his home in Kansas City and, after informing the appellant of his Miranda rights, Officer Cavanah drove the appellant to Independence (P.Tr. 1868-1869). Officer Cavanah advised the appellant of the murder he was suspected of committing (P.Tr. 1871-1872). The appellant indicated that he had heard about it and knew where it happened, but there was nothing he could do about it, and that he had "no emotion" about the murder (P.Tr. 1871-1872). The appellant stated that he had been at the gas station once, but that he had never been inside (P.Tr. 1872).

The next day, April 22, 1994, while at the Kansas City Police Department, the appellant was again advised of his rights and agreed to talk to Officers Cavanah and Johann after they allowed him to speak to Willie (P.Tr. 1875-1878). The appellant asked to view Willie's videotaped statement, and after a few minutes of watching it, stated that "he had seen enough" (P.Tr. 1877-1878). The appellant then agreed to give a statement on videotape (P.Tr. 1878).

In his statement, the appellant admitted that he had shot and killed Mr. Newton, but claimed that it was an accident (State's Exhibit 45). The appellant stated that he, Willie and Tina were driving around talking about robbing a drug dealer, and that he suggested the gas station where he knew there was only one attendant (State's Exhibit 45). The appellant stated that they got some gas, left the station, but went back when the oil light came on (State's Exhibit 45). When asked if they left the first time because the little girl was there, the appellant responded, "[y]eah, I guess" (State's Exhibit 45). The appellant stated that on their return, Willie went inside first and he followed, demanding the money (State's Exhibit 45). Willie took the money and went back to the car while the appellant stayed behind and ordered Mr. Newton and his stepdaughter into the back room (State's Exhibit 45). The appellant stated that he told them he was not going to hurt them, but claimed that when he was closing the door the gun fired accidentally (State's Exhibit 45). The appellant asserted that he was not sure how this happened, saying, "I don't know if I hit the wall, hit the door, or something," and noted he was just "nervous and drinking" (State's Exhibit 45). Afterwards, he said they all went home and split the money (State's Exhibit 45).

After the videotaped statement was completed, Officer Johann asked the appellant how they were standing when Mr. Newton was shot (P.Tr. 1893). The appellant stated that they were facing each other, with the victim only a few feet away (P.Tr. 1893). The appellant denied trying to shoot Sarah, stating that he may have pointed the gun at her when he was looking at the gun in amazement (P.Tr. 1893).

Forensic examination of the evidence revealed that Mr. Newton was shot in the forehead with a 9 millimeter full-metal-jacketed bullet from approximately six inches away, and that the bullet exited at the base of the neck with a downward trajectory, indicating that the victim was "ducking" down (P.Tr. 1773, 1777-1779; State's Exhibits 47 & 48). In addition, it was shown that a normal 9 millimeter semi-automatic pistol would not go off accidentally unless it is "slammed" down on a surface or dropped from a distance (P.Tr. 1840-1841). The cause of Mr. Newton's death was a single gunshot would to his head with penetrating brain injuries (P.Tr. 1773).

The jury also heard evidence of the appellant's prior convictions for murder in the second degree, robbery in the first degree, and attempted robbery in the first degree, and his convictions that arose out of the facts of this case (P.Tr. 1691-1693, 1730, 1928-1930).

2. Defense evidence

In an attempt to mitigate the murder of Robert Newton, appellant presented the testimony of 10 witnesses, including a clinical psychologist, a clinical social worker/psychiatric social worker/therapist, three of the appellant's relatives, three friends of appellant's family, an ex-judge, and a police officer (P.Tr. 1936-2086). The appellant presented evidence that his mother abused him, stabbed and shot others, and was a chronic alcoholic who gave alcohol to her children (P.Tr. 1709-1711, 1972, 2021). She died from cirrhosis of the liver when she was 38 years old (P.Tr. 1998). The appellant presented evidence that he never received any guidance about what was right and wrong and that he was sexually abused when he was five years old (P.Tr. 1959, 1975-76, 2022).

The appellant presented evidence that he suffered from depression when he was apprehended stealing a car at age 13 and was evaluated (P.Tr. 2019). He became addicted to alcohol and drugs (P.Tr. 2020-2021). Appellant presented evidence that as a child he needed treatment and counseling, but never received it (P.Tr. 2036-2037, 2063-2065). He presented evidence that he never received the love and nurturing that was necessary to grow into a healthy adult (P.Tr. 2059-2065). Appellant presented evidence that he wanted to change, but that he "didn't make it" (P.Tr. 2085-2086). He also presented evidence showing that he suffered from post-traumatic stress disorder (P.Tr. 2034-2036).

3. Juror recommendation and sentencing

The jury unanimously recommended that the appellant be sentenced to death (L.F. 198; P.Tr. 2200, 2202-2206). It found as statutory aggravating circumstances the appellant's convictions for murder in the second degree, attempted robbery in the first degree, robbery in the first degree, and that the appellant committed the murder for the purpose of receiving money or any other thing of value from Robert Newton or another (L.F. 198). The trial court imposed the sentence of death that had been recommended by the jury (L.F. 252-253).

4. The appellant's second appeal

The appellant filed a direct appeal from his sentence of death. This Court affirmed the appellant's sentence. State v. Taylor, 18 **S.W.3d** 366 (2000), cert. denied 521 U.S. 901 (2001).

C. The appellant's second post-conviction relief action

On August 3, 2000, the appellant filed a motion to vacate, set aside or correct the judgment or sentence of the trial court, pursuant to Rule 29.15 (P.C.L.F. 4-10). The appellant's counsel filed an amended Rule 29.15 motion, which was 388 pages long, and an appendix, which was 379 pages long, for a total of 767 pages (P.C.L.F. 14-792). The motion court, the Honorable Charles Atwell, found that the appellant's amended motion was rambling and confusing (P.C.L.F. 903-908). The appellant was allowed to file a summary of the issues, "Exhibit 1," which defined the grounds that were raised in the amended motion (P.C.L.F. 798-802).

An evidentiary hearing was held on June 17-19, 2002 (P.C.Tr. 1). After hearing the evidence that was presented, Judge Atwell denied appellant's motion and filed his findings of facts and conclusions of law on December 27, 2002 (P.C.L.F. 921-964).

ARGUMENT

I.

The Rule 29.15 motion court did not clearly err when it rejected the appellant's claim that he was denied effective assistance of counsel on the ground that his trial counsel allegedly failed to investigate, rebut and object to the prosecutor's suggestion that the appellant stabbed a man to death in 1975 because the appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel and his claim is based on a misstatement of the record.

The appellant alleges that the motion court clearly erred when it denied his claim that he was denied effective assistance of counsel because his counsel in his second penalty phase, Robert Wolfrum and Teoffice Cooper, failed to "investigate, rebut and object to the prosecutor's suggestion that [appellant] had stabbed Jessie Howarter to death [in 1975] when he [allegedly] had not, because counsel's failure" denied the appellant his right to effective assistance of counsel (App.Br. 29; P.C.L.F. 945-948). The appellant claims that his co-defendant in that prior murder case, Carl Hardin, was the person who actually stabbed Jessie Howarter to death (App.Br. 30).

The appellant neglects to mention, as will be discussed below, that the State and the defense presented evidence in State v. Hardin that the appellant and Hardin stabbed Jessie Howarter to death and that the jury in State v. Hardin was required to find, in order to convict Hardin, that the appellant and Hardin both stabbed Howarter to death.

A. Standard of review

On appeal from the denial of a post-conviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. State v. Taylor, 929 S.W.2d 209, 224 (Mo.banc 1996), **cert. denied** 519 U.S. 1152 (1997). 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). The defendant must show that counsel's performance was deficient and that it prejudiced the defense. Id., 466 U.S. at 687.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id. 466 U.S. at 688. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Wiggins v. Smith, ___ U.S. __, 123 S.Ct. 2527, 2535, 156, L.Ed.2d 471 (2003). In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra 466 U.S. at 694.

B. Relevant facts

The appellant's claims that his counsel should have objected to and rebutted the following matters: In the appellant's second penalty phase, the prosecutor told the jury in the

State's opening statement that the appellant had been convicted of murder for stabbing Howarter (P.Tr. 1664). The State adduced evidence that about that conviction by reading to the jury the information for the charge of murder in the second degree. It stated that the appellant "did strike, cut, stab, wound at and upon the body of...Howarter, with the aforesaid knife, thereby feloniously inflicting a mortal wound upon the said... Howarter, from which mortal wound ...Howarter did die on or about the 1st day of April 1975" (P.Tr. 1928). The prosecutor later argued that the jury should consider that appellant had stabbed a man to death in 1975 (P.Tr. 2173, 2195).

However, these matters were not objectionable and could not have been rebutted because the statements and evidence in question were correct. Although the transcript of the appellant's prior guilty plea for the charge of murder in the second degree was not presented to the motion court by the appellant, the evidence of the appellant's guilty plea that was adduced during the trial of the appellant's co-defendant in that murder, Carl Hardin, shows that the appellant pled guilty to murder in the second degree as the result of him actually being guilty of the murder of Jessie Howarter in 1975 (Movant's Exhibit 2 at 380-381, 389). Howarter's body had sixteen incision wounds and numerous bruises (Movant's Exhibit 3 at 436–443). The cause of death was "the cutting wounds of the front side of the chest that penetrated the heart and lungs" (Movant's Exhibit 3 at 440). Blood stains on Howarter's shirt, the appellant's pants, and the butcher knife that was used to murder Howarter all matched (Movant's Exhibit 32 at 104).

During Hardin's trial, the appellant testified for the State that he "stabbed at" Howarter, but that he was not sure whether or not he actually stabbed him (Movant's Exhibit 2 at 366-368, 391-392). However, other witnesses contradicted the self-serving aspect of this testimony. E.H. Morgan, of the Missouri State Highway Patrol, testified that Hardin indicated that the appellant was the person who stabbed and beat the victim to death (Movant's Exhibit 3 at 500-502). Defense witness Roy Briscoe, who was a friend of the appellant's and Hardin's, testified that Hardin said that he did not know whether the appellant stabbed the victim, but that he saw the appellant beat the victim, wash his hands, and dispose of the knife (Movant's Exhibit 3 at 545-546). Hardin testified that he saw the appellant stab and hit Howarter, and that the appellant later told him that he had stabbed and hit Howarter (Movant's Exhibit 3 at 590, 597-599).

The State submitted the case to the jury under the theory that both the appellant and Hardin stabbed Howarter. The jury instruction for murder in the second degree, of which Hardin was convicted, stated that "the defendant and Leon Taylor caused the death of the Jessie Eldridge Howarter by stabbing, cutting and striking him" (Movant's Exhibit 4 at 739). The State's opening statement and closing argument in State v. Hardin were not transcribed in the exhibits that were filed with the motion court.

At the Rule 29.15 evidentiary hearing, the appellant did not present the testimony of one of his counsel, Teoffice Cooper. Thus, he did not present any testimony as to what investigation Cooper did in this matter.

He did present the testimony of his other counsel, Robert Wolfrum (P.C.Tr. 347). Wolfrum did not testify about Cooper's investigation of this matter. Wolfrum said that he had investigated the matter by reading the police reports (P.C.Tr. 353-354). Those reports showed that the appellant had confessed to stabbing Howarter and committing the murder, and that the appellant said that Hardin had assisted him in the murder (Movant's Exhibit 32 at 98, 111, 119). The reports showed that blood stains on Howarter's shirt, the appellant's pants, and the butcher knife that was used to murder Howarter all matched (Movant's Exhibit 32 at 104). Wolfrum said that he was aware that under Missouri law an accomplice is just as guilty as the principal (P.C.Tr. 383-384). See State v. Shockley, 98 **S.W.3d** 885, 890 **(Mo.App., S.D.** 2003).

C. Analysis

The appellant failed to prove that his counsel acted unreasonably in their investigation because he failed to prove that both of his counsel were unaware of the facts as to the murder of Howarter and that they did not object as a matter of reasonable trial strategy. Initially, it must be pointed out that the appellant did not present the testimony of one of his counsel, Teoffice Cooper, and he did not present any testimony as to what investigation Cooper did in this matter. This is fatal to his claim because it is presumed that Cooper conducted a reasonable investigation and that his failure to object was a matter of reasonable trial strategy. State v. Tokar, 918 **S.W.2d** 753, 768 (Mo.banc 1996), cert. denied 519 U.S. 933 (1996). The appellant failed to carry his burden of proof on this matter. See Rule 29.15(i).

The appellant also failed to show that Wolfrum failed to conduct a reasonable investigation. As was described above, Wolfrum said that he read the police reports from the

murder of Howarter that showed that the appellant stabbed and murder Howarter and that Harden assisted the appellant in that murder (Movant's Exhibit 32 at 98-181). Thus, he was fully aware of the facts surrounding that murder.

Additionally, appellant failed to prove that reasonable counsel would have objected to the prosecutor's evidence and statements in question and that he was prejudiced by the actions of his counsel because the evidence and statements were in fact accurate. The motion court found that the evidence showed that both appellant and Hardin stabbed Howarter and that both of their actions contributed to Howarter's death (P.C.L.F. 945). As was discussed above, appellant had been charged with stabbing and murdering Howarter and had pled guilty because he was actually guilty of that offense (Movant's Exhibit 2 at 380-381, 389). Evidence in the trial of appellant's accomplice in that case showed that appellant and Hardin stabbed Howarter to death and the jury finding in that case was that appellant and Hardin stabbed Howarter to death (Movant's Exhibit 2 at 366-368; Movant's Exhibit 3 at 500-502, 545-546, 590, 597-599; Movant's Exhibit 4 at 739). Thus, the evidence and statements made by the prosecutor in the appellant's trial were accurate.

Moreover, as the motion court stated, "an effort to trivialize a prior murder conviction in the brutal circumstances of this case could be problematic" (P.C.L.F. 947). If counsel had attempted to present evidence through the transcript in State v. Hardin that appellant had not stabbed the victim to death, the State could have presented evidence that appellant had in fact stabbed the victim to death and then could have then further gone into the brutal nature of the crime in that case and presented evidence of the full nature of the stab wounds and the beating

of Howarter (Movant's Exhibit 3 at 436-443). By not attempting to mislead the jury into believing that the appellant did not murder Howarter, the appellant's counsel avoided the jury being exposed to evidence of the gruesome nature of that murder.

In light of the above, respondent submits that the motion court did not clearly err when it denied the appellant's claim. Thus, the appellant's first point on appeal must fail.

II.

The motion court did not clearly err when it rejected the appellant's claim that he was denied effective assistance of counsel on the ground that his counsel in his second penalty phase were ineffective for failing to investigate and present evidence through Dr. Logan about mental problems that the appellant had at the time of the crime because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel in that the record shows that counsel performed a reasonable investigation and chose what to present as a matter of reasonable trial strategy, and the appellant was not prejudiced by the actions of his counsel.

The appellant alleges that the motion court clearly erred when it denied his claim that he was denied effective assistance of counsel on the ground that his trial counsel did not investigate and present evidence through Dr. William Logan about mental problems that he had at the time of his crimes (App.Br. 42). Specifically he claims that evidence should have been presented that he suffered from dysthymia, chronic depression, post traumatic stress disorder, substance abuse problems, and a personality disorder (App.Br. 42).

A. Relevant facts

1. Investigation before the second penalty phase

Before the appellant's second penalty phase, one of his counsel, Melinda Pendergraph, hired Dr. Robert Smith, who was a forensic and clinical psychologist, to evaluate the appellant (P.C.Tr. 30; P.Tr. 2007; Movant's Exhibit 26). Dr. Smith wrote a report that stated that his

"diagnostic impression" was that appellant had alcohol dependence, cannabis dependence, post traumatic stress disorder, dysthymic disorder, and mixed personality disorder with antisocial and paranoid features (Movant's Exhibit 26). In relevant part, he concluded:

> It is my professional opinion, with reasonable degree of psychological certainty, that Mr. Taylor's psychological disorders played a significant role in his commission of the instant offense. His abuse of alcohol at the time just prior to the instant offense served to impair his cognitive functioning, distorted his perceptions, led to labile mood, and interfered with his judgment. Given his history of being abused it is likely that this highly stressful situation led to his re-experiencing his own history of being victimized. This served to further confound his perception and judgment. The ongoing depression that Mr. Taylor has experienced through his adolescence and adulthood has left him feeling helpless and hopeless. These symptoms often lead an individual to feel that they have nothing to loose.... The culmination of each of these psychological disorders is a highly dysfunctional and erratic individual. It is strongly believed that the interaction among these disorders led to Mr. Taylor's committing of the instant offense.

(Movant's Exhibit 26).

The appellant's trial counsel in his second penalty phase relied on Dr. Smith and also retained Robert Dempsey, who was a psychiatric and clinical social worker and a therapist (P.Tr. 2055-2056). The appellant's trial counsel would not have discouraged further

investigation of the case by Dr. Smith if such investigation was needed by Smith for him to testify more effectively, unless a strategic reason existed (P.C.Tr. 389). Funding was not an issue (P.C.Tr. 397).

2. The second penalty phase

During the second penalty phase, there was no issue as to whether the appellant had shot the victim with deliberation because a prior jury had already made that determination and the jury in this case was informed of that finding (P.Tr. 1792).

The appellant's counsel presented the testimony of Dr. Smith and Dempsey and supported it with the testimony of the appellant's relatives, friends of the appellant's family, an ex-judge, and a police officer in an attempt to mitigate appellant's punishment (P.Tr. 1936-2086). The appellant's second penalty-phase counsel presented evidence that the appellant's mother abused him, stabbed and shot others, and was a chronic alcoholic who gave alcohol to her children, including the appellant (P.Tr. 1709-1711, 1972, 2021). They presented testimony of factors that made appellant likely to become an abuser of alcohol, that appellant became addicted to alcohol and drugs, and that test results that indicated that he had a problem with alcohol and drugs (Tr. 2020-2035).

They presented evidence that he never received any guidance about what was right and wrong and that he was sexually abused when he was five years old (P.Tr. 1959, 1975-76, 2022). They presented evidence that as a child appellant needed treatment and counseling, but never received it, and that he never received the love and nurturing that was necessary to grow into a healthy adult (P.Tr. 2036-2037, 2059-2065).

The appellant's second penalty-phase counsel presented evidence that the appellant suffered from depression when he was apprehended stealing a car at age 13 and was evaluated (P.Tr. 2019). The appellant was also tested by Dr. Smith for post-traumatic stress disorder and that testing confirmed that he had been traumatized as a child by the experiences that he had as a child (P.Tr. 2034).

3. The Rule 29.15 hearing

At the Rule 29.15 evidentiary hearing, appellant presented the testimony of Dr. Logan. He said that appellant knew right from wrong and was able to appreciate the wrongfulness of his actions at the time of the murder (P.C.Tr. 167). Dr. Logan testified that evidence at the appellant's second penalty phase about how the appellant about how the appellant shot the victim, indicated that the murder was not caused by post-traumatic stress disorder, but that appellant may have done so because he was despondent and intoxicated (P.C.Tr. 184). Dr. Logan said that appellant going back to get another gun to shoot the little girl was consistent with the appellant being desperate and wanting to get away and acting without regard for the life of the little girl (P.C.Tr. 184).

Dr. Logan said that if the shooting was accidental, a theory that had been rejected in the guilt phase, a finding of post-traumatic stress syndrome could be relevant to the appellant's case because it could have given him the tendency to overreact (P.Tr. 1692; P.C.Tr. 167-169). He said that he did not know whether post-traumatic stress syndrome or intoxication had anything to do with the appellant murdering Newton, but that some parts of the appellant's story

of him overreacting to things under stress were supported by "mental health factors that led some credibility to that scenario" (P.C.Tr. 169).

According to Dr. Logan, those mental health factors were that appellant suffered from were dysthymia (which is a chronic depression), very poor self-esteem, low competence, anxiety, despondency, post-traumatic stress disorder, substance abuse, and a personality disorder that "manifests itself in terms of some antisocial behavior" and emotional regulation problems (P.C.Tr. 133, 157-158). Dr. Logan said that there were alterations in the appellant's brain functioning due to substance abuse, his upbringing, and his head injuries, but that his IQ was in the lower normal range (Tr. 133-139).

At the Rule 29.15 evidentiary hearing, one of the appellant's trial counsel testified about this matter. Robert Wolfrum testified that he was aware of the possibility of presenting similar evidence as to the appellant's mental state at the time of the murder because of Dr. Smith's findings on that matter, but he thought that it would "be a hard thing to sell" and that it was not a strong direction to pursue (P.C.Tr. 398-399). He said that he and Cooper made a strategic decision to try to stay away from discussing what happened at the time of the murder (P.C.Tr. 393, 397). He said that there were a number of statements that were made that did not come into evidence that could have come into evidence during the cross-examination of Dr. Logan and that these statements could have been very damaging to the appellant (P.C.Tr. 393).

4. Motion court's findings

The Rule 29.15 motion court found that the appellant's counsel acted pursuant to a reasonable trial strategy and that the appellant was not prejudiced by the actions of his counsel. It stated, in relevant part:

> The theory [in the second penalty phase] was to suggest that Leon Taylor lived in a dysfunctional, violent life, and that contributed to his violent acts in this case, which was an appropriate reason not to impose the death penalty.
>
> The Court believes this was a sound and viable tactic for counsel to use. Presenting a weak or soft mental health defense in the context of a situation where a defendant executes an unarmed man in the presence of his 8-year-old stepdaughter and then attempts to kill that 8-year-old girl is potentially fraught with a variety of problems. This Court believes it was well within an appropriate tactical decision to choose not to pursue such mental health evidence. The Court also believes that the mental health evidence for the most part was very similar to the evidence presented, only it was through the eyes of an expert in terms of statutory mitigators. This was not a case in which there was delusional conduct, psychosis, or strong evidence of persuasive mental health issues. The mental health issues in this case were the product of Leon Taylor's tragic life, and that tragic life was portrayed accurately and fully in the second trial of this cause.

While ineffective assistance of counsel in penalty phase cases has led to relief, it is important to understand the posture of this case. Experienced trial counsel presented nine witnesses in mitigation covering two full trial days of evidence. These lawyers also presented a coherent and organized theory of mitigation, that not only was addressed in the evidence itself, but was effectively put forth in opening statements and in closing arguments. Clearly this was a case in which counsel put in meaningful thought and preparation to the mitigation evidence to be presented to the jury.

Frequently issues regarding ineffective assistance of counsel in the mitigation phase of a case arise when counsel does virtually nothing, and there is relevant and compelling mitigation evidence that was, in fact, available. *See*, for example, Williams v. Taylor, 529 U.S. 362 (2000). Other cases arise in which death sentences have been affirmed, but the efforts of counsel in those cases certainly do not equal or parallel the efforts of Mr. Wolfrum and Mr. Cooper.

* * *

The evidence in this cause reveals that a different tactic in mitigation could have been used, and one can speculate as to whether it would have been more effective or not. Clearly, trial counsel in this cause put forth a substantial and meaningful effort on behalf of Mr. Taylor. The Court finds their conduct

does not constitute ineffective assistance of counsel, and any of the failures alleged on their part would not have affected the outcome of this cause.

* * *

As with any death penalty case, this cause touches upon issues of some complexity. Also, consistent with other capital litigation, this case has already acquired a forest of paper. However, when it is all said and done, the analysis in this case is simpler than it is complicated. Leon Taylor committed a horrible and brutal murder in that he deliberately killed another human being for little reason in the presence of his 8-year-old daughter. Leon Taylor then attempted to kill that 8-year-old child. This circumstance was further aggravated by the fact that Leon Taylor had previously been convicted of murder. This is exactly the kind of case that a midwestern jury would likely consider for a sentence of death. The facts were brutal and the Defendant had a history of violence.

There is also evidence that clearly demonstrates that Leon Taylor probably lost any chance of a productive life at a very young age due to no fault of his own. He clearly grew up in a world of severe and constant abuse. He often saw violence when he was a young child. His household was one of constant turmoil highlighted by drug and alcohol abuse. It is hard to imagine that Leon Taylor's early life did not have a profound impact upon his later conduct, yet at the same time, the jury in this cause was fully and completely advised of these circumstances and it recommended a sentence of death.

* * *

> Yet the question of this litigation is whether the record in this case demonstrates ineffective assistance of counsel as it relates to the retrial of the penalty phase proceedings against Leon Taylor. The answer to that question is no.

(P.C.L.F. 957-962).

B. Analysis

The motion court did not clearly err when it found that the appellant's second penalty-phase counsel acted pursuant to a reasonable strategy. The record shows that counsel fully investigated potential psychological evidence by retaining Dr. Smith and Dempsey and chose to present their testimony as to appellant's background as mitigating evidence. "[D]efense counsel was not ineffective for failing to shop around to find an expert witness who will testify more favorably." State v. Kenley, 952 **S.W.2d** 250, 269 (Mo.banc 1997), cert. denied 522 U.S. 1095 (1998); State v. Mease, 842 **S.W.2d** 98, 114 (Mo.banc 1992), cert. denied 508 U.S. 918 (1993).

Moreover, Wolfrum stated that the defense strategy was to present evidence through and expert who stayed away from the facts of this case, which Dr. Logan admitted undermined his testimony, because counsel knew that it would be difficult to convince a jury that the appellant's actions were controlled by his mental disorders (P.C.Tr. 184, 393, 398-399). This strategy enhanced the credibility of the evidence that counsel presented and allowed them to avoid Dr. Logan being cross-examined by very damaging statements that appellant made about the murder (P.C.Tr. 393). Thus, counsel reasonably avoided the use of evidence that would

have had a "mixed impact." Bucklew v. State, 38 **S.W.3d** 395, 398 (Mo.banc 2001). "Strategic choices that are made after thorough investigation are essentially unchallengeable." Id.; Wiggins v. Smith, ___ U.S. __, 123 S.Ct. 2527, 2535, 156, L.Ed.2d 471 (2003).

Further, counsel testified that they wanted a defense that was not focused on the facts of the murder and attempted murder (P.C.Tr. 393, 397). It was reasonable for them to try to keep the jury from focusing on the gruesome facts of the murder and attempted murder in the case at bar and to try to get them to dwell upon the horrible life that the appellant had experienced. This strategy attempted to get the jury to think of the appellant as a victim. It also attempted to show that the appellant was less culpable because his criminal acts were "attributable to a disadvantaged background." Wiggins v. Smith, supra 123 S.Ct. at 2542.

Additionally, the motion court did not clearly err when it found that the appellant was not prejudiced by the actions of his counsel because the appellant failed to prove that but for the actions of his counsel there was a reasonable probability that he would not have been given the death penalty. See Rousan v. State, 48 **S.W.2d** 576, 582 (Mo.banc 2001), cert. denied 534 U.S. 1017 (2001). His counsel were not ineffective because they did elicit the "same sort of information," see Lyons v. State, 39 **S.W.3d** 32, 40 (Mo.banc 2001), as the information in question because they were able to elicit evidence of the appellant's tragic life and that the murder was the result of it. As the motion court found, "[t]his was not a case where there was strong evidence of delusional conduct, psychosis, or strong evidence of persuasive mental health issues. The mental health issues in this case were the product of Leon Taylor's tragic

life, and that tragic life was portrayed accurately and fully in the second trial of this cause" (P.C.L.F. 957). See Middleton v. State, 103 **S.W.3d** 726, 738 (Mo.banc 2003).

The appellant argues that this case is similar to Wiggins v. Smith, supra (App.Br. 53). In that case, the United States Supreme Court found that Wiggin's trial counsel was ineffective for failing to investigate the defendant's social history because the counsel failed to conduct virtually any investigation into his client's childhood and locate an abundance of potentially mitigating evidence, including evidence of severe privation and abuse by his alcoholic, absentee mother, physical torment, sexual molestation, and repeated rape while in foster care, his time spent homeless and his diminished mental capacities. Wiggins v. Smith, supra, 123 S.Ct. at 2531. Wiggin's counsel exacerbated this problem by promising the jury in her opening statement that it would hear such evidence. Id. at 2532. Instead, Wiggins' counsel pursued a defense that Wiggins was not responsible for the murder, presented an inconsistent defense through a criminologist who said that inmates serving life sentences tend not to be violent, and presented evidence of the defendant's lack of prior convictions. Id. at 2536-2538.

The United States Supreme Court found that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unneccessary." Id. at 2535. It found that counsel did not make a strategic decision not to investigate the evidence in question because the use of the words "strategic decision" to describe "counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior

to sentencing." Id. at 2538. It found that found that counsel's failure to investigate into the defendant's social history was unreasonable and the defendant was prejudiced by this failure.

However, the case at bar is not comparable to Wiggins. Here, counsel investigated the appellant's life history; counsel hired a forensic and clinical psychologist to evaluate the appellant; counsel hired a psychiatric and clinical social worker/therapist to investigate the appellant's history; and counsel interviewed many of the appellant's family members. Counsel conducted a thorough, exhaustive investigation for potentially mitigating evidence and strategically presented mitigating evidence to the jury through the testimony of nine witnesses over the course of two days to the jury (P.Tr. 1936-2086). Counsel's actions were reasonable and did not prejudice the appellant.

In light of the above, respondent submits that the motion court did not clearly err when it found that the appellant was not denied effective assistance of counsel. Thus, the appellant's second point on appeal must fail.

III.

The motion court did not clearly err in not granting the appellant's post-conviction motion based on claims that were never presented to it because those claims were waived, pursuant to Rule 29.15(d), and are not cognizable on appeal in that this Court lacks jurisdiction to consider claims that were not raised in a timely filed Rule 29.15 motion.

In any event, the appellant's claim that he was denied effective assistance of counsel because his counsel in his second penalty phase failed to present evidence that he was mentally retarded and the appellant's claim that his sentence is excessive based mental retardation are without merit because the appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel and he failed to present evidence from which a reasonable fact finder could find by a preponderance of the evidence that he was mentally retarded in that the evidence showed that the appellant had an IQ of 101 and did not fit within the definition of mental retardation.

The appellant alleges that the motion court clearly erred when it denied his Rule 29.15 motion because he was denied effective assistance of counsel on the ground that his second penalty-phase counsel failed to present evidence that the appellant was retarded (App.Br. 61). He also alleges that his sentence was excessive because of his alleged retardation (App.Br. 61). As will be discussed below, his claim of retardation is based on a misrepresentation of the record, and there was no evidence that the appellant was actually retarded.

However, first respondent must point out that the appellant has waived this claim by failing to raise it in his Rule 29.15 motion. This Court has repeatedly held, based on Rule 29.15(d), that a movant waives all claims that are not raised in a timely filed Rule 29.15 motion.[3] Barnett v. State, 103 **S.W.3d** 765, 773 (Mo.banc 2003); Winfield v. State, 93 **S.W.3d** 732, 737 (Mo.banc 2002); State v. Johnson, 968 **S.W.2d** 686, 695 (Mo.banc 1998), cert. denied 525 U.S. 935 (1998); State v. Tokar, 918 **S.W.2d** 753, 769 (Mo.banc 1996), cert. denied 519 U.S. 933 (1996); Coates v. State, 939 **S.W.2d** 912, 915 (Mo.banc 1997). "'An appellate court is without jurisdiction to consider an issue not raised before the motion court.'" State v. Mullins, 897 **S.W.2d** 229, 231 **(Mo.App., S.D.** 1995)(quoting State v. Light, 835 **S.W.2d** 933, 941 **(Mo.App., E.D.** 1992)). Thus, appellant's third point on appeal must fail.

Even if this Court had jurisdiction to consider the appellant's claims, his claims would fail on appeal because the appellant failed to carry his burden of proof at the evidentiary hearing in that he failed to prove that his counsel acted unreasonably, that he was prejudiced by the actions of his counsel, and he failed to present sufficient evidence that he is mentally retarded.

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[3]**Appellant also failed to raise the claim in "Movant's Exhibit 1," which was a pleading that was designed to "define" the issues that were pled in the appellant's 388 page long Rule 29.15 motion (P.C.L.F. 798-802, 932).**

The appellant failed to present any evidence as to whether a reasonable investigation of this issue of whether he was retarded was conducted. At the evidentiary hearing, he failed to question his counsel in question, i.e., Teoffice Cooper and Robert Wolfrum, about what investigation they conducted, whether they found evidence that the appellant was retarded, and why they chose not to present whatever evident they found on this issue. It is presumed that the appellant's counsel conducted a reasonable investigation and chose to present the case as they did as a matter of reasonable trial strategy. State v. Tokar, supra at 768; Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Additionally, the appellant failed to show that reasonable counsel would have had reason to question whether the appellant was retarded because the appellant's psychiatric records showed that he was not mentally retarded. Those records, which were placed into evidence at the Rule 29.15 hearing by the appellant, stated that the appellant had an IQ of "101 which is in the average range," that he had a "normal intellect," and that his "intellect is possibly slightly below normal" (Movant's Exhibit 8 at 1681; Movant's Exhibit 7 at 1544, 1554; Movant's Exhibit 33 at 200, 209).

The appellant also failed to prove that he was prejudiced by the actions of his counsel or that his sentence was excessive because he failed to prove "by a preponderance of the evidence," see Rule 29.15(i), that he was retarded. Nor did he present substantial evidence of mental retardation to support a claim that his punishment was excessive.

In Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the United States Supreme Court decided that it violates the Eighth Amendment to execute

mentally retarded individuals. After Atkins was decided, this Court held "that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in 565.030.6, shall not be subject to the death penalty." Johnson v. State, 102 **S.W.3d** 535, 540 (Mo.banc 2003). Missouri's definition of mental retardation, which was designed to only be applied to crimes that occurred after August 28, 2001, states that retardation is:

> a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitation in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

§ 565.030.6, RSMo Cum.Supp. 1991; Johnson v. State, supra at 540.

No witness at the Rule 29.15 evidentiary hearing testified that the appellant fit within this definition of mental retardation. Although the appellant mentions this definition in his brief, he makes no real attempt to apply the full definition to the facts of his case (App.Br. 65-66). He does not even argue that he met the requirements that a person have limitations in two areas of adoptive skills that are related to significantly subaverage intellectual functioning and that these limitations were manifested and documented before the age of eighteen. § 565.030.6, RSMo Cum.Supp. 1991.

Appellant relies completely on one answer of one witness, and he neglects to mention that the witness in question later changed that answer (App.Br. 61, 66). The appellant points

to Dr. Logan's testimony that the appellant's IQ had been measured in the "borderline retarded" area "at times in the past" because of the appellant's use of inhalants (P.C.Tr. 135-136; App.Br. 61, 66). However, this is not the same as saying that the appellant is retarded. Moreover, Dr. Logan later corrected himself and said that the appellant's IQ was "in the low normal range" (P.C.Tr. 139). The other evidence presented by the appellant on this issue was showed that the appellant was not retarded. As was mentioned above, that evidence stated that the appellant had an IQ of "101 which is in the average range," that he had a "normal intellect" or that his "intellect is possibly slightly below normal" (Movant's Exhibit 8 at 1681; Movant's Exhibit 7 at 1544, 1554; Movant's Exhibit 33 at 200, 209). This is not evidence of "significantly subaverage intellectual functioning" as is required by § 565.030.6. On the contrary, it was evidence that the appellant was not mentally retarded. Nor did the appellant present evidence about his alleged mental retardation being manifested before he was 18 as is required by § 565.030.6, RSMo Cum.Supp. 1991. Thus, no reasonable finder of fact could find by a preponderance of the evidence from the evidence that was presented that the appellant was retarded.

This case may easily be distinguished from Johnson v. State supra, which was remanded for a new penalty phase. There, the defendant claimed in a timely filed Rule 29.15 motion that his sentence was disproportionate based on his mental retardation, and this Court found that there was sufficient evidence for a reasonable finder of fact to find that the defendant was mentally retarded because a witness testified that the defendant was retarded, the defendant had an IQ as low as 70, he had severe limitations in adaptive behaviors, and these qualities had

manifested before the age of 18. Id. at 541. Here, the appellant failed to plead his claim in a timely filed Rule 29.15 motion, no witness testified that the appellant was mentally retarded, the appellant's evidence showed that he was not mentally retarded, the appellant failed to show that he had severe limitations in adaptive behaviors as the result of subaverage intellectual functioning, and the appellant failed to show that any such qualities had manifested before age 18.

In light of the above, the respondent submits that the motion court did not clearly err when it denied appellant's claims because they were not pled in the appellant's Rule 29.15 motion, appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel, and the appellant failed to present evidence showing that he was mentally retarded. Thus, the appellant's third point must fail.

IV.

The Rule 29.15 motion court did not clearly err when it rejected the appellant's claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to investigate and elicit additional testimony from Dr. Smith about the appellant's mental condition at the time that he murdered Mr. Newton because the appellant's counsel conducted a reasonable investigation and chose as a matter of reasonable trial strategy to present a more credible defense based on the defendant's life history that kept out damaging evidence. Further, the appellant was not prejudiced by the actions of his counsel.

The appellant alleges that the motion court clearly erred when it denied his claim that he was denied effective assistance of counsel on the ground that his counsel in his second penalty phase failed to investigate and present additional evidence from Dr. Robert Smith, who testified in the appellant's second penalty phase (App.Br. 68). Specifically, he alleges that his counsel in that proceeding "failed to investigate and present evidence through their expert Dr. Smith that [the appellant] suffered from Depression, Post-Traumatic Stress disorder, and Alcohol and Drug Dependence, which established the statutory mitigators, extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct" (App.Br. 68).

At the Rule 29.15 evidentiary hearing, the appellant did not present the testimony of one of his counsel in the second penalty phase, i.e., Teoffice Cooper. Thus, we do not know what

investigation was conducted by Cooper. The appellant did present the testimony of his other counsel in that proceeding, Robert Wolfrum (P.C.Tr. 347).

Wolfrum testified that Dr. Smith had been hired by Melinda Pendergraph during the first appeal (P.C.Tr. 373). He met with Dr. Smith, read reports written by Dr. Smith and corresponded with him (P.C.Tr. 34, 39, 388-391; Movant's Exhibit 28). He was aware that Dr. Smith had examined and tested the appellant and had stated that his "diagnostic impression" was that the appellant had alcohol dependence, cannabis dependence, post traumatic stress disorder, dysthymic disorder, and mixed personality disorder with antisocial and paranoid features (Movant's Exhibit 26; P.C.Tr. 374, 389-390). He was aware that Dr. Smith could testify that these disorders led to the appellant committing the murder (Movant's Exhibit 26; P.C.Tr. 374, 389-390). He was also aware that Dr. Smith could testify about the appellant's family history and medical history and the trauma in his life led to the appellant committing the murder in question (Movant's Exhibit 27; P.C.Tr. 375).

Wolfrum said that the only additional testing that he remembered that Dr. Smith requested was the T.S.I. test (trauma system inventory test), which tested for post-traumatic stress syndrome (P.C.Tr. 391). Wolfrum had provided Dr. Smith with the results of a T.S.I. test that had been performed in 1998, but Dr. Smith wanted to retest the appellant (P.C.Tr.35, 391). Wolfrum had Dr. Smith conduct a new T.S.I. test on the appellant, and Dr. Smith then sent the results to Wolfrum (Movant's Exhibit 28; P.C.Tr. 388).

Wolfrum said that he would not have discouraged any additional investigation by Dr. Smith unless he had a strategic reason for believing that it would be harmful (P.C.Tr. 389). He

said that funding was not an issue in whether or not he had Smith do any additional examinations (P.C.Tr. 397).

As was discussed in Point II of this brief, Wolfrum testified that he and Cooper chose to present a defense that asked for mercy based on the appellant's life history, rather than to use a less credible defense that focused the jury further on the facts of the murder and tried to say that the defendant could not control his actions because of mental diseases or defects (P.Tr. 2178-2192; P.C.Tr. 393, 397-399). Wolfrum testified that he was aware of the possibility of presenting evidence from Dr. Smith as to the appellant's mental state at the time of the murder because of Dr. Smith's findings on that matter, but he thought that it would "be a hard thing to sell" and that it was not a strong direction to pursue (P.C.Tr. 398-399). He said that he and Cooper made a strategic decision to try to stay away from discussing what happened at the time of the murder (P.C.Tr. 393, 397). Wolfrum said that there were a number of the appellant's statements that did not come into evidence and that could have come into evidence during the cross-examination of Dr. Smith if he tried to blame the murder on mental diseases or defects and that these statements could have been very damaging to the appellant (P.C.Tr. 393).

The motion court found the following:

> Dr. Smith was retained by trial counsel and became fully informed of the family history of Mr. Taylor. Dr. Smith gave testimony on the psychological effect of Mr. Taylor's upbringing, opined that Mr. Taylor's dysfunctional life made it difficult for him to make important and good choices. Dr. Smith strongly

suggested that some type of intervention needed to occur in Mr. Taylor's life to have prevented him from being disabled by the psychological impact of his difficult and tragic young life. Mr. Robert Dempsey was a psychiatric social worker. He presented testimony regarding the benefits of a healthy family life and the problems created by a dysfunctional family life. He gave testimony that was similar to Dr. Smith.

At the retrial of the penalty phase, Dr. Smith's testimony and Mr. Dempsey's testimony appropriately and coherently fit together with other fact witnesses describing the tragedy of Leon Taylor's life beginning at a young age and continuing until the time he first entered the penitentiary. In the postconviction hearing, Mr. Taylor again called Dr. Smith. Dr. Smith testified that he had been presented with substantial additional facts and information since the time of Mr. Taylor's conviction and Mr. Taylor's sentence to death.

* * *

Dr. Smith provided testimony that may well have supported appropriate instructions under MAI CR3d 313.44(A).

* * *

The Court believes a careful review of the record will demonstrate that the bulk of the information relied upon by Dr. Smith... in the postconviction litigation was the same type and kind of information presented by counsel during the course of the second penalty trial. The thrust of the testimony of Dr. Smith...

was that Leon Taylor led a tragic life in which he was abused and subjected to violence and extreme dysfunction at an early age. It was demonstrated that Leon Taylor grew up in an abusive environment full of physical and sexual abuse, highlighted by the use of drugs and alcohol. Leon Taylor saw violence early in his lifetime. This evidence was key to the opinions rendered by...Dr. Smith. Expert mental health opinions were not presented in the retrial of the penalty phase; however, the basis for those opinions were thoroughly addressed during the course of that trial. This Court does not believe that the testimony of Dr. Smith...was substantially different than the testimony that was presented in the first trial, other than, it would have likely allowed additional statutory mitigators to be submitted to the jury.

This Court has witnesses a variety of mental health experts testifying in various contexts. It is this Court's strong belief that the testimony of Dr. Smith... clearly demonstrates the mental health damage done by the lifestyle to which Leon Taylor was submitted. However, this Court does not find that testimony to be particularly persuasive as pure mental health or diminished capacity type of defense.

* * *

In this case, trial counsel made a tactical decision not to pursue a § 552, or mental health defense. This decision was based on the qualify of the other evidence that counsel possessed. Not only did counsel have various fact

witnesses that could graphically and pointedly describe the tragic upbringing of Leon Taylor, but they even had such evidence as the police officer from Warrensburg and a former juvenile court judge testify as to the kind of life Leon Taylor lived as a young man. The theory was to suggest that Leon Taylor lived in a dysfunctional, violent life, and that contributed to his violent acts in this case, which was an appropriate reason not to impose the death penalty.

The Court believes this was a sound and viable tactic for counsel to use. Presenting a weak or soft mental health defense in the context of a situation where a defendant executes an unarmed man in the presence of his 8-year-old step-daughter and then attempts to kill that 8-year-old girl is potentially fraught with a variety of problems. This Court believes it was well within an appropriate tactical decision to choose not to pursue such mental health evidence. The Court also believes that the mental health evidence for the most part was very similar to the evidence presented, only it was through the eyes of an expert in terms of statutory mitigators. This was not a case is which there was delusional conduct, psychosis, or strong evidence of persuasive mental health issues. Thus mental health issues in this case were the product of Leon Taylor's tragic life, and that tragic life was portrayed accurately and fully in the second phase of this cause.

* * *

> The evidence in this cause reveals that a different tactic in mitigation could have been used, and one can speculate as to whether it would have been more effective or not. Clearly, trial counsel in this cause put forth a substantial and meaningful effort on behalf of Mr. Taylor. This Court finds their conduct does not constitute ineffective assistance of counsel and any failures alleged on their part would not have affected the outcome of this cause.

(P.C.L.F. 952-960).

The motion court did not clearly err when it made these findings because the appellant failed to prove that his counsel acted unreasonably in investigating the evidence in question and in deciding not to present it as a matter of trial strategy. As to the reasonableness of the investigation by counsel, the appellant failed to present any evidence concerning the investigation that was conducted by Teoffice Cooper. This is fatal to his claim because it is presumed that Cooper conducted a reasonable investigation and that his failure to object was a matter of reasonable trial strategy. State v. Tokar, 918 **S.W.2d** 753, 768 (Mo.banc 1996), cert. denied 519 U.S. 933 (1996). Appellant failed to carry his burden of proof on this matter. See Rule 29.15(i).

The record also showed that Robert Wolfrum conducted a reasonable investigation. As was discussed above, he was aware that Dr. Smith could testify that the appellant had alcohol dependence, cannabis dependence, post traumatic stress disorder, dysthymic disorder, and mixed personality disorder with antisocial and paranoid features (Movant's Exhibit 26; P.C.Tr.

374, 389-390). He also was aware that Dr. Smith could testify that these disorders led to the appellant committing the murder (Movant's Exhibit 26; P.C.Tr. 374, 389-390).

However, as a matter of reasonable trial strategy he reasonably chose not present that evidence and chose to pursue a different strategy. "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy." Clayton v. State, 63 **S.W.3d** 201, 207-208 (Mo.banc 2001), cert. denied 535 U.S. 1118 (2002); State v. Ferguson, 20 **S.W.3d** 485, 508 (Mo.banc 2000), cert. denied 531 U.S. 1019 (2000).

The appellant's trial counsel recognized that trying to blame the appellant's actions at the time of the murder on mental illnesses would "be a hard thing to sell" in light of the facts of this case and they decided not to use that defense (P.C.Tr. 398-399). They wanted to stay away from what happened at the time of the murder and instead focus on the defendant's tragic life that led to him being a criminal (P.C.Tr. 393, 397-398; P.Tr. 2178-2192). It was reasonable for counsel to choose to pursue the defense that they thought was stronger so that they could enhance their credibility with the jury. Clayton v. State, supra at 207. This choice was made after a reasonable investigation and "strategic choices made after thorough investigation of law and fact are virtually unchallengeable...." Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Wiggins v. Smith, ___ U.S. __, 123 S.Ct. 2527, 2535, 156, L.Ed.2d 471 (2003).

The defense that was chosen was the stronger defense because it was impossible for the State to dispute the hard life that the appellant had lived. Dr. Smith's testimony about mental

disorders, on the other hand, was weaker because he could not testify that the appellant did not know that what he was doing was wrong and that he was not capable of controlling his actions. Nor could he testify that the appellant was acting pursuant to delusions when he committed the murder. There was strong evidence that after the robbery was committed and without any provocation, the appellant took the victim and his granddaughter into a room at the gas station for the purpose of murdering them (P.Tr. 1703, 1916; State's Exhibit 45). He shot Mr. Newton to death and attempted to do the same to eight-year-old Sarah Yates (P.Tr. 1917). He was upset that his gun jammed and prevented him from killing Sarah, though he attempted to remedy this situation by trying to find another gun (P.Tr. 1704-1705, 1917-1918). Thus, it appeared that the appellant was acting rationally by attempting to kill all of the witnesses to the robbery so as to avoid having to go to prison (see P.C.Tr. 172, 184).

Additionally, the appellant's counsel testified that they wanted a defense that was not focused on the facts of the murder and attempted murder (P.C.Tr. 393, 397). It was reasonable for them to try to keep the jury from focusing on the murder and attempted murder in the case at bar and to try to get them to dwell upon the horrible life that the appellant experienced. It also attempted to show that the appellant was less culpable because his criminal acts were "attributable to a disadvantaged background." Wiggins v. Smith, supra 123 S.Ct. at 2542.

The appellant's trial counsel also recognized that a number of the statements that were made by the appellant did not come into evidence and that they would have could have come into evidence during the cross-examination of Dr. Smith if he tried to blame the murder on mental diseases or defects (P.C.Tr. 393). He recognized that these statements could have been

very damaging to the appellant (P.C.Tr. 393). Thus, this strategy was reasonable in that it avoided the admission of damaging evidence. Rousan v. State, 48 **S.W.3d** 576, 583 (Mo.banc 2001), cert. denied 534 U.S. 1017 (2001).

Additionally, the motion court did not clearly err when it found that the appellant was not prejudiced by the actions of his counsel because the appellant failed to prove that but for the actions of his counsel there was a reasonable probability that he would not have been given the death penalty. See Rousan v. State, 48 **S.W.2d** 576, 582 (Mo.banc 2001), cert. denied 534 U.S. 1017 (2001). His counsel were not ineffective because they did elicit the "same sort of information," As the motion court found, "[t]his was not a case where there was strong evidence of delusional conduct, psychosis, or strong evidence of persuasive mental health issues. The mental health issues in this case were the product of Leon Taylor's tragic life, and that tragic life was portrayed accurately and fully in the second trial of this cause" (P.C.L.F. 957). See Middleton v. State, 103 **S.W.3d** 726, 738 (Mo.banc 2003).

Nor was the appellant prejudiced by the fact that the defense that his counsel chose did not entitle him to instruct the jury on the statutory mitigators of extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct. The jury was allowed to view the evidence that was presented by the defense and consider it as mitigating evidence in the absence of specific instructions because it was instructed to consider all evidence that was offered in mitigation of punishment (P.L.F. 190). State v. Johnson, 22 **S.W.3d** 183, 191 (Mo.banc 2000), cert. denied 531 U.S. 935 (2000).

The appellant relies on Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995), which is a case that was reversed for failure to present mitigating evidence in the penalty phase of a case (App.Br. 80). The appellant argues that Hildwin was reversed because the defense counsel failed to present evidence that would have supported two statutory mitigating circumstances (App.Br. 80). The appellant argues that in Hildwin, as in the case at bar, "the jury had no statutory mitigators to weigh against the aggravators" (App.Br. 80).

Appellant appears to be unaware that in Missouri, unlike Florida, juries do not weigh statutory aggravating circumstances against statutory mitigating circumstances. Rather, they weigh aggravating evidence and mitigating evidence, regardless of whether that evidence is specifically described in an instruction. State v. Johnson, supra at 191. Thus, in Missouri, unlike Florida, it does not matter how many statutory mitigating circumstances are contained in the instructions.

In Missouri, a statutory aggravating circumstance is a legal conclusion whose only function is to limit the discretion of the sentencer in a capital case by premising a defendant's eligibility for the death penalty upon the proof of specifically-defined facts. Tuilaepa v. California, 512 U.S. 967, 971-972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994); State v. Worthington, 8 S.W.3d 83,88 (Mo.banc 1999), cert. denied 529 U.S. 1116 (2000). In "non-weighing" states such as Missouri, "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 873-874, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); see State

v. Brooks, 960 S.W.2d 479, 496 (Mo.banc 1997), cert. denied 524 U.S. 957 (1998). Instead, the sentencer considers all of the evidence in arriving at a decision on punishment. Stringer v. Black, 503 U.S. 222, 229-230, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); State v. Worthington, supra at 88. This is different than in a "weighing state," such as Florida. Blanco v. State, 706 So.2d 7, 13 (Fla. 1997), cert. denied 525 U.S. 837 (1998); Kearse v. State, 662 So.2d 677, 686 (Fla. 1995). In a weighing state, the jury weighs aggravating and mitigating circumstances against each other, rather than simply weighing all of the evidence after finding that the defendant is eligible for the death penalty. Stringer v. Black, supra 503 U.S. at 229-230. Thus, analysis from a "weighing state" such as Florida is not helpful in determining prejudice in a "non-weighing state" such as in the case at bar.

However, the appellant's analysis of Hildwin is misleading because that case was not reversed because the jury had no statutory mitigators to weigh against the aggravators, as the appellant suggests in his brief (App.Br. 80). It was actually reversed because, unlike the case at bar, a reasonable investigation for mental health evidence was not conducted, the defendant's counsel was unaware of the "abundance of mitigating evidence" that could have been presented, there was no strategic decision by counsel not to present that evidence, and the testimony that was presented in the punishment phase was "quite limited." Hildwin v. Dugger, supra at 109-110.

In the case at bar the appellant failed to prove that his counsel failed to conduct a reasonable investigation. The evidence also showed that his counsel made a reasonable strategic decision to avoid presenting the mental health defense in question and instead decided

to present a more credible defense based on the appellant's hard life. This decision supported the credibility of the defense that was raised and avoided the State presenting additional evidence that would have been very damaging to the defense. Thus, the appellant failed to prove that the motion court clearly erred when it denied his post-conviction motion and his fourth point on appeal must fail.

V.

The Rule 29.15 motion court did not clearly err when it denied the appellant's claim that he was denied effective assistance of counsel on the ground that his counsel in his second penalty phase did not present evidence of the appellant's good conduct in prison because his counsel acted pursuant to a reasonable trial strategy and the appellant was not prejudiced by the actions of his counsel, which avoided the admission of the enormous amount of bad conduct that was committed by the appellant while he was in the custody of the Department of Corrections.

In the appellant's fifth point on appeal, he alleges that the motion court clearly erred when it denied his claim that he was denied effective assistance of counsel on the ground that his counsel in his second penalty phase decided not to present evidence of the appellant's good conduct in prison, which included writing poetry to other inmates and others and writing words of encouragement (App.Br. 82). He also claims that his counsel should have elicited statements, which were hearsay, in which other inmates said that the appellant expressed remorse for his past actions (App.Br. 82). The appellant does not dispute that his counsel knew of the evidence in question, but chose as a matter of trial strategy not to present it to the jury.

The motion court made the following findings:

> The evidence during the postconviction hearing demonstrated that Leon Taylor was a prolific writer of poetry. The evidence fairly demonstrated that much of this poetry was well written and showed a side of Mr. Taylor that appeared to be inconsistent with someone who would commit a first degree

murder case. Trial counsel indicated that they were aware of that poetry, but felt that it did not fit their theme of mitigation and chose not to use it. The record will reflect that, at the initial sentencing hearing in front of the Trial Court, a friend of the Defendant, Mr. Lowell Listrom, did, in fact, talk at length about Mr. Taylor's poetry.[4]

This Court finds the poetry in and of itself, may or may not, have been persuasive mitigation evidence. While on the one hand, much of the poetry shows a sensitivity that's inconsistent with a murderer, on the other hand, the undue use of this poetry in the fact of the brutality of this crime could conceivably work against the Movant. The Court specifically finds Mr. Listrom's presentation at the sentencing hearing was not persuasive, and would not have been persuasive in front of a jury. This Court finds it was an appropriate trial decision not to overly utilize the poetry of Mr. Taylor, and the failure to do so does not constitute ineffective assistance of counsel. Further, the Court finds that the failure to present this poetry did not prejudice Mr. Taylor in the context of Strickland vs. Washington.

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[4] **"Lowell Listrom talked about Mr. Taylor's poetry at the sentencing hearing that was conducted after a jury verdict that recommended a death sentence."**

> In a related theory, the Movant suggests counsel should have presented evidence from Paula Skillicorn and four inmates at the Potosi Correctional Center. Dennis Skillicorn, Ronald Artizola, Marvin Chaney and Bernard Rhodes.[5] The Court does not believe the failure to present this evidence constituted ineffective assistance of counsel, nor would it create a circumstance that would undermine confidence in the sentence imposed by the jury.

(P.C.L.F. 948-950)(footnotes in original).

The appellant has failed to show that the motion court's findings are clearly erroneous. The appellant failed to prove that his counsel were acting unreasonably when they decided not to present the evidence in question. The appellant did not present the testimony of one of his counsel, Teoffice Cooper, and he did not present any testimony as to why Cooper did not want to present that evidence to the jury. This is fatal to his claim because it is presumed that Cooper acted pursuant to a reasonable trial strategy. State v. Tokar, 918 **S.W.2d** 753, 768

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[5] **"The testimony of Mr. Skillicorn, Mr. Arizola, Mr. Chaney, and Mr. Rhodes was presented by way of deposition. It is urged by Movant that this testimony demonstrates, not only the powerful message of Mr. Taylor's poetry, but shows the positive effect it had on various individuals, four of which were sentenced to either death, or long terms of imprisonment at the Potosi Correctional Center. Obviously, the use of inmate testimony would be subject to cross-examination regarding their criminal history. It would be a reasonable trial strategy to avoid this kind of inquiry."**

(Mo.banc 1996), cert. denied 519 U.S. 933 (1996). Appellant failed to carry his burden of proof and overcome this presumption. See Rule 29.15(i).

Cooper may have decided as a matter of reasonable trial strategy not to present evidence of the appellant's favorable conduct in prison because that evidence may have drawn rebuttal evidence from the prosecutor about the voluminous evidence of the appellant's misconduct while incarcerated. The appellant's own evidence at the Rule 29.15 hearing shows that while in the custody of the Department of Corrections, he had numerous institutional violations for offenses including fighting, assault, forcible sexual misconduct, rioting (which resulted in the death of one correctional officer and four officers being injured), theft, fraud, disobeying orders, possession or use of controlled substances, giving false information, a sanitary violation, tampering with a locking devise, being out-of-bounds, possession of contraband, and destroying state property (Movant's Exhibit 8 at 1658, 1661, 1672, 1674, 1692-1695, 1697-1707, 1779-1780; Movant's Exhibit 31, Department of Corrections Section at 23, 34-35, 40-55, 386, 414-417, 478-482, 515-522, 525-530, 539-540, 543-615; Movant's Exhibit 32 at 1, 5, 8, 12, 14, 28-30, 35-42, 57-61, 83, 94, 100-103, 106-107).

In analyzing a similar claim in Rousan v. State, 48 **S.W.3d** 576, 582-583 (Mo.banc 2001), cert. denied 534 U.S. 1017 (2001), pertaining to counsel's decision not to introduce records of the defendant's good conduct in prison, this Court found that the decision was reasonable because it kept out evidence of the defendant's bad acts that had been committed while he was in prison. This Court stated:

> [t]he introduction of such misconduct could have been prejudicial to Rousan, as "[t]o the average juror... unconvicted criminal activity is practically indistinguishable from criminal activity resulting in convictions...." State v. Debler, 856 **S.W.2d** 641, 657 (Mo.banc 1993). Thus, defense counsel's decision not to introduce such non-beneficial items cannot be said to be anything other than reasonable trial strategy.

Rousan v. State, supra at 582-583.

The above shows that the appellant failed to prove that his counsel acted unreasonably when they did not present the evidence in question, and he was not prejudiced by their actions because they kept out the evidence of his bad acts while incarcerated.

Moreover, the appellant's other counsel, Wolfrum, testified at the Rule 29.15 evidentiary hearing that he was aware of evidence concerning the appellant's poetry and songs (P.C.Tr. 393-395). He said that he did not want to present that evidence because it would be easy for the prosecutor to belittle (P.C.Tr. 394). He said that he was aware of evidence surrounding the appellant's interactions with other inmates, but that he chose as a matter of trial strategy not to present that evidence (P.C.Tr. 394-395). Instead of presenting evidence of the good times that the appellant was having with other criminals and others while he was in prison, counsel chose as a matter of reasonable trial strategy to present evidence of the appellant's good interaction with a family before he went to prison for the second murder that he committed (P.C.Tr. 394-395). During the appellant's second penalty phase, Cooper presented evidence from Nichele Owens, who testified: that the appellant lived with her family; that the

appellant had a positive effect on her family; that the appellant wished that his family was like her family; and that the appellant unsuccessfully tried try to change his life (P.C.Tr. 2079-2086). This testimony was consistent with the theme utilized by counsel that focused on the appellant's poor upbringing and traumatic life history that rendered him a victim of circumstances. "[S]trategic choices made after thorough investigation of law and fact are virtually unchallengeable...." Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

It was reasonable and the appellant was not prejudiced by his counsels' to choice not to present evidence of the appellant's poems and songs because in light of the seriousness of the appellant's crimes they appear to have very little mitigating value and the presentation of these matters, which are trivial compared to the appellant's offenses, to the jury could have backfired.

Additionally, it was reasonable for counsel to choose not to present evidence of the appellant's poetry, songs and his positive interactions with other criminals and others because showing that the appellant had the ability to intelligently communicate, that he had the ability to control his actions, and that he could get along with others made him appear more culpable. The evidence in question was inconsistent with his defense that his traumatic life history controlled what he did, because it showed that he could act positively if he wanted to. "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy." Clayton v. State, 63 **S.W.3d** 201, 207-208 (Mo.banc 2001), cert. denied 535 U.S. 1118 (2002); State v. Ferguson, 20 **S.W.3d** 485, 508 (Mo.banc 2000), cert. denied 531 U.S. 1019 (2000).

An analogous case is State v. Johnston, 957 S.W.2d 734 (Mo.banc 1997), cert. denied 522 U.S. 1150 (1998). In that case, counsel made a strategic decision not to pursue evidence of the defendant's drug use and criminal history in mitigation in order to portray the defendant in a positive light and avoid the problem areas in his life. Id. at 755. This Court stated: "Ineffective assistance of counsel claims are not meant to be a means to second guess the trial strategy of the defense. Where trial counsel reasonably decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance." Id.

In the case at bar, counsel, after investigating the evidence in question, decided not to pursue this type of evidence because he did not believe it would have benefitted the defense. Just as counsel in Johnson reasonably chose to avoid mitigating evidence of the defendant's traumatic life to portray the defendant in a positive light, counsel in the case at bar chose the opposite defense, which was also reasonable. That defense was to focus on the defendant's traumatic life and to avoid evidence of how the defendant was able to control his actions and act positively towards others if he wanted to in prison. As was discussed above, the appellant's counsel did present testimony from Nichele Owens about the positive effect that the appellant had on her family when he lived with them, but this testimony emphasized that the appellant wished that his family was like her family, and that he unsuccessfully tried try to change his life (P.C.Tr. 2079-2086). Thus, it was consistent with the appellant's defense that his traumatic life led to the murder in question, and it avoided the inference that the appellant was able to control has action and act properly if he wanted to. It was also more mitigating that the appellant

reached out to others when he was not in prison, because once he was in prison he had a lot of time on his hands and had a motive to make gestures to others in order to manufacture defense evidence.

The appellant's counsel also acted reasonably and the appellant was not prejudiced by the actions of his counsel because, as Wolfrum explained, if they presented testimony about the appellant interacting with other persons who were sentenced to death, there was a danger that the jury would figure out that the appellant had been sentenced to death after his first trial (P.C.Tr. 395). The jury was well-aware that this case had been previously heard by a different jury and that the appellant had been found to be guilty of murder in the first degree (P.Tr. 1692). By avoiding the testimony from such inmates and their spouses, counsel avoided that inference.

The motion court also properly found that testimony from inmates who were sentenced to death or long terms of imprisonment at the Potosi Correctional Center had an obvious drawback, which was that the inmates would be subject to extensive cross-examination regarding their criminal history. Thus, their credibility would be in doubt. Moreover, the fact that a defendant is able to bond and socialize with other murderers and other criminals is something that a jury might not find to be endearing.

Additionally, evidence that the appellant was able to socialize so successfully with inmates and other persons while he was incarcerated may have had the negative effect of convincing the jurors that incarceration was not a sufficient punishment for the heinous crime

that the appellant committed. They may have wanted the appellant to have a punishment, such as death, that would not allow him to such interactions with others.

The appellant also suggest that his counsel should have submitted similar evidence through non-inmates, which is largely about the appellant sending poetry to people, however, that argument suffers the same defects that are discussed above that were not dependent upon whether the interaction was with an inmate (App.Br. 88). Additionally, the appellant failed to ask his counsel at the evidentiary hearing why they did not call the individuals in question and he failed to specifically ask why his counsel did not present the evidence in question as to the non-inmates, other than the general testimony described above from Wolfrum concerning the poetry and music. It is presumed that they were acting pursuant to a reasonable trial strategy and the appellant failed to overcome that presumption. State v. Tokar, supra at 768.

The appellant also alleges that his counsel should have presented testimony from others that he expressed "remorse for his past misdeeds" (App.Br. 82). However, such testimony would have been inadmissible hearsay because it would be using out-of-court statements of the appellant for the truth of the matters asserted therein. State v. Smulls, 71 **S.W.3d** 148 (Mo.banc 2002), cert. denied 537 U.S. 1009 (2002). It was only admissible at the post-conviction hearing in order to prove its existence in order to explain the subsequent conduct of counsel and to determine whether they acted reasonably. See Edwards v. State, No. SC84648, slip op. at 27 (Mo.banc August 26, 2003). The only person who could have testified without about appellant feeling remorse for the truth of that matter, without that testimony being hearsay, was the appellant, and he chose not to testify at his trial. Moreover, the appellant

failed to specifically question his counsel on this matter at the evidentiary hearing and it is presumed that his counsel were acting pursuant to a reasonable trial strategy. State v. Tokar, supra at 768.

In light of the above, the respondent submits that the motion court did not clearly err when it denied the appellant's post-conviction relief motion because the appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel. On the contrary, the record shows that the appellant's trial counsel were acting pursuant to a reasonable trial strategy and that the appellant was not prejudiced by their actions. The motion court's findings on these issues were not clearly erroneous. Thus, the appellant's fifth point on appeal must fail.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

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

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of September, 2003, to:

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