No. 83615

IN THE
MISSOURI SUPREME COURT

WALTER BARTON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Benton County, Missouri
The Honorable Theodore Scott, 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 Supreme Court Rule 29.15 in the Circuit Court of Benton County, Missouri. The conviction sought to be vacated was for murder in the first degree, §565.020, RSMo 2000, for which the sentence was death. Because of the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

On February 18, 1992, appellant was charged by information in the Circuit Court of Christian County with first-degree murder (L.F.1).[1] Appellant sought a change of judge and venue (L.F.2). This Court appointed the Honorable Theodore Scott to preside over this case (L.F.16). Following mistrials involving juries from Henry and Cooper County (L.F.10-13), appellant was convicted by a jury from Callaway County and sentenced to death (L.F.34). This court reversed that conviction based on restrictions placed on defense counsel's closing argument. State v. Barton, 936 S.W.2d 781 (Mo.banc 1996). For the fourth trial, venue was a changed to Benton County (L.F.14-15), where the jury again convicted appellant and recommended a sentence of death, which the judge followed (L.F.168-170).

Viewed in the light most favorable to the verdict, the following evidence was adduced: Gladys Kuehler, 81 years old, could not move about without a cane (Tr.394-395,453-454). She lived at the Riverview Mobile Home Park in Ozark and served as the manager (Tr.369-370,464,550,558). On October 9, 1991, Kuehler called Bill and Dorothy Pickering, the

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[1]In this brief, "1993 Tr." will designate appellant's 1993 trial transcript; "SC77147 Tr." will designate the 1994 transcripts; "SC77147 L.F." will designate the 1994 legal file; "Tr." will designate the current direct appeal trial transcript; "L.F." will designate the current direct appeal legal file; "PCR.Tr." will designate the current post-conviction transcript; "PCR.L.F." will designate the current post-conviction legal file; "[Name] Depo.Tr." will designate the post-conviction depositions; and "MX" will designate Movant's Exhibits.

owners of the park, because she had to many rent checks and wanted to talk to them about somebody wanting a trailer (Tr.559).

Carol Horton, a resident of the park, went by Kuehler's trailer around 9:00 a.m. to do some odd jobs for Kuehler (Tr.375-376). Horton last saw the victim at 11:04 a.m. (Tr.376).

Bill and Dorothy Pickering came by Kuehler's sometime between 1:15 and 2:00 p.m. to pick up rent receipts (Tr.551-553,559). Ted and Sharon Bartlett, former residents of the park, came by for a visit around 2:00 or 2:15 p.m. and stayed until 2:45 (Tr.555). As they left, Sharon Bartlett saw a man wearing a hat and coat similar to that worn by appellant that day (Tr.565). Ted Bartlett testified that Kuehler told them she did not feel well and was going to lay down (Tr.556).

When the Pickerings arrived home around 3:00 or 3:15 p.m., Bill Pickering called Kuehler's trailer (Tr.560). A male voice (later determined to be appellant) answered, and Pickering asked if he could speak to Gladys (Tr.561). Appellant said that she was in the bathroom and could not come to the phone (Tr.561).

Appellant came to Horton's trailer around noon (Tr.377). Horton had not seen appellant for approximately a week (Tr.440-441). Appellant said he had been sleeping in his broken down car (Tr.378,417-418). At 2:00 p.m., appellant left, telling Horton he was going to talk to Kuehler about borrowing $20.00 (Tr.378). Appellant returned 10-15 minutes later saying that Kuehler was busy and told him to come back later for the $20.00 (Tr.379).

Appellant left again around 3:00 p.m. and was gone for approximately one hour (Tr.379,435-436). Upon his return, appellant was acting "totally different", was "in a hurry",

and asked if he could use her restroom (Tr.380-381). He smelled like blood (Tr.382-383,424).

After appellant had been in the bathroom for awhile, Horton went to check on him (Tr.380). Appellant was washing his hands. Noticing Horton, appellant said he had been working on a car (Tr.380). Appellant asked Horton to take him to his car but she could not (Tr.384). At about 4:15, Horton mentioned that she was going to Kuehler's trailer to check on her (Tr.381). Appellant said, "Well, don't Ms Carol. Ms. Gladys is fixing to lay down and take a nap" (Tr.381-382).

After appellant left Horton's trailer, Horton went to check on Kuehler and wash her car (Tr.384-385). She knocked on Kuehler's door and called out her name but received no response (Tr.383). The door was locked (Tr.388).

Danny Dowdy, another resident, saw appellant about 4:20 approaching Horton's trailer (Tr.570). Dowdy told appellant that nobody was home and appellant came over, asking to use his restroom (Tr.571-572).

When Horton returned between 4:30 and 5:00, appellant came over to work on a "loose board" (Tr.385). His car was sitting at her trailer (Tr.385).

Horton went back to Kuehler's trailer around 6:00 p.m., but Kuehler still did not answer (Tr.385-386).

Kuehler's granddaughter, Debbie Selvidge, had been trying to reach her grandmother on the telephone (Tr.495-496). She usually called Kuehler several times a day (Tr.412), and spoke to her grandmother sometime in the mid-afternoon (Tr.442). The conversation was "real

short" (Tr.473-475). The next time she called, around 3:30 or 4:00 p.m., nobody answered (Tr.443,477-478). Selvidge tried several times but received no answer (Tr.444). Selvidge drove over to Kuehler's trailer (Tr.443-445). She knocked on the door but received no answer (Tr.444-445). Kuehler's porch light was off and no lights were on inside, which were normally on if she left (Tr.444-445).

At approximately 7:30 p.m., Selvidge went to Horton's (Tr.386). As Selvidge and Horton were talking on Horton's porch, appellant stepped on a neighbor's porch and asked if anything was wrong (Tr.386-387). Horton said they were "just concerned about Gladys" (Tr.386-387). The two women and Horton's son went to Kuehler's residence and knocked on the door (Tr.387). Nobody answered (Tr.387).

Selvidge suggested they go to her mother's to make some phone calls (Tr.387,446-447). On the way back, they flagged down Officer Lyle Hodges of the Ozark Police who said he would meet them at Kuehler's trailer after he went on another call (Tr.450,487). They returned to the trailer park and talked to appellant (Tr.388,447). Selvidge asked him if he would go with them to Kuehler's(Tr.388,448). The women drove ahead, appellant came up later (Tr.448-449). The women were knocking on Kuehler's door, but appellant walked under Kuehler's bedroom window, and began pounding under the window near where the body was later found (Tr.388,427-428,469,496-497). The knocking prompted no response (Tr.452).

Officer Hodges arrived but was unable to open the door (Tr.390-391,450). Hodges radioed the dispatcher to send a locksmith (Tr.391,451,489). By the time the locksmith arrived, Hodges had left on another call (Tr.450). The locksmith opened the door, and

Selvidge, Horton and appellant entered Kuehler's residence (Tr.391-392,451-452).

Horton and Selvidge noticed Kuehler's cane lying in the middle of the day-bed (Tr.394-395,453-454). After calling out for Kuehler and receiving no answer, Selvidge, Horton and appellant went down the hall to Kuehler's bedroom (Tr.408).

Before Selvidge started down the hall, appellant said, "Ms Debbie, don't go down there" (Tr.409). Selvidge and Horton passed the bathroom and noticed Kuehler's clothing on the floor in front of the stool; the lid of the toilet had been left up (Tr.397-398,456).

Selvidge continued toward the bedroom, turned on the light, and screamed (Tr.408,461). Kuehler's body lay on the floor between her bed and the wall; there was a great deal of dried blood on the bed and floor (Tr.461,495-496). Selvidge attempted to go towards the body, but Horton stopped her and told her not to touch it (Tr.409-410,461-462). Selvidge went back to the living room (Tr.411,462,470-471). Appellant looked over Horton's shoulder into the bedroom but did not go in (Tr.410-411). Appellant never got close to the body or blood (Tr.411). Appellant did not appear to be surprised and showed no emotion (Tr.412). However, Selvidge later heard him say "Oh, Ms. Gladys. I'm so sorry, Ms. Gladys." (Tr.471-472).

The locksmith, Cliff Mills, testified that when the three came back out of the trailer, the women were horrified and Selvidge was crying severely, but appellant was calm (Tr.467-468). Officer Hodges returned to Kuehler's trailer; Selvidge directed Officer Hodges to Kuehler's bedroom where he found her partially nude body (Tr.490-491). Most of the blood was dried, except on the bed (Tr.495-496).

Pat Dial, a paramedic, responded to Kuehler's trailer (Tr.514-516). After determining that Kuehler was dead, Dial went back outside and talked to law enforcement (Tr.518). Appellant asked whether Kuehler was dead; Dial stated she was (Tr.518). Appellant told Dial that he lived in the park and was an acquaintance (Tr.518). Dial thought appellant seemed "overly concerned and upset" (Tr.518).

Hodges asked appellant when he had last seen Kuehler (Tr.503). He said he had last seen her at her trailer between 2:00 and 2:30 p.m. (Tr.503). Appellant stated that she had agreed to lend him money but could not write the check because she was not well and was going to take a nap (Tr.503). Appellant said he came back later but Kuehler did not answer the door (Tr.504,606).

Sgt. Jack Merritt of the Missouri Highway Patrol was dispatched to the trailer (Tr.504,586-588). Upon arriving, Sgt. Merritt examined Kuehler's body, noticing that she was partially naked, "cut up really bad" and had severe mutilation (Tr.597-598). Sgt. Merritt discovered a pocketbook and checkbook on a vanity across from Kuehler's bed (Tr.609-610). The first remaining check in the checkbook was No. 6028; although there appeared to be an entry in the check register for all the other checks which had been written, there was no entry for check No. 6027 (Tr.609-610).

In the bathroom, Merritt found a washcloth on the sink with what appeared to be blood on it (Tr.638-39). He also found a pair of white women's trousers with underwear rolled up inside with smeared bloodstains (Tr.590-597). There was also a droplet of blood next to a plant on the table (Tr.599-600).

Merritt was aware that Bill Pickering had called the victim around 3:15 and a male voice had answered Kuehler's phone (Tr.599). Merritt asked appellant, "What time did you answer the phone in Gladys' trailer?" (Tr.599,601-602). Appellant admitted answering the phone between 3:00 and 3:30 and telling the caller Kuehler was in the bathroom (Tr.504-505,570-571,601-602). Appellant agreed to come to the sheriff's department (Tr.618-619). Upon arrival, Merritt advised appellant of his Miranda rights (Tr.618).

While Merritt was fingerprinting appellant, Hodges noticed an apparent bloodstain on appellant's shirt at the elbow, and a bloody handprint on the shoulder (Tr.506-507,602-603,607). Later, the officers noticed blood on appellant's jeans (Tr.605). Hodges asked appellant how the blood got on his clothing; appellant said it was from pulling Selvidge away from the body (Tr.507-509). However, Hodges did not notice any blood on Selvidge (Tr.597).

Three days after the murder, Christa Torrisi was picking up trash with her church youth group (Tr.576). She found a personalized check (register No. 6027) bearing Kuehler's name, made out to appellant for $50 in a ditch two blocks east of the park (Tr.576-584). Her minister told Torrisi that Kuehler had been killed, and she took the check to the police station (Tr.578). Ozark police sent the check to the Missouri Highway Patrol's crime laboratory (Tr.640). Donald Lock, a handwriting and fingerprint expert, determined that Kuehler wrote the check (Tr.643).

Cary Maloney, a serologist, examined several items taken from Kuehler's trailer, as well as appellant's shirt, jeans and boots, and known blood samples from Kuehler, appellant and Ted Bartlett (Tr.646-651). Maloney found a small droplet of human blood on one of

appellant's boots, but there was not enough to compare with the known samples (Tr.652-653). He also found a large smear of blood on appellant's jeans, but because that blood had been diluted, there was not enough to make a comparison (Tr.653-654). He was, however, able to compare the bloodstains on appellant's shirt; he determined that the blood could have come from Kuehler, but not from appellant or Bartlett (Tr.658-665). Maloney determined that the enzyme profile found in the bloodstain on appellant's shirt occurs at a rate of approximately 0.5 percent in the general population (Tr.664).

Anita Matthews, a DNA expert testified that the (Tr.694). DNA from appellant's shirt matched Gladys Kuehler (Tr.694,703-707).

William Newhouse, a criminalist and blood splatter interpretation expert, testified that the "very tiny" bloodstains on appellant's shirt came from "high velocity" blood spatter which required a lot of energy and could not be produced by pulling someone away (Tr.720-725). Such stains could be produced when blood comes back at an assailant who stabs into a wound or a pool of blood on the victim (Tr.720-723).

Dr. James Spindler conducted Kuehler's autopsy (Tr.525). Her blood-saturated shirt had thirty-four cuts in the front and back; the brassiere had eleven cuts (Tr.530-531). Kuehler sustained five blunt-force injuries to her head (Tr.532-533). Kuehler had been stabbed and slashed several times in the eye area (Tr.533-535). Prior to her death, her right eye had been slashed through, and she sustained a stab wound to her left eyelid (Tr.533-535). Kuehler sustained at least four stab and slash wounds to her neck; the most serious wound severed her jugular vein and cut down to the bones in the back of her neck (Tr.536-537).

Kuehler was struck "about 65 times," including 41 stab wounds, 11 slash wounds, and blunt force injuries (Tr.545). The multiple chest stab wounds deflated Kuehler's left lung; she suffered extensive bleeding into the chest cavity (Tr.536-40). Dr. Spindler concluded that Kuehler's breasts were held down while she was stabbed in the chest (Tr.549). Four large, deep slashes were cut into Kuehler's abdominal area, forming two X's one so deep that her intestines protruded from the wound (Tr.539). She also had four defensive wounds to the back of her hands and arms (Tr.542).

Finally, Dr. Spindler examined the victim's genitalia and found bruising and tears in the vaginal area, caused by some blunt instrument or a penis (Tr.543-544).

Dr. Spindler concluded that the victim died from a combination of blood loss, shock, and stab wounds to the throat and chest, with lung collapse and hemorrhage of the lung spaces as contributing factors (Tr.544-545).

Appellant told Larry Arnold, his cellmate at the Christian County Jail, that he had killed an old lady by cutting her throat and stabbing her; he had cut an X on her body; and he had thrown the murder weapon into a river (Tr.728-730,749).

Ricky Ellis was also in the Christian County Jail, housed two to three cells away from appellant (Tr.765-766). Ellis overheard appellant say that "he was going to have [Arnold] killed because he had discussed a murder with him and he had talked about it" (Tr.766-767).

Kathy Allen, a trustee at the Lawrence County Jail, met appellant (Tr.768-769). Appellant twice got angry at Allen, telling her, "I will kill you like I killed her" (Tr.769-773).

Appellant told Craig Dorser, another Lawrence County Jail inmate, that he was in jail

for murdering an old lady (Tr.777). Appellant said he stabbed the woman "like 47 times," getting blood all over his face and clothing; he licked the blood off of his face and "he liked it" (Tr.778).

Appellant did not testify, but presented the testimony of nine witnesses (Tr.781-886). The jury found appellant guilty as charged (Tr.933; L.F.139).

In the penalty phase, the state presented evidence that in 1976, appellant was convicted of assault with intent to kill against a female convenience store clerk (Tr.968-969) and that after appellant was paroled in early 1984, he attacked, beat, and choked a female convenience store clerk in West Plains, for which he was convicted of assault in the first degree (Tr.972,976-978, 986-987).

The state also presented the testimony of Selvidge, who testified about her relationship with her grandmother (Tr.993).

Six witnesses testified for appellant, including family members and a psychiatrist who testified about the effects of appellant's brain injury (Tr.995-1074).

The jury returned a recommendation of the sentence of death, finding the following statutory aggravating circumstances: that appellant was convicted of assault with intent to kill on August 16, 1976; that appellant was convicted of assault in the first degree on June 18, 1984; and that the Kuehler's murder involved depravity of mind and, as a result thereof, was outrageously and wantonly vile, horrible and inhuman (Tr.1098-1099).

On June 10, 1998, the court imposed sentence in accordance with the recommendation of the jury (Tr.1102-1104).

This Court affirmed appellant's conviction and sentence on August 3, 1999. State v. Barton, 998 S.W.2d 19 (Mo.banc 1999).

Appellant filed his pro-se motion for post-conviction relief on December 3, 1999 and following appointment of counsel, filed his amended motion on March 6, 2000 (PCR.L.F.1). Following an evidentiary hearing on October 17th and 18th, 2000, the motion court denied appellant's motion for post-conviction relief (PCR.L.F.1-2,220-257).

ARGUMENT

I.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S MOTION TO DISQUALIFY BECAUSE HE WAS NOT BIASED AGAINST APPELLANT IN THAT THE LETTER TO AN INDIANA JUDGE RETURNING CUSTODY OF STATE'S WITNESS CATHY ALLEN EXPRESSED NO BIAS, PREJUDICE, OR OPINION ABOUT APPELLANT OR THE MERITS OF THE CASE AND THE INFORMATION WAS NOT EXTRAJUDICIAL AND THE JUDGE WAS NOT AN ESSENTIAL WITNESS IN THAT THE LETTER AND HIS KNOWLEDGE OF CATHY ALLEN DID NOT PERTAIN TO ANY POST-CONVICTION CLAIMS.

Appellant claims that the motion court clearly erred in denying his motion to disqualify without holding a hearing (App.Br.39). Appellant claims that the judge's action of sending a letter to an Indiana judge regarding testimony of a trial witness, Cathy Allen, who had pending charges in front of the Indiana court, made him a witness in the post-conviction proceeding and called his impartiality into question (App.Br.39).

Relevant Facts

Cathy Allen testified on behalf of the State during appellant's trial (Tr.768-773). The State had brought her from Indiana where she was in custody with pending charges (PCR.Tr.189-190). Following appellant's most recent trial, the trial judge, the Honorable Theodore Scott sent a letter to an Indiana judge, returning Allen to his custody (PCR.Tr.270). discussed Allen's beneficial testimony at appellant's trial and her cooperation with authorities

(PCR.L.F.83).[2]

On October 16, 2000, the day before the evidentiary hearing, appellant filed a "Motion for Change or Disqualification of Judge" (PCR.L.F.2,82). Appellant claimed that Judge Scott was biased towards Allen because he acted as an "advocate" for her by writing the letter to the Indiana judge (PCR.L.F.85). Appellant also alleged that Judge Scott should recuse himself because he would be a witness to various claims (PCR.L.F.82-83). Appellant claimed that because Judge Scott had written the letter to the Indiana judge, he would be a witness regarding appellant's claims of prosecutorial misconduct for failing to disclose Allen's criminal history and for suborning perjury from her during trial (PCR.L.F.82-83).

On October 17, 2000, the first day of the evidentiary hearing, the motion court denied appellant's motion stating that "the Court does not believe it rises to the level which would require the Court to take any affirmative action on that motion" (PCR.Tr.1; PCR.L.F.2).

During the evidentiary hearing, appellant attempted to call Judge Scott as a witness (PCR.Tr.392). Judge Scott declined, standing by his earlier ruling on the Motion to Disqualify (PCR.Tr.392). Via an offer of proof, appellant alleged that had he been permitted to call Judge Scott as a witness, he would have asked "what you knew regarding the letter that we discovered and Ms. Cathy Allen and when you knew it and how you found that out and why you wrote that letter and what biases you may or may not have in this case" (PCR.Tr.392).

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[2]This letter was not filed in the motion court and this Court denied appellant's motion to file an uncertified copy.

The motion court found that appellant failed to present compelling evidence in support of his allegations and a claim that this Court has an "interest in upholding the trial court actions, though, is not a disqualifying bias." (PCR L.F. 232). The Court also found that appellant offered no explanation as to why the Court was a necessary witness (PCR.L.F.232).

No bias or prejudice warranting disqualification

Due process concerns allow a litigant to remove a biased judge. State v. Taylor, 929 S.W.2d 209,220 (Mo.banc 1996). Judges should perform judicial duties without bias or prejudice; it is presumed that judges act with honesty and integrity; and that they will not preside in a proceeding in which they are unable to be impartial. State v. Kinder, 942 S.W.2d 313, 321 (Mo.banc 1996). Disqualification is only required if a reasonable person would find an "appearance of impropriety" and doubt the impartiality of the court. Id. A reasonable person "is not one who is ignorant of what has gone on in the courtroom before the judge" but rather knows all that "has been said and done in the presence of the judge" and understands that a judge's role changes between arraignment and sentencing and throughout the proceedings. Haynes v. State, 937 S.W.2d 199,202 (Mo.banc 1996). Under this standard, a disqualifying bias is one with an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learned from participation in the case. Id.; State v. Nicklasson, 967 S.W.2d 596, 605 (Mo.banc 1998).

Disqualification and recusal are case-by-case determinations and "[a] judge's decision whether his or her own bias threatens the fundamental fairness of the proceedings is left to the court itself, and we will defer to that decision if there is no abuse of that discretion." State v.

Cooper, 811 S.W.2d 786,791 (Mo.App.W.D. 1991); State v. Jones, 979 S.W.2d 171,178 (Mo.banc 1998). Effective administration of justice prefers that the trial judge oversee the Rule 29.15 hearing because the same judge is better equipped to assess the strengths and weaknesses of the prosecution's case and defense counsel's performance within the context of the entire case. State v. Whitfield, 939 S.W.2d 361,367 (Mo.banc 1997).

In the case at bar, there is no factual basis in which a reasonable person would find that the trial judge had formed an opinion on the merits based on an extrajudicial source. Hunter, supra. The letter does not indicate an opinion on the merits of the case or any issue or claim in the post-conviction proceeding. The essence of the alleged letter is that Ms. Allen cooperated with law enforcement in their prosecution of a killer. This does not mean the Judge Scott liked her, that he preferred her testimony, or that he had formed any opinion about appellant's post-convictions claims of prosecutorial misconduct. The letter does not show any bias or prejudice nor does it indicate that the judge made any opinion.

Even ignoring the fact that the letter does not indicate an opinion on the merits, appellant's motion was properly denied because Judge Scott did not learn of this information from outside the courtroom. Rather this information was obtained from presiding over the case. The information that Ms. Allen had been brought from Indiana in order to testify, that she testified that appellant threatened to kill her just as he had killed Ms. Kuehler, and that based on the evidence presented, appellant had been found guilty and the jury recommended the death penalty were all the details Judge Scott learned from the criminal proceedings, not from an extrajudicial source. There is no evidence that Judge Scott's opinions were based on anything

other than from his participation in the case. Although the trial judge spoke freely about the trial and Allen's testimony, his letter does not establish a disqualifying bias. See Haynes, supra at 204-205. Appellant did not offer any evidence that the trial court was biased or prejudiced against him and the motion court did not err in overruling his motion.

Not an essential witness

Appellant alleged in his motion that the judge's testimony regarding the letter about Cathy Allen would be evidence pertaining to his claims of prosecutorial misconduct (PCR.L.F.82-84). Specifically, appellant alleged that the judge's testimony would show that Judge Scott knew of Allen's Indiana case at the time of trial and that was relevant to his claim that the prosecutors suborned perjury of Cathy Allen when she testified about her criminal history and her name; that trial counsel was ineffective for failing to investigate Allen's criminal history and cross-examine her about it; and that prosecutors failed to disclose Allen's criminal history to defense counsel (PCR.L.F.82-83).

In order to require a judge to disqualify himself as a witness, the movant is required to assert a compelling reason why the judge would be called as a witness in the proceeding. State v. Simmons, 955 S.W.2d 752, 770 (Mo.banc 1997). Appellant fails to show how the trial judge's letter to an Indiana judge regarding Allen's *pending* charges has anything to do with her *prior convictions* or how this would tend to prove any claims regarding her criminal history or the prosecutors failure to disclose the same. The trial judge could offer no evidence towards these claims and appellant has failed to establish that the trial court abused its discretion in failing to disqualify itself.

Appellant also claims, for the first time on appeal, that the trial judge was a necessary witness because the letter rose the issue of whether Cathy Allen "was aware, before she testified, that such a benefit would be bestowed" upon her for testifying (App.Br.45). Appellant failed to raise this claim in his Motion to Disqualify or at anytime in the motion court (PCR.L.F.82). This claim is not properly before this Court and the motion court cannot be held to have erred when it was not granted the opportunity to rule on this aspect. State v. Reynolds, 997 S.W.2d 528,531 (Mo.banc 1999). Appellate courts will not find trial court err when the question that appellant raises on appeal was never put before the trial court to decide. Id.

Moreover, appellant did not raise any claim of Cathy Allen receiving a "deal" or "benefit" from her testimony in his post-conviction motion. An appellant is limited to his pleadings regarding evidence that may be presented at a post-conviction motion. State v. Johnson, 968 S.W.2d 686,695-697 (Mo.banc 1998). Disqualification is required only when the movant has asserted a compelling reason to have called the judge as a witness to support a claim at the post-conviction proceeding. Simmons, 955 S.W.2d at 770. Without any pleading related to a "deal" with Cathy Allen, the trial judge was not required to disqualify himself as he was not a witness to any post-conviction claim. Appellant has failed to assert a compelling reason to call the judge as a witness.

II.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT THE PROSECUTOR FAILED TO DISCLOSE CONVICTIONS OF CATHY ALLEN OTHER THAN THE SEVEN CONVICTIONS SHE ADMITTED TO AT TRIAL OF CATHY ALLEN BECAUSE 1) THERE WAS NO VIOLATION IN THAT THE PROSECUTOR DISCLOSED ALLEN'S CRIMINAL RECORD; 2) APPELLANT HAS FAILED TO SUSTAIN HIS BURDEN IN THAT HE HAS FAILED TO SHOW THAT ALLEN HAD A CRIMINAL RECORD DIFFERENT FROM THAT TESTIFIED TO; AND 3) EVEN ASSUMING THAT THERE WERE ADDITIONAL CONVICTIONS TO DISCLOSE, APPELLANT WAS NOT PREJUDICED IN THAT THE JURY WAS AWARE THAT ALLEN HAD SIX PREVIOUS CONVICTIONS, THAT SHE WAS IN JAIL AND THAT SHE WAS GUILTY OF CRIMES OF DECEPTION.

Appellant claims that the motion court was clearly erroneous in denying his claim that the prosecutor failed to disclose the criminal record of a witness, Cathy Allen (App.Br.50).

Relevant Facts

During appellant's trial, Cathy Allen, a state's witness, testified that she could recall that she had six convictions that were for "bad checks and check deceptions" and also admitted to a conviction for escaping from jail (Tr.768).

Dean Price, appellant's trial counsel, testified during the evidentiary hearing that he did not recall receiving a criminal history on Cathy Allen (PCR.Tr.178-179). He also stated that he had received the files from the attorneys that handled appellant's previous trials and that

although he could not recall for sure, they may have had Allen's criminal history records (PCR.Tr.178). When questioned about specific convictions for Cathy Allen, Price stated that he was not aware of them (PCR.Tr.179-189). During direct examination, Price stated that he did not know about Allen's escape charge; however, during cross-examination, Price admitted that he must have known about her escape because he questioned her about it at trial (PCR.Tr.186,226). Price also admitted that he was not surprised by Allen's testimony at trial that she had prior convictions (PCR.Tr.225-226). Price stated that he recalled a conversation with the prosecutor, prior to trial, that the State had located Allen in Indiana and she had pending charges (PCR.Tr.297-298). Price did not recall Ahsens telling him that she had more convictions (PCR.Tr.297-298).

Bob Ahsens, the prosecutor of appellant's trial, testified at the evidentiary hearing that although he did not specifically recall running a criminal history check on Cathy Allen, he was certain that he did because it was his practice to do so and he knew that she had prior convictions (PCR.Tr.253). Ahsens stated he either sent a copy of the criminal history printout or a letter containing the convictions to opposing counsel (PCR.Tr.253). Ahsens recalled speaking with Price at a pre-trial hearing, regarding Cathy Allen where Ahsens informed Price that they had located Cathy Allen in prison in Indiana and that she had new charges and convictions for bad checks or forgeries (PCR.Tr.255,275). Ahsens stated that he believed he followed up the information with a printout and that everyone involved in appellant's trial were acutely aware of Allen's criminal history (PCR.Tr.278).

In denying appellant's claim that the prosecutor committed prosecutorial misconduct

by failing to disclose Cathy Allen's criminal record, the motion court found that the State fulfilled its obligation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1994, 10 L.Ed.2d 216 (1963), by disclosing Cathy Allen's prior convictions (PCR.L.F.240). The motion court also found that appellant failed to prove, with one exception, that Allen had any convictions that were not disclosed (PCR.L.F.239). The motion court stated that the State was not negligent in failing to find convictions that appellant's post-conviction relief team failed to find, even "through extraordinary efforts" (PCR.L.F.239-240). Finally, the motion court stated that even assuming that the State failed to disclose some convictions, appellant failed to establish that he was prejudiced by the alleged non-disclosure (PCR.L.F.239). The motion court stated that the outcome would not have changed because the jury was aware that Allen had six previous convictions, that she was in jail and that she was guilty of crimes of deception (PCR.L.F.239).[3]

[3]Appellant attempts to rely on a deposition of Bob Ahsens and various exhibits that occurred after the evidentiary hearing. Although appellant requested the motion court to reopen the evidence, the motion court refused and did not accept the deposition or exhibits. Appellant makes no allegation that the motion court's refusal to reopen the evidence was in err. Appellant cannot offer new evidence on appeal. State v. Tokar, 918 S.W.2d 753,761-762 (Mo.banc 1996).

Disclosure of Criminal Convictions

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). 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.

The state has a due process obligation to disclose matters that are favorable to the defense, either as exculpatory evidence or as evidence that impeaches a witness who is adverse to the defense. Brady, supra; United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). There are three requirements for a "Brady violation": (1) that the evidence in question is favorable to the defense, either because it was exculpatory or because it impeached state's evidence, (2) that the evidence was knowingly or inadvertently suppressed by the state, and (3) that prejudice resulted to the defendant. Strickler v. Greene, 527 U.S. 263, 280-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); State v. Ferguson, 20 S.W.3d 485, 503 (Mo.banc 2000). By definition, prior criminal convictions of a State's witness must be disclosed to the defense as it is impeaching evidence.

In the case at bar, the evidence shows that the State did, in fact, disclose the prior convictions of Cathy Allen. The prosecutor testified at the evidentiary hearing that he disclosed the criminal history of Cathy Allen and as the motion court stated, Cathy Allen had testified at a previous trial that she had six prior convictions. The prosecutor verbally informed defense counsel of the new charges against Cathy Allen in Indiana and her most recent

convictions in Indiana. The motion court was free to disbelieve appellant's trial counsel and to find the prosecutor's testimony credible. The motion court is entitled to make determinations of credibility. State v. Gilpin, 954 S.W.2d 570,577 (Mo.App.W.D. 1997). Deference should be given to the motion court's superior opportunity to judge the credibility of the witnesses. State v. Twenter, 818 S.W.2d 628,635 (Mo.banc 1991).

Moreover, appellant failed to provide any proof at the evidentiary hearing that Allen had any other convictions beyond those testified to at trial. Appellant did not present any evidence that Cathy Allen had more convictions. Without any proof of other convictions, appellant's claim cannot succeed. The motion court was not clearly erroneous in denying appellant's claim.

Prejudice

As stated above, in order to succeed on a claim for failure to disclose prior convictions of a state's witness, among other things, appellant must show that there was non-disclosure and if there was no disclosure, he must prove that the non-disclosure prejudiced him. In order to show prejudice, appellant must show that there is a reasonable probability that, but for the non-disclosure, the result of the proceeding would be different. State v. Middleton, 995 S.W.2d 443,455 (Mo.banc 1999); State v. Goodwin, 43 S.W.3d 805,812 (Mo.banc 2001).

The motion court's findings were not clearly erroneous because there is no reasonable probability that the result of the trial would have been any different. First, when considering the testimony of Cathy Allen, Craig Dorser, Ricky Ellis, and Larry Arnold about appellant's admissions to killing Ms. Kuehler, and the other evidence of guilt, including the DNA

evidence, the blood splatter evidence, and appellant's presence at the scene near the time of death, additional impeachment of Ms. Allen would not have changed the outcome.

Second, when considering that the jury was made aware that she had several convictions dealing with deception and that she had escaped from the prison, there is no reasonable probability that additional convictions would have changed the verdict. Appellant was not prejudiced and the motion court did not clearly err in denying his claim.

Psychiatric Examination

Although it is nowhere to be found in his point relied on, appellant offers a perfunctory assertion in his argument that the State also failed to disclose a psychological evaluation of Allen "which revealed that she was malingering" (App.Br.54). Appellant claims that, had his counsel known of the evaluation, he would have used it to attempt to have Allen declared incompetent to testify (App.Br.54). Appellant ignores the fact that 1) this evaluation was not in the possession of the State, but rather in Allen's court files Kyles v. Whitley 514 U.S. 419,434-438,115 S.Ct. 1555,131 L.Ed.2d 490 (1995) (State is only required to learn and disclose exculpatory and impeaching evidence that is known to the others working on the government's behalf in the case but is not required to disclose items that are not in the prosecutor's or law enforcement community's knowledge, possession, or control); 2) that the psychological evaluation does not declare her as incompetent but rather, a malingerer; and 3) that even appellant's trial counsel admitted at the evidentiary hearing that he could not have gotten her declared incompetent based on this evaluation (PCR.Tr.246). The motion court did not err in denying this claim.

III.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT THE STATE FAILED TO REVEAL A PLEA BARGAIN MADE WITH CATHY ALLEN FOR HER TESTIMONY BECAUSE THIS CLAIM IS UNREVIEWABLE IN THAT IT WAS NOT PLED IN HIS POST-CONVICTION MOTION.

Appellant claims that the motion court was clearly erroneous in denying his claim that the State failed to reveal a plea bargain made with Cathy Allen which terms allegedly included that if she testified for the State against appellant, the Cass County, Missouri prosecutor's office would dismiss charges against her (App.Br.62).

Appellant failed to raise this claim in his post-conviction motion. This has repeatedly held that claims which would properly have been raised in a post-conviction motion, but were not included in such a motion, are waived and cannot be reviewed on appeal. State v. Johnson, 968 S.W.2d 686,695-697 (Mo.banc 1998); Coates v. State, 939 S.W.2d 912,915 (Mo.banc 1997). By failing to raise this claim in his post-conviction motion, this claim is not reviewable by this Court. Id.

Even assuming that this claim was properly before the court, appellant's claim still fails because, as the motion court found, appellant presented no evidence that there was a deal with Cathy Allen (PCR.L.F. 240). The motion court was not clearly erroneous in denying this claim.

IV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT THE PROSECUTOR KNOWINGLY PRESENTED PERJURED TESTIMONY OF CATHY ALLEN BECAUSE APPELLANT FAILED TO SUSTAIN HIS BURDEN IN THAT HE FAILED TO PRESENT ANY EVIDENCE THAT CATHY ALLEN HAD ANY OTHER CONVICTIONS THAN THE ONES SHE ADMITTED TO AT TRIAL. IN ANY EVENT, APPELLANT WAS NOT PREJUDICED IN THAT TESTIMONY ABOUT ADDITIONAL CONVICTIONS WOULD NOT HAVE CHANGED THE OUTCOME.

Appellant claims that the State knowingly presented perjured testimony of Cathy Allen when she testified at trial that she had six convictions for check deceptions and bad checks and an escape charge (App.Br.68).

In denying appellant's claim, the motion court found that appellant tried to change the theory set forth in his Motion; appellant presented no evidence that her name was not Katherine Allen; and the motion court would not allow appellant to avoid the pleading requirements of Rule 29.15 by changing his claim (L.F.241).

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." State v. Tokar, 918 S.W.2d 753,761 (Mo.banc 1996). 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). "A hearing court is not clearly erroneous in refusing to grant relief on an issue which is not supported by evidence at the evidentiary hearing." Id.

To obtain relief based on a claim that the State used perjured testimony, appellant must establish 1) that the witness's testimony was false; 2) that the State used that testimony knowing of its falsity; and 3) that the conviction was obtained as a result of that testimony. State v. Arndt, 881 S.W.2d 634,637 (Mo.App.S.D.1994).

Appellant failed to prove by a preponderance of the evidence that Cathy Allen's testimony was false; he did not present any evidence that the State knew that the testimony was false; and he has failed to show that the conviction was obtained as a result of her testimony.

Appellant failed to present any evidence on what convictions Cathy Allen had.[4] Appellant did not present any evidence that Allen had more convictions than she testified to, nor did he present any evidence that the prosecutor knew that Allen had more convictions and failed to correct the allegedly false testimony. By failing to present any evidence, appellant failed to sustain his burden and the motion court was not clearly erroneous in denying his claim.

Even assuming that Allen's testimony was false as appellant claims, and that the

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[4]Appellant cites to MX 65 and 66 and Bob Ahsens' deposition, alleging that these prove that Allen had more convictions that she testified to (App.Br.68-69). However, these exhibits were not admitted at the evidentiary hearing, the motion court did not reopen the evidence and these exhibits are not before this Court.

prosecutor knowingly suborned the false testimony, appellant's claim would fail as he has failed to prove that the result of the proceeding would have been different. Appellant's conviction was not obtained as a result of Allen's testimony. Rather, appellant's conviction was obtained from the overwhelming evidence--including appellant's admissions to various other prisoners, his place at the scene of the crime at the time of death; and Kuehler's blood splatters on his clothes. State v. Barton, 998 S.W.2d 19 (Mo.banc 1999). Appellant has failed to establish that he is entitled to relief and the motion court was not clearly erroneous in denying his claim.

V.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL, WHO REPRESENTED HIM AT HIS 1993 TRIAL, WERE INEFFECTIVE FOR MOVING FOR A MISTRIAL AFTER THE STATE HAD FAILED TO ENDORSE ITS WITNESSES BEFORE TRIAL BECAUSE COUNSEL'S ACTIONS WERE REASONABLE AND APPELLANT WAS NOT PREJUDICED IN THAT THE TRIAL COURT WOULD NOT HAVE *SUA SPONTE* GRANTED A MISTRIAL AND DISCHARGED APPELLANT.

Appellant claims that the attorneys who represented him at his 1993 trial that resulted in a mistrial were ineffective for requesting a mistrial following the State's failure to file its endorsement of witnesses prior to trial (App.Br.71). Appellant alleges that because the jury had already been sworn, double jeopardy had attached, and the trial court was bound to declare a mistrial, sua sponte, and discharge appellant had defense counsel not requested the mistrial (App.Br.73).

Relevant Facts

After jury selection in Henry County, a jury was empaneled and sworn on April 3, 1993 (SC77147 L.F.174). However, before trial was to begin on April 5, 1993, it was discovered that, for unknown reasons, the State's endorsement of witnesses had not reached the circuit clerk or opposing counsel (SC77147 Supp.Tr.94,96-99,103-107) (Appendix A 36-50). Defense counsel then requested a mistrial which the trial court granted (Appendix A 36-50)(SC77147 Supp.Tr.94,96-99,103-07). The proceedings then returned to open court; the

trial court informed the jury that "[t]he defendant is requesting and the court is required to grant a mistrial and I am so doing." (SC77147 Supp.Tr.108.) Prior to the second and third trials in this case, defense counsel requested appellant discharged on double jeopardy grounds; both times the request was denied (SC77147 Tr.1-2).

Appellant was retried and found guilty of murder in the first degree and was sentenced to death (SC77147 Tr.895,999,1005-1006). Appellant subsequently filed a pro se motion for post-conviction relief and an amended motion for relief, alleging in relevant part, that his trial counsel was ineffective for requesting a mistrial after the jury was sworn following the State's failure to endorse witnesses (SC77147 PCR.L.F.18-19). During the evidentiary hearing, appellant's trial counsel, Mary Young testified, via deposition, that she had advised co-counsel Dan Gralike not to request a mistrial, because she believed that the trial court was required to grant a mistrial, sua sponte, or that when the State was not able to call any witnesses during trial, the trial court would then have to grant a mistrial, sua sponte, and appellant would be discharged (SC77147 PCR.L.F.66-73).

Attorney Gralike testified that during a break he researched the subject and believed that the Court would not grant a mistrial sua sponte, and that in order to preserve the issue for appeal, it would be necessary for him to request the mistrial (SC77147 PCR.Tr.78). Gralike believed that the Court would not grant a mistrial sua sponte because it was not a manifest necessity and the trial court made several comments, including debate about whether it would allow the State to call only its witnesses that it called during the extensive preliminary hearing; whether the State could only call witnesses that the defense had endorsed (they had endorsed

over a hundred, many of them State's witnesses); or the State could call not only witnesses that testified at the evidentiary hearing but witnesses that defense had deposed (SC77147 PCR.Tr.79). Gralike believed that the State could have made a submissible case with those witnesses (SC77147 PCR.Tr.79). Gralike had found a case that he thought supported his position that if it was determined that the State was "grossly negligent" in failing to endorse their witnesses, he would not automatically waive double jeopardy by requesting the mistrial (SC77147 PCR.Tr.78-80). Gralike strategically decided to request the mistrial (SC77147 PCR.Tr.80). The motion court denied his claim.

Appellant filed his consolidated appeal in this Court, raising several claims, but did not raise the claim of ineffective assistance of counsel for requesting the mistrial. This Court reversed appellant's case and remanded for a new trial based on a trial court error in sustaining an objection to defense counsel's closing argument which was deemed prejudicial. State v. Barton, 936 S.W.2d 781 (Mo.banc 1996). No other claims were addressed by this Court. Id.

Following appellant's trial, conviction and appeal to this Court, appellant filed a post-conviction motion, raising this claim. The motion court found that although no witnesses had been endorsed by the State, discovery had been conducted and trial counsel was not surprised by the State's evidence (PCR.L.F.241). The motion court also stated that the trial court had other options than declaring a mistrial, including allowing the State to endorse the witnesses and proceed to trial (PCR.L.F.241).

Collateral Estoppel

Appellant is precluded from raising this point on appeal as he has had a full and fair opportunity to litigate his claim in his prior post-conviction motion. Carrow v. State, 766 S.W.2d 463, 464 (Mo.App.E.D. 1989). Appellant raised this claim in his post-conviction motion following his 1994 conviction. The motion court ruled against him and appellant abandoned this claim on appeal. Appellant's post-conviction motion was never vacated and the motion court's findings was a full judgment on the merits. Carrow, supra. This issue was identical to the issue raised in the prior suit, appellant was a party to that adjudication, and he had a full opportunity to litigate the issue at that time. Therefore, collateral estoppel precludes relitigation of the issue in this proceeding.

Effective Trial Counsel

Even assuming that appellant's claim is not barred from relitigation, appellant's claim must fail because his trial counsel was not ineffective for requesting the mistrial and even if trial counsel had not requested the mistrial, there is no reasonable probability that the result would have been different.

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. State v. Ervin, 835 S.W.2d 905,928 (Mo.banc 1992). To require reversal, 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." Strickland v. Washington, 466 U.S. 668,687, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). Trial counsel Gralike testified that he had researched the double jeopardy and mistrial issues and

based on his research, he had determined that he would not necessarily waive his double jeopardy claim by requesting the mistrial. Based on the discussions, he believed that the trial court was not inclined to declare a mistrial sua sponte, but rather was going to let the trial continue. This conclusion is supported by the motion court's findings (the motion court judge was also the trial judge) that he would have allowed the state to endorse the witnesses and continue with trial and that there were other options besides a mistrial (PCR.L.F.241). Trial counsel's tactical decision was reasonable based on the discussion with the trial court and the prosecutor and based on his research that made him believe that if he could prove "gross negligence" by the state, his double jeopardy claim was not automatically waived. By requesting the mistrial, defense counsel was acting as a reasonable counsel, evaluating the status of the case, determining a proper strategy and course to follow under the circumstances as they existed at the time. See Fitzpatrick v. State, 676 S.W.2d 831 (Mo.banc 1984) (trial counsel's actions reasonable in requesting a mistrial after an unintentional prosecutorial error which resulted in the jury reading a non-admitted police report). Trial counsel's actions were reasonable.[5]

[5]In appellant's argument section of this point, he requests, in a footnote, that this Court consider testimony by Charles Rogers, a criminal defense attorney, who testified as an "expert" attorney, that counsel's actions were unreasonable. Appellant ignores this Court's holding in Sidebottom v. State, 781 S.W.2d 791,795 (Mo.banc 1989) that this testimony is irrelevant, incompetent and not proper expert testimony.

Not only were trial counsel's actions reasonable, but appellant was not prejudiced by his trial counsel's actions. The result of the proceeding would not have been different because, as the motion court found, he would not have sua sponte granted a mistrial but rather had other options such as allowing the State to late endorse its witnesses (PCR.L.F. 35-36); State v. Chaney, 967 S.W.2d 47,56-57 (Mo.banc 1998); State v. Gardner, 955 S.W.2d 819,825 (Mo.App.E.D.1997) (Trial court's have broad discretion in permitting the late endorsement of witnesses). The trial court had many options beyond requiring a mistrial. See Supreme Court Rule 25.16. Moreover, a mistrial is a drastic remedy which the trial court should reserve for situations when all other remedies are inadequate. State v. Smothers, 605 S.W.2d 128,132 (Mo.banc 1980). The trial court assessed the situation and determined that there were other appropriate options available other than granting a mistrial and that he would not have sua sponte granted a mistrial. Appellant has not established that he was prejudiced.

VI.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR APPEAL THE ISSUE OF DOUBLE JEOPARDY BY RENEWING THE MOTION AT TRIAL BECAUSE CLAIMS THAT TRIAL COUNSEL FAILED TO PRESERVE AN ISSUE FOR REVIEW ARE NOT COGNIZABLE IN A RULE 29.15 PROCEEDING. MOREOVER, TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE THIS MOTION HAD NO MERIT IN THAT THE RETRIAL AGAINST APPELLANT DID NOT RESULT IN DOUBLE JEOPARDY.

Appellant alleges that his trial counsel was ineffective for failing to preserve for appeal the motion for double jeopardy, as discussed *supra* in Point 5, filed by prior counsel in the previous trial (App.Br.76).

The motion court denied this claim, without an evidentiary hearing, and found that the claim was without merit and would have been a meaningless act (PCR.L.F.246; PCR.Tr.5,211). However, during the evidentiary hearing, appellant attempted to present testimony via an offer of proof, through Dean Price, appellant's trial counsel, that prior to appellant's last trial, the trial court was considering all motions filed by previous counsel and all rulings would be the same (PCR.Tr.211). Trial counsel admitted that he did not include the issue in the motion for new trial and he did not have a strategic reason not to do so (Tr.211).

The motion court's findings were not clearly erroneous as appellant's claim is without

merit. 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.

"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, appellant's claim that his trial counsel was ineffective for failing to properly preserve these issues on appeal must fail, as failure to preserve issues for appeal is not cognizable in a 29.15 proceeding. Id.

In any event, appellant's claim must fail because trial counsel was not ineffective for failing to raise a meritless claim. In general, when a defendant requests a mistrial, the retrial of his case is not prohibited by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. State v. Tolliver, 839 S.W.2d 296,298-99 (Mo.banc 1992). "A defendant's motion for a mistrial constitutes 'a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact.'" Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). See also United States v. Dinitz, 424 U.S. 600,608, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) (mistrials granted "at the defendant's request" do not bar retrial even when request triggered by "judicial or prosecutorial error"). "Only where the government conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after

having succeeded in aborting the first on his own motion." Id.; Tolliver, supra at 299; State v. Fitzpatrick, 676 S.W.2d 831,835 (Mo.banc 1984). Prosecutorial misconduct alone is insufficient to bar a retrial on double jeopardy grounds. Kennedy, supra at 676. Moreover, appellant has the burden of proving that the defense request for a mistrial was the result of prosecutorial misconduct and that the misconduct was intended to coerce such a request. Id.

There is nothing in the record to indicate that any prosecutorial misconduct involved in this case was intended to cause appellant to request a mistrial. To the contrary, the record makes abundantly clear that the prosecutor believed that he had, in fact, endorsed his witnesses by sending the relevant documents to the court clerk and to opposing counsel. The prosecutor produced his own file copy of the documents at issue, complete with a certificate of service indicating that they had been sent, and was "flabbergasted" to learn that they had not been received by counsel or the clerk (SC77147 Supp.Tr.96-99,103-04). Appellant has identified nothing in the record to indicate that the prosecutor intentionally failed to endorse any witnesses. Accordingly, his claim that the first mistrial barred subsequent prosecutions on double jeopardy grounds would have failed and his trial counsel was not ineffective for failing to renew the motion. Tolliver, supra, at 299.

VII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE THAT THE STATE'S DEATH PENALTY NOTICE BE QUASHED ON THE GROUND THAT THIS COURT'S PROPORTIONALITY REVIEW VIOLATES DUE PROCESS BECAUSE THIS CLAIM IS MERITLESS IN THAT THIS COURT HAS REPEATEDLY REJECTED SUCH CLAIMS, HOLDING THAT THE PROPORTIONALITY REVIEW IS CONSTITUTIONAL.

Appellant claims that the motion court was clearly erroneous in denying his claim that his trial counsel was ineffective for failing to move that the state's death penalty notice be quashed on the constitutional ground that this court's proportionality review violates due process, relying on Harris v. Blodgett, 853 F.Supp. 1239,1286 (W.D.Wash.1994), (App.Br.80).

The motion court denied appellant's claim, finding that "such an effort would have been a wasted effort and such challenges have been repeatedly rejected by the Missouri Supreme Court" (PCR.L.F.246).

The motion court was not clearly erroneous in denying this claim because it was meritless. This Court has repeatedly denied such claims. State v. Middleton, 998 S.W.2d 520,530 (Mo.banc 1999); State v. Clay, 975 S.W.2d 121,146 (Mo.banc 1998); State v. Johnson, 968 S.W.2d 123,134-135 (Mo.banc 1998); State v. Rousan, 961 S.W.2d 831,854-855 (Mo.banc 1998); State v. Richardson, 923 S.W.2d 301,329 (Mo.banc 1996).

Appellant's trial counsel was not ineffective for failing to raise this meritless claim.

VIII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A "PRETRIAL EVALUATION" OF THE RELIABILITY OF THE STATE'S INFORMANT WITNESSES BECAUSE TRIAL COUNSEL WAS NOT INEFFECTIVE IN NOT RAISING THIS CLAIM IN THAT IT IS MERITLESS.

Appellant claims that his trial counsel were ineffective for failing to request a pretrial evaluation of the reliability of the State's jailhouse informant witnesses so that their testimony would be excluded (App.Br.82).

In denying this claim, the motion court found, in relevant part, that "[appellant] asserts that counsel should have requested some unspecified hearing on the reliability of jailhouse informants. This would have been a wasted effort; no such remedy exists nor would it have been granted. Credibility was for the jury to decide and it was properly instructed on how to weigh credibility" (PCR.L.F.246).

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." State v. Tokar, 918 S.W.2d 753,761 (Mo.banc 1996). 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's findings are not clearly erroneous. Appellant did not cite facts which would have entitled him to relief. Appellant offers no authority from any jurisdiction regarding "pretrial evaluation," and respondent knows of none which allows a pretrial evaluation on the reliability of witnesses. Credibility determinations are for the jury to determine and the jury was properly instructed on how to weigh credibility. See State v. Davis, 814 S.W.2d 593,603 (Mo.banc 1991). The motion court was not clearly erroneous in denying this claim.

Appellant also claims, for the first time on appeal, that trial counsel could have used the informant's testimony during this "reliability hearing" to impeach them during trial (App.Br.83). This claim was not raised at the motion court level and appellant cannot change his theory on appeal. Nunley v. State, 980 S.W.2d 290,292 (Mo.banc 1998). The motion court was not clearly erroneous in denying his claim.

IX.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIMS THAT COUNSEL WERE INEFFECTIVE DURING VOIR DIRE BECAUSE COUNSELS' ACTIONS WERE REASONABLE AND APPELLANT WAS NOT PREJUDICED IN THAT THESE ACTIONS WERE EITHER MERITLESS OR DID NOT AFFECT THE VERDICT.

Appellant makes several claims regarding trial counsel's effectiveness during voir dire including that 1) trial counsel was ineffective in allegedly misstating the law regarding appellant's failure to testify; 2) counsel's failure to voir dire on various "penalty issues"; 3) counsel failed to peremptorily strike two veniremen; 4) counsel failed to request additional strikes due to pretrial publicity; and 5) counsel failed to object to an alleged misstatement regarding aggravating and mitigating circumstances during the State's voir dire (App.Br.85).

Statement regarding appellant's failure to testify

During voir dire, appellant's counsel made the following statements regarding appellant's failure to testify during trial:

> There's a concept of law that I expect at some point will be instructed on, that defendants have a right to remain silent and not testify. I expect that the instruction will tell you that that is not evidence of guilt but it can be considered by you in determining believability and other factors about the defendant. The question I have generally is, is there anyone here should Mr. Barton decide not to testify, should that instruction be given to you, you do not believe you could

follow that instruction of law? Is there anyone who feels so strongly about that issue you don't believe you could follow the instruction of law that you cannot infer guilt from his failing to testify?

(Tr.268-269).

The jury instruction that was given to the jury regarding appellant's failure to testify read as follows:

Under the law, a defendant has a right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that defendant did not testify.

(L.F.119).

During the evidentiary hearing, trial counsel stated that he did a "poor job" of questioning the jury regarding appellant's failure to testify and that he had a "total brain cramp and a mistake" when he incorrectly informed the jury about the instruction (PCR.Tr.216).

In denying appellant's claim, the motion court found that although the statement was wrong and mistake by counsel, it was not prejudicial; appellant was found guilty from the evidence, not his silence; and the jury was properly instructed that Movant's silence could not be considered (PCR.L.F.247).

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." State v. Tokar, 918 S.W.2d 753,761 (Mo.banc 1996). In order to show ineffective assistance of counsel, 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." Strickland v. Washington, 466 U.S. 668,687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The motion court was not clearly erroneous in denying appellant's claim. Although counsel misstated the law, appellant has failed to show that had counsel correctly stated that his silence could not be used against him at all, there is a reasonable probability that the outcome would have been different. First, this statement was made early in the proceedings and was an isolated incident. Second, as the motion court found (PCR.L.F.247), the jury was properly instructed on the law and the jury is presumed to follow the court's instructions. State v. Madison, 997 S.W.2d 16,20 (Mo.banc 1999); State v. Nicklasson, 967 S.W.2d 596,608 (Mo.banc 1998) (Proper jury instructions correct the effect of any potentially misleading statements during voir dire). Third, the jury was asked and they agreed that they were willing to follow all of the instructions which the Court would give to them (Tr.52).

Finally, as the motion court found (PCR.L.F.247), it was not appellant's silence that resulted in the guilty verdict but rather the overwhelming evidence against him including his confessions to other inmates, the blood splatter evidence, the DNA evidence, appellant's actions at the crime scene, and his admission that he was at her home near the time of death. The motion court was not clearly erroneous in denying this claim.

Failure to voir dire regarding "beliefs on the penalty phase issues"

Appellant claims that counsel failed to question prospective jurors whether they would automatically consider the death penalty upon finding a particular aggravating circumstance;

failed to question prospective jurors who expressed opposition to the death penalty whether they could set aside their beliefs and follow the law; failed to ask prospective jurors about the source and depth of their opinions about the death penalty and their feelings about it; and failed to question the jurors about whether they would give weight to mitigating evidence as required by law (App.Br.86).

During the evidentiary hearing, trial counsel testified that he was told that no other individual questions could be asked following the State's voir dire (PCR.Tr.213). Counsel stated that he did ask a few general questions to the panel (PCR.Tr.213). Counsel also stated that he had an "entire packet" of questions that he was prepared to ask if the trial court had allowed him to do so (PCR.Tr.214). Counsel wanted to question the jurors about "elements a person would consider being present or absent that would make the difference" between the two sentences and questions about how the jurors felt about various issues (PCR.Tr.214). Counsel stated that "it was made clear that feelings of the jurors were irrelevant and [he] wasn't going to be able to get in to any of those on any issue" (PCR.Tr.214).

In denying appellant's claim, the motion court found "[t]rial counsel's voir dire was adequate and was not ineffective" (PCR.L.F.246-247).

The motion court's findings were not clearly erroneous because appellant has failed to establish that his trial counsel's actions were unreasonable or that he was prejudiced under Strickland. Trial counsel testified that the trial court informed him that he was not able to voir dire the panel individually. In fact, trial counsel had made requests to the trial court to do individual voir dire, both on the record and off the record--both requests were denied (Tr.84).

Moreover, trial counsel inquired of the venire panel regarding their understanding of procedure for finding aggravating and mitigating circumstances; he asked them about their understanding of the burden of proof; whether they had an open mind on guilt and punishment; the venire panel's feelings on mitigating circumstances; and whether the jury could give life in prison even if there were aggravating circumstances (Tr.318-320). Trial counsel conducted a reasonable penalty phase voir dire following the prosecutor's voir dire, within the constraints given him by the trial court. Finally, counsel could not have questioned the jury about their "feelings" as these questions are improper during voir dire. State v. Kreutzer, 928 S.W.2d 854,864 (Mo.banc 1996). Counsel's actions were reasonable.

Even assuming that trial counsel should have asked the specific questions as appellant alleges, appellant has failed to establish that he was prejudiced by his attorneys' actions. The total voir dire examination was proper and the court adequately informed the jury of the law regarding burden of proof, law on aggravating and mitigating circumstances and all other necessary matters of law. Appellant failed to demonstrate that any bias resulted from the jury selection process. Clemmons v. State, 785 S.W.2d 524,529 (Mo.banc 1990). Moreover, appellant does not identify any members of the venire who would have answered negatively to these questions and does not even allege that any jurors existed that could not have followed the instructions. Id. Appellant has failed to show any prejudice resulted from trial counsel's actions.

Peremptory Strikes against Veniremen Haas and Cole

Appellant claims that trial counsel should have used peremptory strikes against Veniremen Haas and Cole (App.Br.85). Specifically, appellant alleges that because Venireman Haas had experienced torture in Yugoslavia and the case indicated that the victim was tortured prior to her death, trial counsel should have used one of his peremptory strikes against Haas (App.Br.87). Appellant claims that veniremen Cole should have been struck because she "thought" that she could set aside the information she had learned through pretrial publicity (App.Br.87).

During voir dire, venireman Cole stated that she had not formed an opinion as to whether appellant was guilty or not guilty based upon the pretrial publicity she had been confronted with (Tr.169-170). Cole stated that "there wasn't enough from what I saw that told you anything really" (Tr.169-170). Cole then stated that she thought she could base the verdict solely on evidence presented in the courtroom (Tr.170). Cole later stated that she had not formed any opinion about the case from the pretrial publicity and that she does not "believe everything [she] reads" (Tr.177). She then stated that she did not just "think" that she could set aside the information that she had heard, but that she definitely could set aside the information (Tr.178).

Venireman Haas stated that he had been tortured in Yugoslavia after the second World War and he had seen tortures, mutilation and "just about everything imaginable" (Tr.223). Haas stated that after coming to America, he became a citizen, and had a family (Tr.223). He also stated that he had no difficulties with this country (Tr.223).

During the evidentiary hearing, appellant failed to question trial counsel regarding his trial strategy regarding peremptory strikes and specifically, whether he had a strategy for not striking Haas and Cole.

The motion court denied appellant's claim, finding that "[b]oth jurors were qualified to sit as jurors. There were other potential jurors whom counsel could reasonably believed needed to be excluded and Movant failed to overcome the presumption that the decisions made by counsel were reasonable trial strategy" (PCR.L.F.247).

"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 use peremptory strikes against Haas and Cole, 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), failure to make this inquiry signifies failure to meet his burden of proof. By failing to make this inquiry, appellant has failed to show that counsel's actions were not strategic.

Moreover, appellant has failed to show that he was prejudiced. He made no showing that Haas and Cole were not qualified to sit on the jury or that they were biased against him. Clemmons, supra. The motion court was not clearly erroneous in denying this claim.

Additional Strikes Due to Pre-Trial Publicity

Appellant alleges that trial counsel was ineffective for failing to request additional peremptory challenges due to pretrial publicity (App.Br.88).

During the evidentiary hearing, trial counsel stated that he should have requested additional challenges but that he did not (PCR.Tr.215).

The motion court denied this claim, finding that "[n]o showing was made that the jury selected was other than fair and impartial and this Court, in fact, finds that Movant was tried by a fair and impartial jury. Counsel was not entitled to additional strikes beyond that permitted by law and would not have been successful had such a request been made." (PCR.L.F.247).

The motion court's findings are not clearly erroneous because appellant cites to no authority and respondent knows of none which would entitle him to more peremptory strikes than that afforded to him by law. §494.480, RSMo 2000. In any event, appellant made no showing that the jury was anything other than impartial and free from bias. Clemmons, supra. The motion court was not clearly erroneous in denying this claim.

Voir Dire Question Regarding

Aggravating and Mitigating Circumstances

Appellant alleges that his trial counsel was ineffective for failing to object to the following statement made by the prosecutor during voir dire regarding the law of aggravating and mitigating circumstances (App.Br.85,89):

> With regard to that however your job is not done. You may find they [aggravating circumstances] exist and decide that in your opinion as a jury, and you have to decide unanimously, that in your opinion as a jury that's not good enough for you. You still don't want to give the death penalty. You may decide

> that after hearing evidence from the defense in the second part of the trial, and I'm sure you'll hear evidence from both sides, that perhaps something that you've heard from them outweighs the aggravating circumstances. Those are called mitigating circumstances. Aggravating makes it less [sic]; mitigators make it less severe. So once you get to that point and you start balancing you consider everything that you've heard in both phases of the trial and you make up your mind as to which punishment is appropriate.

(Tr.287). Appellant alleges that this was a misstatement of the law in that it suggested that the jurors must agree unanimously as to the existence of mitigating circumstances (App.Br.90).

During the evidentiary hearing, trial counsel testified that he believed it was a misstatement of the law and that he did not object to the statement because he "just missed it" (PCR.Tr.217).

The motion court denied appellant's claim finding that "[t]he challenged statement was not a misstatement of the law and, during the penalty phase, the jury was given proper written instructions on the law" (PCR.L.F.247).

The motion court's findings are not clearly erroneous because the prosecutor's statement was correct under the law. At no point in his statement did the prosecutor state or imply that the jury was required to unanimously find mitigating circumstances. Trial counsel cannot be ineffective for failing to object to a proper statement. State v. Parker, 886 S.W.2d 908,932 (Mo.banc 1994). The motion court was not clearly erroneous in denying appellant's claim.

X.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIMS THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL RICHARD AUSMUS AND RICHARD MORRISET AS WITNESSES BECAUSE APPELLANT HAS FAILED TO SUSTAIN HIS BURDEN IN THAT HE FAILED TO SHOW THAT IT WAS NOT TRIAL STRATEGY AND APPELLANT WAS NOT PREJUDICED IN THAT THESE WITNESSES WOULD NOT HAVE PROVIDED A VIABLE DEFENSE.

Appellant claims that trial counsel was ineffective for failing to call Richard Ausmus and Richard Morriset as witnesses during his trial (App.Br.92). Appellant alleges that Ausmus' testimony regarding appellant's whereabouts during "a portion of the afternoon of the crime" would have aided his defense and his testimony that he saw appellant "milling" around after the murder with other people could have explained how appellant got blood splatters on him been presented (App.Br.93). Appellant also claims that Richard Morriset's testimony that Debbie Selvidge had blood on her coat when she came out of her grandmother's trailer and that she got the blood from kneeling near her grandmother's body would have impeached Selvidge's testimony at trial that she did not kneel near her grandmother and that appellant did not pull her away (App.Br.95).

RICHARD AUSMUS

Richard Ausmus testified via deposition. He testified that early in the day, he and another friend drove appellant to get a paycheck from his boss (Ausmus Depo.Tr.6,10-11).

However, appellant's boss was not home, so the men drove back to the trailer park (Ausmus Depo.Tr.10-11). The trip took approximately twenty minutes (Ausmus Depo.Tr.10-11). Once they arrived back at the trailer park, Ausmus let appellant out of the truck and appellant walked towards Carol Horton's trailer (Ausmus Depo.Tr.6). At approximately 2:30 p.m., Ausmus saw a couple walk out of Kuehler's trailer and then he and another friend left for Springfield to go drinking (Ausmus Depo.Tr.6,17-20). Ausmus returned later in the evening to find police cars surrounding the trailer park and found out that Kuehler had been murdered (Ausmus Depo.Tr.21-22). Ausmus then saw appellant for only the second time that day (Ausmus Depo.Tr.22). Appellant was "cleaned up," wearing a western shirt and was calm when Ausmus spoke with him (Ausmus Depo.Tr.22, 28).

During the evidentiary hearing, trial counsel testified that he did not recall if he had called Ausmus as a witness during the trial (PCR.Tr.202). Appellant never asked trial counsel whether he had a trial strategy for not presenting Ausmus's testimony that he could account for appellant's whereabouts during part of the day of the murder (PCR.Tr.202). Nor did appellant inquire about whether trial counsel had a strategic reason for not presenting evidence of whether appellant could have gotten the blood splatters on his clothing by "milling" around people after Kuehler's body was discovered (PCR.Tr.202-204).

The motion court denied appellant's claim, finding that: "His testimony would not have been helpful and would not have changed the outcome of the trial. This is further refuted by Movant's testimony that counsel had called all witnesses he had asked counsel to contact (Tr.1065). (PCR.L.F.241).

The motion court's findings are not clearly erroneous because appellant has failed to prove that trial counsel's actions were unreasonable or that he was prejudiced under the standards enunciated under Strickland.

"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 v. Washington, 466 U.S. 668,687, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). By failing to ask counsel about their strategy, appellant, in effect, seeks to create a presumption of ineffectiveness. As recognized in State v. Kreutzer, 928 S.W.2d 854,874-75 (Mo.banc 1996), failure to make this inquiry signifies failure to meet his burden of proof. By failing to make this inquiry, appellant has failed to show that trial counsel's actions were not strategic.

In any event, appellant has failed to show that he was prejudiced by Ausmus's absence from the trial. As the motion court found, his testimony would not have been helpful or changed the outcome of the trial. In order to establish ineffective assistance of counsel for failure to call a witness, among other things, appellant must show that the witness's testimony would have provided a viable defense. State v. Harris, 870 S.W.2d 798,817 (Mo.banc 1994). Ausmus's testimony would not have done so. Ausmus could only testify about appellant's whereabout's early in the day, not during the time of the murder, and for only twenty minutes (Ausmus Depo.Tr.6,10-11). This would not have provided appellant with a defense, nor would it have provided an alibi for appellant. Moreover, Ausmus's testimony that appellant was standing around with other people following the discovery of Kuehler's body, does not prove

anything about where or how appellant acquired blood splatters on his clothing and would not have disproved the State's case that appellant killed Gladys Kuehler.

Appellant has failed to establish that trial counsel did not have strategic reasons for not presenting this evidence nor has he shown that there is a reasonable probability that had Ausmus testified that the verdict would have been different.

RICHARD MORRISET

Richard Morriset also testified via deposition. Morriset testified that he had seen appellant at 1:00 p.m on the day of the murder, at approximately 4:00 p.m., and then again later that evening after Kuehler's body was discovered (Morriset Depo.Tr.6-8). Morriset also testified that there was a small amount of blood on the corner of Debbie Selvidge's coat when she came out of her grandmother's trailer (Morriset Depo.Tr.15-16, 28). Selvidge told Morriset that she got the blood on her coat when she kneeled next to her grandmother's body (Morriset Depo.Tr.18).

Trial counsel testified at the evidentiary hearing that he did not recall the name Richard Morriset and could not remember if he was called as a witness (PCR.Tr.200). Trial counsel did state that if Morriset would have testified that Selvidge had blood on her coat when she came out of the trailer, and that she had gotten the blood from kneeling next to her grandmother, that would have been consistent with their defense at trial (PCR.Tr.200-201). Trial counsel stated that he would have presented Morriset's testimony (PCR.Tr.202).

In denying appellant's claim, the motion court found that Morriset's testimony was neither credible nor helpful to movant and it would not have changed the outcome of the trial

(PCR.L.F.241).

The motion court's findings are not clearly erroneous because appellant has failed to establish Strickland prejudice in that Morriset would not have benefitted appellant's case. Among other things, in order to establish that trial counsel was ineffective for failing to call a witness, appellant must show that the witness was available and willing to testify and that the witness's testimony would have produced a viable defense. Harris, 870 S.W.2d at 817.

As an initial matter, appellant has failed to establish that Morriset was available and willing to testify. Appellant did not question Morriset about his availability or willingness to testify during the deposition and has therefore, failed to sustain his burden under Supreme Court Rule 29.15.

Moreover, appellant has failed to show that Morriset's testimony would have provided a viable defense or that his absence prejudiced him. His testimony that Selvidge had blood on a corner of her coat does not establish that appellant got blood on him from pulling Selvidge off of her grandmother's body as appellant claims. The testimony, at best, impeaches Selvidge's testimony that she did not have blood on her coat after leaving her grandmother's trailer (Tr.461-462). State v. Gollafer, 905 S.W.2d 542, 548 (Mo.App.E.D. 1995) (To overcome presumption of effective trial counsel, movant must show that impeachment would have provided a defense or changed the outcome). This testimony does not establish an alternative means for appellant getting blood on himself. This testimony does not provide a defense and there is no reasonable probability that Morriset's testimony would have changed the outcome of the trial.

XI.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIMS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE AND CROSS-EXAMINE STATE'S WITNESSES KATHY ALLEN AND RICKY ELLIS BECAUSE APPELLANT HAS FAILED TO SHOW THAT TRIAL COUNSEL'S ACTIONS WERE NOT REASONABLE AND APPELLANT WAS NOT PREJUDICED IN THAT THEIR TESTIMONY WOULD NOT HAVE CHANGED THE OUTCOME.

Appellant claims that trial counsel was ineffective for failing to properly investigate and cross-examine State's witnesses Kathy Allen and Ricky Ellis (App.Br.102). Specifically, appellant claims that his trial counsel should have found out about Kathy Allen's prior criminal history and cross-examined her about it and that they should have adequately cross-examined Ellis that he did not hear appellant confess to murdering Kuehler (App.Br.103).

KATHY ALLEN

Trial counsel testified that he would have cross-examined Allen about her alleged convictions if they had differed from what she testified to at trial (PCR.Tr.196).

The motion court denied this claim, finding that:

> [T]he Court finds that counsel's strategy at trial was to portray Ms. Allen as a jailhouse snitch who was deceptive and that is what he did at trial. She admitted to numerous convictions on direct examination and to escaping on cross-examination. Trial counsel was unsuccessful, but not ineffective, in his

attempt to impeach her.

(PCR.L.F.242).

Appellant has failed to prove that his trial counsels' actions were not reasonable because, as discussed *supra* in Point II, appellant has failed to establish that Cathy Allen had a different criminal history than what she testified to at trial.

In any event, as discussed *supra* in Point II, appellant was not prejudiced because the jury was already aware that Ms. Allen had multiple prior convictions regarding deceptions and the other convictions would not have changed the outcome.

RICKY ELLIS

During trial, Ricky Ellis testified on behalf of the State. He testified that he was in the Christian County Jail in January 1992 along with appellant, and was housed two to three cells away from appellant (Tr.765-766). Ellis overheard appellant say that "he was going to have the guy [Arnold] killed because he had discussed a murder with him and he had talked about it" (Tr.766-767). During cross-examination, Ellis admitted that appellant had not said these things directly to him; that he was not in the cell with appellant at the time he said these things; and that he was never in the same cell with appellant (Tr.767).

Ellis testified via deposition for the evidentiary hearing. During the deposition, Ellis stated that he heard appellant state to another cellmate that he was going to have Larry Arnold killed for snitching on him about the murder that he had committed (Ellis Depo.Tr.6). Ellis stated that he never heard appellant confess to the murder (Ellis Depo.Tr.10-11).

During the evidentiary hearing, appellant never questioned trial counsel on why they did

not question Ellis about whether he heard appellant confess to the murder.

In denying appellant's claim, the motion court found, in relevant part, that: "Mr. Ellis's deposition testimony [was] incredible and finds that counsel was not ineffective in this regard" (PCR.L.F.242).

The motion court was not clearly erroneous in denying appellant's claim. Appellant failed to question trial counsel about Ellis. Appellant cannot sustain his burden of proof by failing to question trial counsel about their strategy. State v. Tokar, 918 S.W.2d 753,768 (Mo.banc 1996). By failing to question trial counsel, appellant fails to show that it was not reasonable strategy not to question or investigate Ellis further about whether appellant had actually confessed to killing Kuehler.

Moreover, appellant has failed to establish Strickland prejudice. Ellis's testimony at trial that appellant stated that he was going to have Arnold killed because he "snitched" does not imply that appellant admitted to killing Kuehler at that time. Ellis did not state that he heard appellant admit to killing Kuehler and appellant's suggestion that somehow the jury implied this from his testimony is absurd. The motion court was not clearly erroneous in denying appellant's claim.

XII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THE TESTIMONY OF MICHELLE HAMPTON THAT APPELLANT WORE THE SAME SHIRT ALL DAY BECAUSE APPELLANT WAS NOT PREJUDICED IN THAT THIS TESTIMONY DID NOT REBUT THE STATE'S THEORY AT TRIAL.

Appellant claims that his trial counsel was ineffective for failing to present testimony from Michelle Hampton that the shirt appellant was wearing when he was arrested was the same shirt he wore all day (App.Br.105). Appellant alleges that this evidence would have undermined the State's theory that the reason appellant did not have much blood on him after the murder was because he had changed clothes (App.Br.105).

During trial, Michelle Hampton testified on behalf of the defense. Relevant to this claim, Hampton testified that she did not notice any blood on appellant on the day of the murder and that she saw him wearing a western style long sleeved shirt at some point during the day (Tr.801-802).

During closing argument, the prosecution argued as follows:

> So again, it was him. His shirt. Why not more [blood splatters]? Well, I submit if we've been able to find that jacket or maybe that shirt we probably would have found a lot more blood. But the defendant had time, didn't he? to get rid of it. We didn't find it. And that's probably too bad. But it doesn't alter the

fact that there's high speed blood on a shirt. He didn't notice that himself or I'm sure we would have lost the T-shirt too.

(Tr.898-899).

Michelle Hampton testified via deposition for the evidentiary hearing. She testified that she believed that appellant had the same clothing on earlier in the day as he had on when he was arrested (Hampton Depo.Tr.20). She stated that although she could not identify the shirt he was arrested in as definitely the one she remembered, she would describe the shirt as "westerny" and it had red on it as she remembered (Hampton Depo.Tr.7-8, 12). Trial counsel testified during the evidentiary hearing that he was certain that he had spoken with Michelle Hampton prior to trial but did not recall whether anyone showed her the shirt that appellant was wearing when he was arrested (Tr.218). He also testified that he did not have a strategic reason to not show her the shirt (Tr.218).

In denying appellant's claim, the motion court found that Hampton could not recognize the shirt and her testimony was uncertain and lacking credibility, particularly when her categorization of the shirt does not match its description (PCR.L.F.248).

The motion court was not clearly erroneous in denying this claim because appellant has failed to establish that there is a reasonable probability that had this evidence been presented the result of the trial would have been different under Strickland. As the motion court found, Hampton's testimony was not credible because she continued to falter and could not positively identify the shirt in the photograph as the one worn by appellant. State v. Simmons, 955 S.W.2d 752,773 (Mo.banc 1997) (Credibility determinations are for the motion court to

decide and the appellate courts will defer to their determinations).

Moreover, this testimony would not have refuted the State's theory. As can been seen from the above quoted portion of the State's closing argument, the State argues that appellant took off a jacket or a shirt and got rid of it because it had blood on it. The State did not argue that the shirt appellant had on when he was arrested was not the shirt he was wearing when he committed the murder, but merely that he had worn another shirt or jacket over the other shirt. The State argued that is the reason that appellant did not have more blood splatters on his shirt. Hampton's testimony would not have refuted the State's theory and appellant has failed to prove that he was prejudiced.

XIII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INTRODUCE ALLEGEDLY PRIOR INCONSISTENT STATEMENTS OF CAROL HORTON, DEBBIE SELVIDGE, AND CLIFF MILLS AS SUBSTANTIVE EVIDENCE BECAUSE COUNSEL WAS NOT INEFFECTIVE IN THAT THESE PRIOR STATEMENTS WERE NOT INCONSISTENT OR WERE MINOR POINTS THAT COULD NOT HAVE EFFECTED THE OUTCOME.

Appellant alleges that trial counsel was ineffective for failing to introduce prior statements of Carol Horton, Debbie Selvidge, and Cliff Mills as substantive evidence (App.Br.108).

Testimony of Carol Horton

During trial, Carol Horton, a State's witness, testified during direct examination that appellant was at her trailer and left at 2:00 p.m. to go to Kuehler's trailer to ask to borrow some money (Tr.378). Appellant was gone about ten to fifteen minutes and when he returned to Horton's, he stated that Kuehler had told him to come back later because she was busy (Tr.379). Horton then testified that appellant left her trailer again at 3:00 p.m. to go back to Kuehler's and was gone approximately one hour (Tr.379).

During cross-examination, Horton testified that the second time appellant left her place, he was gone approximately one hour (Tr.435-436). She also testified that:

Q. Isn't it true that when you spoke to Tom Martin of the Missouri

Highway Patrol at 7:30 the next morning you told him that Walter Barton was gone approximately ten to 15 minutes?

A. No, sir, I did not. I said the first time that he left my place to go up there he was gone approximately ten to 15 minutes. That's what I've always told them.

Q. Isn't it also true that you said the second time he left before he came back to wash his hands he was also gone ten to 15 minutes?

A. I never said that. Now I just told you that.

Q. And after he washed his hands, isn't it true that Walter Barton came back to the living room and talked to you for approximately 30 minutes?

A. No, that's not true. After he washed his hands he was ready to go.

Q. Isn't true that on October the 10th, 1991 you told Tom Martin of the Missouri State Highway Patrol that after he washed his hands he came back to the living room and talked to you for approximately 30 minutes?

A. I never told nobody that.

Q. Thank you.

Now when he left and before he came back to wash his hands he wasn't gone very long, was he?

A. I don't understand your question.

Q. Isn't it true that on October the 14th while a tape recorder was running you told Officer Martin of the Missouri State Highway Patrol it didn't seem like

he was gone hardly, you know, very long? Isn't that true?

A. I don't recall that.

Q. Thank you.

And when asked to estimate how long he was gone, isn't it also true that you said, "Uh, well, maybe 20 minutes. It didn't seem like he'd been gone very long to me."

A. I don't recall saying that.

(Tr.435-437).

Testimony of Debbie Selvidge

During trial, Debbie Selvidge testified during direct examination, that when she walked into her grandmother's trailer and saw her grandmother, she tried to go to her grandmother's side but Carol Horton stopped her (Tr.461). She could not remember how close she got to her grandmother but she did not touch her and did not get any blood on her (Tr.461-462).

During cross-examination, Selvidge testified as follows:

Q. Do you remember ever telling Officer Hodges that when you went to kneel by your grandmother that Walter Barton pulled you out of the room?

A. I don't remember telling him that.

Q. Do you remember telling Officer Isringhausen of the highway patrol the same thing?

A. No.

Q. Do you remember demonstrating for him how Walter Barton wrapped you around the stomach and pulled you away?

A. No. He didn't pull me away though. I didn't - - I didn't touch - -

Q. I understand you didn't touch her.

A. That's right.

Q. But you don't ever remember telling Officer Isringhausen?

A. No.

* * * * *

Q. (Cont. by Mr. Price) Ms. Selvidge, now that mean that you're telling me that you didn't say those things or you just don't remember saying those things?

A. I don't remember saying them.

Q. But you're not saying that you didn't say them?

A. I probably said them at that time, but God, I was under duress. I mean, God, I'd just seen my grandmother killed.

(Tr.483-485).

Testimony of Govan Mills

During trial, Govan Mills, the locksmith who unlocked Gladys Kuehler's trailer, testified that after he unlocked the mobile home, he returned to his truck while Selvidge, Horton and appellant entered the trailer (Tr.466). Mills then heard screaming coming from the trailer and he called the sheriff's office (Tr.467). Mills observed them come out of the

trailer (Tr.467).

Mills was not questioned during direct examination or cross-examination about how many times Selvidge, Horton, and appellant entered and exited the trailer.

Evidentiary Hearing

Appellant claims that trial counsel examination of Mills, Selvidge, and Horton was not satisfactory and that trial counsel should have introduced prior inconsistent statements of the three witnesses (App.Br.108-109).

Trial counsel testified during the evidentiary hearing that he was familiar with §491.074, RSMo 2000 and that although he argued the statements as substantive evidence, he just "missed" admitting them as such (PCR.Tr.219-220).

In denying appellant's claims, the motion court found, relating to the claim regarding Carol Horton that the "inconsistencies" were minor points, were of "little consequence," and would not have negated appellant's guilt (PCR.L.F.248). Regarding the statements of Debbie Selvidge, the motion court found that appellant failed to support his claim with evidence and that the statement was of no consequence and would not have changed the outcome (PCR.L.F.248). Finally, regarding the statement by Mills, the motion court found that the inconsistency was of no consequence and would not have changed the result (PCR.L.F.248).

Analysis

The motion court was not clearly erroneous in denying appellant's claims. Appellant has failed to show that trial counsel's actions were unreasonable under Strickland. Although trial counsel stated that he "missed" or "forgot" to introduce these statements as prior

inconsistent statements under §491.074, RSMo 2000, which provides for prior inconsistent statements to be admitted as substantive evidence, he could not have introduced Selvidge's and Mills' statements because they were not inconsistent with the witnesses' testimony. Trial counsel cannot be ineffective for failing to attempt to introduce inadmissible evidence. State v. Twenter, 818 S.W.2d 628,638 (Mo.banc 1991). Debbie Selvidge never testified inconsistent to her statement in the police department's investigative report. Movant's Exhibit 11 states that Ms. Selvidge informed officers that "she knelt by the body to see if her grandmother was still alive. [Appellant] reached around her and pulled her away from the body." Ms. Selvidge's testimony at trial is not inconsistent with that statement. Ms. Selvidge only testified that she did not touch her grandmother and she did not get blood on her. She never testified that she did not kneel near her grandmother or that appellant pulled her away but merely testified that she could not remember what she said that day. Her statement was not inconsistent and could not have been admissible under §491.074, RSMo 2000.

Likewise, Cliff Mills' testimony was not inconsistent with his testimony at the 1993 trial. At the 1993 trial, Mills was questioned about how many times Selvidge, Horton, and appellant went into and came out of Kuehler's trailer (1993 Tr. 130). Mills stated that they came out at least twice. However, during the current trial, Mills was never questioned about how many times they went in and out of the trailer. He was only questioned about what happened when they entered the trailer and when they came out of the trailer (Tr.467). His statement was not inconsistent with his prior testimony and trial counsel could not be ineffective for failing to attempt to introduce the statements as substantive evidence because

it would not have been admissible. Twenter, supra.

Selvidge and Mills statements were not admissible under §491.074, RSMo 2000 as they were not prior inconsistent statements and would have been inadmissible as they were hearsay, statements offered for the truth of the matter asserted.

Moreover, appellant was not prejudiced by trial counsel's failure to introduce these statements. As the motion court found, the fact that appellant and the others may have gone into the trailer more than once is a minor detail that adds nothing to the evidence of appellant's innocence or guilt. It does not prove or give another explanation how appellant got blood on his clothing, as appellant alleges. Mills' statement that appellant may have entered and exited the trailer more than once would not have changed the outcome.

Debbie Selvidge's statement that appellant pulled her away from near her grandmother's body does not aid appellant either. It does not give an explanation of how appellant got blood splatters on his clothing and would not have provided appellant with a defense.

Finally, Carol Horton's discrepancy on whether appellant was gone a half hour or approximately an hour from her trailer is of little consequence and would not have changed the outcome, as the motion court found. Whether appellant spent an hour at Ms. Kuehler's or twenty minutes to a half hour does not negate the fact that he was at her residence and killed her. All of the statements made by the witnesses including Horton's prior statement, Selvidge's testimony that she could not get ahold of her grandmother after 3:30 p.m., appellant's admission that he answered Kuehler's phone at 3:15 p.m. and Pickering's statement that appellant answered her phone all put appellant at Ms. Kuehler's at the time of her death.

Horton's slight discrepancy on the amount of time appellant was gone from her home does not negate appellant's guilt and would not have affected the outcome of the trial. Trial counsel was not ineffective and appellant was not prejudiced.

XIV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL BOB RILEY TO IMPEACH STATE'S WITNESS KATHY ALLEN BECAUSE TRIAL COUNSEL WAS EFFECTIVE IN THAT HE STRATEGICALLY CHOSE NOT TO CALL HIM AND APPELLANT WAS NOT PREJUDICED IN THAT RILEY WAS NOT A CREDIBLE WITNESS.

Appellant claims that his trial counsel was ineffective for failing to call Bob Riley to impeach Kathy Allen's testimony that appellant threatened to kill her like he killed Ms. Kuehler (App.Br.111).

During trial, Kathy Allen, testified that she met appellant while she was a trustee at the Lawrence County Jail (Tr.768-769). Appellant twice got angry at Allen and told her, "I will kill you like I killed her" (Tr.769-773).

During the evidentiary hearing, Bob Riley's testimony was introduced via affidavit (PCR.Tr.386). According to Riley, who was an inmate at the same time as Allen and appellant, Allen was never alone with appellant without officers present (MX 44). Riley stated that he was present with appellant when Allen would bring food and laundry but never heard appellant make any statements or threats to her (MX 44). Riley also stated that if appellant would have made those statements, the officers would have overheard him (MX 44). Finally, Riley would have testified that Allen's reputation for truthfulness was "not good" (MX 44).

Trial counsel testified that he did not recall Riley and did not remember having him

subpoenaed but not testifying(PCR.Tr.221). Trial counsel did state that even though they subpoenaed some witnesses, due to the investigation and theory of defense, many witnesses were not called due to trial strategy (PCR.Tr.221). Trial counsel testified that "I do not have any independent recollection of Mr. Riley or what he may have said, but a decision was made and it was my decision not to put him on" (PCR.Tr.221).

In denying appellant's claim, the motion court found that "Mr. Riley's testimony is not credible and counsel was not ineffective in failing to call him at trial. This claim is also refuted by Movant's testimony (Tr.1065)" (PCR.L.F.249).

The motion court was not clearly erroneous in denying appellant's claim because appellant failed to show that it was unreasonable not to call Riley as a witness nor has appellant shown that he was prejudiced by Riley's absence.

Trial counsel's decision not to call a witness is presumed to be trial strategy unless otherwise clearly shown. State v. Clay, 975 S.W.2d 121,143 (Mo.banc 1998). Strategic choices made after thorough investigation are essentially unchallengeable. State v. Ramsey, 864 S.W.2d 320,340 (Mo.banc 1993).

Although trial counsel could not specifically remember why they did not call Riley as a witness, trial counsel explained that after their investigation and when forming their defense and viewing the evidence, many potential witnesses, including Riley, were not called. Counsel explained that they had a strategy behind it. Appellant has failed to prove that failure to call Riley was anything other than reasonable trial strategy.

Moreover, the motion court found Riley's testimony to be incredible. State v.

Simmons, 955 S.W.2d 752, 773 (Mo.banc 1997). Trial counsel could not be ineffective for failing to call a witness whose testimony was not credible. Specifically, it is incredible to believe that Riley was around appellant on every single occasion that appellant saw Allen. Furthermore, Riley's testimony was merely impeaching and trial counsel cannot be ineffective for failing to introduce evidence merely to impeach a state's witness. State v. Gollafer, 905 S.W.2d 542, 548 (Mo.App.E.D. 1995). Appellant was not prejudiced from his absence due to his incredible testimony.

XV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY PREPARE WITNESS CHARLES RENTSCHLER TO NOT MENTION APPELLANT'S PREVIOUS DEATH SENTENCE DURING HIS TESTIMONY, FAILING TO MOVE TO STRIKE THE STATEMENT AFTER IT WAS MADE, AND FAILING TO ASK FOR A MISTRIAL BECAUSE APPELLANT FAILED TO SUSTAIN HIS BURDEN THAT TRIAL COUNSEL WAS INEFFECTIVE IN THAT APPELLANT FAILED TO QUESTION TRIAL COUNSEL ABOUT THEIR PREPARATION OF RENTSCHLER AND APPELLANT WAS NOT PREJUDICED IN THAT THE STATEMENT DID NOT AFFECT THE VERDICT.

Appellant claims that his trial counsel was ineffective for failing to prepare their witness, Charles Rentschler, to not mention appellant's previous death sentence during his testimony (App.Br.113). Appellant also alleges that after Rentschler mentioned the death sentence, trial counsel was ineffective for failing to move to strike the statement and ask for a mistrial (App.Br.113).

Charles Rentschler testified on behalf of appellant during trial. He testified that Larry Arnold, a state's witness, had told him that he "made up a story to tell to testify against a man in a murder trial" (Tr.784). During cross-examination, the State asked if Arnold had specified the name of the defendant or which case he had lied (Tr.785). Renstschler stated that Arnold did not tell him the name but "he had explained that he had testified against a man and got him

a death sentence" (Tr.785-786). Trial counsel did not object and Rentschler's testimony continued (Tr.786).

Rentschler did not testify at the evidentiary hearing, but in an affidavit admitted at the hearing, Rentschler stated that he made the statement about the death sentence because it seemed like a "logical way" to identify him and he "did not think about the fact that the jury might not know about the previous death sentence" (MX 43). Rentschler also stated that appellant's counsel never told him not to mention the previous death sentence and that if they had told him, they could have found another way for him to identify the case (MX 43).

Trial counsel testified that he recalled the statement made by Rentschler about the death sentence but he did not ask for any relief because he was unsure if he was entitled to any relief since Rentschler was his witness (PCR.Tr.222).

In denying appellant's claim, the motion court found that "[appellant] asserts counsel should have highlighted Charles Rentschler's unresponsive answer by asking that it be stricken. Counsel was not ineffective in making a decision to not request that relief" (PCR.L.F.250). The motion court also stated that appellant failed to prove that counsel failed to give certain instructions to the witness and failed to prove that counsel was ineffective (PCR.L.F.250).

The motion court was not clearly erroneous in denying appellant's claim because appellant failed to show that counsel failed to give instructions to the witness or was ineffective in his instructions. Appellant never questioned trial counsel on whether he gave instructions to Rentschler about the statement, what type of instructions, if any, he gave, or what type of preparation he gave Rentschler prior to his testimony. Essentially, appellant again

failed to question trial counsel about their strategy. By failing to inquire, appellant has failed to sustain his burden of proof. State v. Tokar, 918 S.W.2d 753,761 (Mo.banc 1996).

Moreover, appellant was not prejudiced because the statement was not responsive to the question and was an isolated incident. See State v. Gilmore, 681 S.W.2d 934,943 (Mo.banc 1984). By objecting, as the motion court found, trial counsel would have only highlighted the statement, making it more obvious to the jury. The isolated statement had no effect on the jury and there is not a reasonable probability that a mistrial would have been granted for such an isolated statement nor would a motion to strike have been beneficial. Appellant was not prejudiced by the statement and the motion court was not clearly erroneous in denying appellant's claims.

XVI.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION ON THE "INHERENT UNRELIABILITY OF INFORMER TESTIMONY" BECAUSE APPELLANT FAILED TO SUSTAIN HIS BURDEN IN THAT HE FAILED TO QUESTION TRIAL COUNSEL ABOUT THEIR STRATEGY AND COUNSEL'S ACTIONS WERE REASONABLE IN THAT THE PROPOSED INSTRUCTION WAS IMPROPER.

Appellant claims that his trial counsel was ineffective for failing to request a jury instruction on the "inherent unreliability of informer testimony" (App.Br.116).

Appellant did not present any evidence on this claim at the evidentiary hearing. He did not question his trial counsel about whether there was a strategic reason for not asking for an instruction or whether they had considered such an instruction.

The motion court denied appellant's claim, finding that requesting such an instruction would have been "a meaningless act" and would have been refused since it was not proper (PCR.L.F.249). The motion court also stated that the jury was properly instructed on how to determine the credibility of witnesses (PCR.L.F.249).

The motion court's findings are not clearly erroneous. Appellant has failed to sustain his burden of showing that it was not trial strategy and has failed to show that there is a reasonable probability that but for his counsel's actions, the result of the proceeding would have been different under Strickland.

Appellant failed to produce any evidence on this issue. Specifically, appellant did not ask trial counsel about their strategy on this issue. By failing to adduce any evidence, this claim in not reviewable and the motion court was not clearly erroneous in denying this claim. State v. Tokar, 918 S.W.2d 753,761 (Mo.banc 1996).

In any event, appellant's claim must fail because trial counsel cannot be ineffective for failing to offer an instruction that will be refused. The only appropriate jury instruction regarding credibility of witnesses is MAI-CR3d 302.01. State v. Mayes, SC82743, slip opinion (Mo.banc 2001); State v. Silvey, 894 S.W.2d 662,669-670 (Mo.banc 1995); State v. Oxford, 791 S.W.2d 396,400 (Mo.banc 1990); State v. Smith, 800 S.W.2d 794,795-796 (Mo.App.E.D.1990).

In the case at bar, MAI-CR3d 302.01 was given to the jury (L.F.113). No other instruction was necessary or proper, and, in fact, the submission of any other instruction is prohibited. Mayes, supra; Silvey, supra.

This Court has rejected such proposed instructions as appellant argues that his counsel should have offered and found that Missouri's instruction on witness credibility is sufficient and proper. Mayes, supra. Trial counsel cannot be ineffective for failing to offer an improper instruction and the jury was properly instructed.

XVII

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INTRODUCE PRISON ADJUSTMENT EVIDENCE DURING THE PENALTY PHASE BECAUSE TRIAL COUNSEL'S ACTIONS WERE REASONABLE IN THAT COUNSEL DETERMINED THAT THIS INFORMATION WOULD NOT SUPPORT THEIR DEFENSE THEORY AND APPELLANT WAS NOT PREJUDICED IN THAT THE INFORMATION WAS DAMAGING.

Appellant claims that his trial counsel was ineffective for failing to present prison adjustment evidence during the penalty phase of appellant's trial (App.Br.119).

Appellant claims that the following evidence, related to his prison adjustment should have been admitted at trial:

a) Bob Christerson's testimony that appellant was a good and productive worker under his supervision at Hudson Foods when appellant worked there during a prison inmate work-release program in 1987 (MX 3);

b) Prison records, from the 1970s until the present, that included information of appellant's infractions for stealing, fighting, assaults, threats, disobeying orders, and escape; appellant's position as "Lead Man" in the prison chair factory; his work history, prior criminal history, hearing problems, and medical history (MX 3; 33);

c) Testimony from Jim Kennon, appellant's supervisor at the prison chair factory, about appellant's position in the chair factory including information about his training certificate,

appellant's hard work, appellant's conduct violations and removal from the program due to his conduct violations and appellant's ability to control his behavior (PCR.Tr.20-31);

d) Testimony from Jim Perko, another inmate housed with appellant, regarding appellant's good nature with both inmates and correctional officers (MX 32);

e) Testimony from Bill Elgie, a maintenance team supervisor at Ozark Correctional Center, regarding appellant's ability to follow prison rules, Elgie's trust in appellant not to escape, appellant's hard work, lending appellant money, and knowledge of appellant's "hot temper" (MX 31).

Appellant alleges that if this information was introduced during the penalty phase, there is a reasonable probability that the jury would not have sentenced him to death (App.Br.125).

During the evidentiary hearing, trial counsel testified that appellant had never informed them of Jim Perko and that they did not interview Jim Kennon or Bill Elgie (PCR.Tr.73-76, 205-206). Trial counsel could not interview other inmates or individuals who possibly had information if appellant never told them about them (PCR.Tr.91,205-206). Trial counsel stated that their strategy during penalty phase was to focus on Dr. Merikangas' testimony regarding appellant's brain condition to the exclusion of anything else (PCR.Tr.76, 205). Trial counsel did not believe that his past convictions, his good work in prison, and his good relationships with people were going to "make the kind of impression that [they] needed to make on a jury" (PCR.Tr.77). Counsel believed that testimony on appellant's prison adjustment was inconsistent and contrary to their strategy (PCR.Tr.77,92). Specifically, the fact that appellant adjusted very well in prison concerned counsel because he feared the jury

would think that prison was not a real punishment (PCR.Tr.77,92). Counsel did not believe in taking the "shotgun" approach but would rather take a strong defense, in this case, appellant's brain condition, and focus on it (PCR.Tr.78). According to counsel, if you throw too much at a jury, "they don't separate the wheat from the chaff" (PCR.Tr.78).

In denying appellant's claims regarding prison adjustment evidence, the motion court found that trial counsel was not ineffective nor was appellant prejudiced because evidence of appellant's good behavior and good work habits in prison would have destroyed his claim of brain injury and mental illness; that the records would show that appellant could conform when he wanted to, with or without medication; that he had several prison infractions and had escaped once from prison ("not the type of information one wants a jury to hear when trying to argue a life sentence will adequately protect society"); and much of the testimony was not credible (PCR.L.F.243-244).

The motion court's findings were not clearly erroneous because trial counsel's strategy for the penalty phase was reasonable under Strickland. Counsel believed he had a strong defense with Dr. Merikangas' testimony about appellant's brain injury and his change in personality after the injury. He did not want to take a shotgun approach. Finally, counsel felt the prison adjustment evidence was inconsistent and would not have worked well in front of a jury. When counsel believes evidence would not unqualifiedly support his client's position, it is a matter of trial strategy and does not constitute ineffective assistance of counsel. Rousan v. State, 48 S.W.3d 576,587 (Mo.banc 2001). These are all valid strategic reasons for

not placing this information in front of a jury.[6]

Moreover, appellant was not prejudiced because the information would not have been beneficial. As the motion court found, the records were contrary to appellant's brain injury defense and they showed that he could conform when he wanted to and finally, they contained information about his conduct violations, including escaping from prison. This information would have been damaging to appellant's defense. Appellant was not prejudiced and trial counsel's actions were reasonable.

[6]Appellant cites to a deposition of Jill Miller, an alleged "mitigation expert," in support of his contention that trial counsel was ineffective in their presentation of mitigating evidence (App.Br.120-128). The motion court found that Ms. Miller was not qualified as an expert in any area, including "mitigation" (PCR.L.F.233). The court further found that she offered nothing but hearsay evidence (PCR.L.F.233). Appellant does not raise any point on appeal alleging error in the motion court's findings that Ms. Miller is not an expert.

XVIII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL JOSEPH BRANDENBURG, AN "EXPERT ON PRISON CONDITIONS," TO TESTIFY ABOUT THE NATURE OF INCARCERATION BECAUSE TRIAL COUNSEL WAS NOT INEFFECTIVE IN THAT EVIDENCE ON PRISON CONDITIONS IS IRRELEVANT TO PENALTY PHASE AND APPELLANT WAS NOT PREJUDICED IN THAT THE EVIDENCE WAS NOT CREDIBLE AND WOULD HAVE BEEN DAMAGING TO THE DEFENSE.

Appellant alleges that his trial counsel was ineffective for failing to present Joseph Brandenburg, an "expert on prison conditions" to testify about the nature of incarceration for people that are sentenced to life without parole and evidence of appellant's potential adjustment in prison (App.Br.132).

During the evidentiary hearing, appellant presented an affidavit from Joseph Brandenburg, alleging him to be an expert on the "oppressive nature of incarceration" (PCR.L.F.25). Brandenburg offered his opinion that the Missouri Department of Corrections controls inmates who have been sentenced to life without parole (Brandenburg Affidavit). According to Brandenburg, the inmates are classified as "high security inmates"; are closely monitored; housed in cells containing no more than two inmates; and are subject to search at any time (Brandenburg Affidavit). Brandenburg also stated that the institutions are highly secured and that "escape from the [high security prisons] is almost nonexistent" (Brandenburg

Affidavit). According to Brandenburg, the Department of Corrections has rules and disciplinary sanctions for those who are disruptive (Brandenburg Affidavit).

Brandenburg believes that appellant's numerous conduct violations were not serious even though many dealt with altercations (Brandenburg Affidavit). Brandenburg summarily dismissed the severity of appellant's "escape" from prison because appellant was outside and was only gone for a few days (Brandenburg Affidavit). Brandenburg also was supportive of appellant's good work habits in prison and explained that as appellant grew older, his conduct violations would continue to decrease as they have because as an older inmate he will become "tired and worn out" (Brandenburg Affidavit). Brandenburg concluded by opining that appellant could safely be confined in the Department of Corrections and he would not be a danger to those inside or outside of the institution (Brandenburg Affidavit). Appellant did not question trial counsel if they had heard of Joseph Brandenburg or about why they did not investigate him as a witness, although trial counsel did testify that he did not consider presenting evidence about the conditions at Potosi including the rules and routine (PCR.Tr.102). Trial counsel also stated however, that he had found that many citizens think that life in prison is easy and not much punishment for criminals (PCR.Tr.102).

The motion court denied appellant's claim, finding that: "Mr. Brandernburg, whose testimony came in by affidavit, is not credible and has no expertise on any matter that would be relevant to the jury. This evidence would not be admissible at trial and had it been admitted, it would have subjected the witness to cross-examination potentially damaging to Movant, such as the fact that prisons are not escape proof, that murders occur in prison, as do assaults, and

whatever “conveniences” that may exist in a prison that jurors may resent inmates having” (PCR.L.F.245). The motion court’s findings were not clearly erroneous. Appellant has failed to show that Brandenburg’s testimony was admissible or would have benefitted his defense. Although it is 'desirable or the jury to have as much information before it as possible when it makes the sentencing decision,' evidence introduced in mitigation must be relevant to 'the defendant's character, prior record, or the circumstances of his offense.'" State v. Schneider, 736 S.W.2d 392,396 (Mo.banc 1987); Skipper v. South Carolina, 476 U.S. 1,4,106 S. Ct. 1669,90 L. Ed. 2d 1(1986); State v. Feltrop, 803 S.W.2d 1,18 (Mo.banc 1991); See Section 557.036.1, RSMo 2000. Evidence not bearing on the defendant’s character, record, or circumstances of the offense is irrelevant. State v. Nicklasson, 967 S.W.2d 596,618 (Mo.banc 1998). Consideration of extraneous facts unconnected to the individual defendant and his offense is not consistent with the sentencer’s duty. Schneider, supra at 397.

Brandenburg’s testimony regarding the safety procedures of Missouri prisons and procedures relating to inmates serving life in prison is not evidence of defendant’s character, record, or circumstances of the offense and would have been irrelevant and not admissible as mitigating evidence. State v. Sidebottom, 753 S.W.2d 915,925 (Mo.banc 1988) (Evidence of the execution process not relevant in determining appropriate sentence and not admissible); State v. Gilmore, 681 S.W.2d 934,941 (Mo.banc 1984) (Evidence regarding the lack of deterrence of the death penalty would not have focused on the specifics of the defendant’s case and would not have assisted the jury in determining an appropriate sentence); Nicklasson, supra. Brandenburg’s testimony regarding the Missouri prison system was not relevant to the

punishment phase and trial counsel could not be ineffective for failing to seek to introduce this testimony.

The remainder of Brandenburg's testimony related to appellant's conduct violations, future conduct in prison, and his speculation that as appellant aged in prison his conduct violations would decrease. The motion court found this evidence to be non-credible. State v. Simmons, 955 S.W.2d 752,773 (Mo.banc 1997). The motion court was correct. Brandenburg's mere speculation that appellant would have fewer conduct violations as he aged and his characterization of appellant's escape from prison as minor would not have been believed by the jury and these statements greatly diminished his credibility.

Moreover, the State could have damaged appellant's defense during cross-examination. As the motion court found, the State could have questioned Brandenburg about the "conveniences" that prisoners have, the fact that prisons are not escape proof, and that various crimes, such as murder and assault as appellant has been convicted of, do occur in prisons. Appellant was not prejudiced by his counsel's failure to call Brandenburg because much of his proposed testimony was irrelevant and he would not have benefitted the defense. The motion court was not clearly erroneous in denying appellant's claim.

XIX.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THE TESTIMONY OF RALPH BARTON AND MARY REESE IN THE PENALTY PHASE BECAUSE APPELLANT FAILED TO SHOW THAT NOT CALLING THESE WITNESSES WAS UNREASONABLE AND APPELLANT WAS NOT PREJUDICED IN THAT THIS TESTIMONY WAS DAMAGING TO HIS DEFENSE.

Appellant claims that trial counsel was ineffective for failing to call Ralph Barton, appellant's brother, and Mary Reese, appellant's aunt, during the penalty phase, to testify about appellant's childhood (App.Br.135).

Ralph Barton

During the evidentiary hearing, an affidavit by Ralph Barton was introduced. In the affidavit Ralph Barton discussed his and appellant's childhood (MX 42). He discussed appellant's intelligence and problems with language (MX 42). He discussed appellant's fighting as a child, although he claimed that all the fights were because appellant was provoked (MX 42). Ralph Barton stated that the children were "whipped" by their parents and discussed their mother's multiple affairs (MX 42). According to Ralph Barton, the children knew of the affairs and did not approve (MX 42). Ralph Barton joined the army at seventeen and appellant joined a year after (MX 42). Ralph Barton also discussed problems with the law that his other siblings have had and about appellant's head injury (MX 42). Although Ralph Barton stated that appellant seemed to have changed after the injury, he admitted that he had not seen him for

more than twenty years after the injury (MX 42). He also stated that he thought that appellant might have "anger and rage at women which is bottled up inside him" (MX 42). Ralph Barton also stated that he had been visited by an investigator for appellant a couple of years prior but the investigator only spoke to him for ten or fifteen minutes (MX 42).

Appellant did not question trial counsel on why they did not call Ralph Barton as a witness during the penalty phase.

In denying appellant's claim, the motion court found that Ralph Barton was interviewed; trial counsel was not ineffective in making the strategic decision to not call him; his information would not have changed the outcome; and the claim was refuted by appellant's testimony at trial that trial counsel did not fail to call any witnesses that he wanted (PCR.L.F.243).

The motion court's findings are not clearly erroneous because appellant has failed to overcome the strong presumption of reasonable trial strategy. 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). 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 Ralph Barton as a witness was anything other than trial strategy. Because appellant failed to ask trial counsel if there was a strategic reason for not calling his brother as a witness, appellant failed

to prove that it was not trial strategy and his claim must fail. State v. Tokar, 918 S.W.2d 753,768 (Mo.banc 1996).

Moreover, appellant was not prejudiced by his brother's absence from the trial. Ralph Barton readily admitted that he had not seen his brother for over twenty years after his brain injury. This would have been damaging to the defense strategy during the penalty phase. Moreover, he knew little about appellant since he had almost no contact with him and this fact could have been exploited by the State during cross-examination. The State also could have exploited the fact that although appellant and his brother were raised similarly in the same environment, appellant has become a murderer, while his brother now leads a productive life. State v. Simmons, 955 S.W.2d 752,776 (Mo.banc 1997) (for similar facts). The motion court's findings that Ralph Barton's testimony would not have changed the outcome was not clearly erroneous.

Mary Reese

Mary Reese's testimony was also introduced through an affidavit at the evidentiary hearing. According to Reese, appellant's maternal aunt, appellant's mother left her childhood home early because "she was lazy and man crazy" (MX 30). Reese stated that appellant's mother was wild and drank (MX 30). Reese helped the family after appellant was born and he was a "normal baby" (MX 30). According to Reese, appellant's mother was hard on the children, including "whipping" them and leaving welts on the children's bodies, but she admitted she was never around when the mother disciplined the children (MX 30). Reese believed that appellant was shamed by the discipline (MX 30). Reese stated that the children

did not have a lot of freedom and had to do chores (MX 30). Reese discussed the mother's extra-marital relationships and the children's knowledge of them (MX 30). Regarding appellant's head injury, she stated that she did not see appellant for many years afterward (MX 30). Moreover, Reese admitted that she had no knowledge about appellant's "trouble" with the law (MX 30).

Trial counsel testified that he did not consider calling her because she was "pretty firm" that she had not seen a change in appellant after the brain injury (PCR.Tr.83). This would not have supported their theory about the brain injury changing appellant's personality (PCR.Tr.83). Moreover, Reese had not seen appellant in many years, did not know about his life, and could not "fill in erratic behavior in a little bit more of a time line to the current" (PCR.Tr.83).

The motion court denied appellant's claim finding that the claim was refuted by appellant's statement at trial that his counsel did not fail to call any witnesses that he wanted them to and her testimony was neither credible nor persuasive and would not have changed the outcome (PCR.L.F.243).

The motion court's finding's were not clearly erroneous. 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. Pounders, supra. Reese's lack of knowledge about appellant and his brain injury would have hurt counsel's defense. Trial counsel's strategy not to call a witness that would not be beneficial to his defense is reasonable.

Moreover, appellant was not prejudiced. Reese had not much contact with appellant in the years since his brain injury and would not have been able to give the jury any information about his change in personality. Moreover, much of her testimony regarding appellant's childhood was hearsay. She never saw the alleged "whippings" and could not have testified to information that she learned from someone else. Her testimony was not significant and would not have changed the outcome. The motion court was not clearly erroneous in denying appellant's claim.

XX.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO FULLY PREPARE AND EXAMINE DEFENSE WITNESS DR. MERIKANGAS BECAUSE APPELLANT HAS FAILED TO SUSTAIN HIS BURDEN OF PROVING THAT IT WAS NOT TRIAL STRATEGY AND APPELLANT WAS NOT PREJUDICED IN THAT THE "ADDITIONAL" INFORMATION WOULD HAVE BEEN DAMAGING.

Appellant claims that his trial counsel were ineffective for failing to adequately prepare and examine a defense witness, Dr. Merikangas, a psychiatrist (App.Br.139). Specifically, appellant claims that trial counsel failed to question Dr. Merikangas about 1) appellant's early family life and how his reported behavior supported the doctor's diagnosis; 2) failed to question the doctor about treatment for appellant's symptoms; and 3) failed to inquire about the effect of a structured environment, such as prison, on appellant (App.Br.139-140).

During trial, Dr. Merikangas, a doctor specializing in psychiatry and neurology, testified on appellant's behalf (Tr.1024). Specifically, Dr. Merikangas testified about appellant's skull fracture in 1974 and the effects that the injury had on his brain and his functioning (Tr.1037-1074). Dr. Merikangas performed a thorough physical and neurological exam on appellant, finding many abnormalities leading him to the conclusion that appellant suffered from brain damage as a result of his skull fracture (Tr.1044-1062). Dr. Merikangas found that appellant had brain damage on the left side of his brain (Tr.1046); he was death in his right ear (Tr.1047);

he had cranial nerve damage and motor impersistence of the tongue (Tr.1048); he had dysarthroic speech (an inability to properly enunciate words) (Tr.1049); brain damage to the frontal lobe (Tr.1049); he had a shrunken cerebellum (Tr.1057); and damage to the olfactory lobe (Tr.1062). Many parts of appellant's brain do not receive enough blood (Tr.1068). This brain damage resulted in a "derangement in personality" (Tr.1063-1064). The damage, especially to the olfactory lobe alters, affects, and reduces a person's ability to control his actions in situations where one is required to control his emotions (Tr.1072). A person with this type of brain damage would be impaired with a lower ability to control any kind of strong emotion, whether it was anger, sadness or any other emotion (Tr.1072). Appellant's brain damage also caused an inability to conform his conduct to the requirements of the law (Tr.1073-1074). Although he could differentiate between right and wrong, he would still suffer from irresistible impulses and would not conform to the law (Tr.1074).

During the evidentiary hearing, Dr. Merikangas's testimony was introduced via deposition. Relevant to this claim, Dr. Merikangas reiterated what he testified to at trial. He also testified that appellant's personality change was due to a general medical condition, aggressive and disinhibited type (Merikangas Depo.Tr.41). Merikangas also stated that appellant had problems in social, occupational or other areas of functioning but he could function in a structured, controlled setting (Merikangas Depo.Tr.44). In other words, according to Dr. Merikangas, appellant could function well in the prison workshop, "a situation where he does not get out of control" (Merikangas Depo.Tr.44). He also stated that the killing of Gladys Kuehler, if it resulted from a dispute or altercation, was consistent behavior for

appellant due to his brain damage (Merikangas Depo.Tr.47). Merikangas also testified that appellant, if on medication (although not currently on medication), and under supervision, would be able to live on his own and have a job (Merikangas Depo.Tr.49). Merikangas stated, however, that he did not believe that appellant needed medication and that he believed that appellant's conduct violations and altercations in prison were minor (Merikangas Depo.Tr.52).

During cross-examination, Dr. Merikangas admitted that the medication is not always effective for everyone with appellant's condition (Merikangas Depo.Tr.60). Merikangas also stated that appellant was a dangerous person and he would not want him to escape without the appropriate supervision (Merikangas Depo.Tr.64). Merikangas admitted that without appellant telling him what happened while he killed Ms. Kuehler, Merikangas would be unable to say whether or not appellant was able to conform his conduct to the law or whether he could tell right from wrong (Merikangas Depo.Tr.69). Finally, Merikangas stated that in order to conclude that appellant was not responsible for his criminal act, Ms. Kuehler had to have done something that "set him off" (Merikangas Depo.Tr.70).

During the evidentiary hearing, trial counsel testified that he did not talk to Dr. Merikangas about whether someone with appellant's injuries could do well in prison (PCR.Tr.79). He also did not discuss with Dr. Merikangas whether appellant could receive treatment for his injuries (PCR.Tr.79). Trial counsel explained that he feared that the prosecutor could turn that around and argue "why the heck didn't he get treatment before these three incidents involving women occurred" (PCR.Tr.79). Based on the damaging potential of

the treatment evidence, trial counsel made the decision to leave that evidence out (PCR.Tr.79-80). Trial counsel also stated, in regards to the State's argument at trial that Merikangas must be discredited because he testified that appellant was deaf in one ear even though he had been in the military, that he did not foresee that argument and that he did recall that appellant's military records indicated that he was deaf in one ear (PCR.Tr.85). Trial counsel did not consider presenting appellant's military and other records to corroborate Dr. Merikangas's findings and testimony (PCR.Tr.86).

During cross-examination, counsel testified that he made a conscious decision not to present the military records because appellant had been dishonorably discharged from the military (PCR.Tr.92).

The motion court denied appellant's claims finding that Dr. Merikangas had testified to much of the same information at trial as he had at the evidentiary hearing; that he was not persuasive at trial or the hearing; that appellant failed to identify specifically what "additional information" Dr. Merikangas should have testified to; and that his "new" information would not have changed the outcome (PCR.L.F.243, 246, 249).

The motion court's findings were not clearly erroneous in that appellant has failed to show that his trial counsel was ineffective or that he was prejudiced by his counsel's actions. In regards to appellant's claim that trial counsel failed to question Dr. Merikangas about his early family life and how his reported behavior supported the doctor's diagnosis, appellant failed to question trial counsel whether they had a strategy for this and has therefore failed to sustain his burden. State v. Tokar, 918 S.W.2d 753,761 (Mo.banc 1996). Moreover, appellant

did not ask Dr. Merikangas about his early family life or how appellant's behavior supported the diagnosis. Appellant failed to show what information he could have provided and fails to support this claim. The motion court is not clearly erroneous in denying a claim where appellant offers no evidence to support it. Nunley v. State, 980 S.W.2d 290,293 (Mo.banc 1998).

In regards to appellant's claim that trial counsel failed to question the doctor about treatment for appellant's symptoms, appellant has failed to show that it was not reasonable trial strategy. As trial counsel testified, it was strategy not to present the treatment options as it could have been more damaging than positive. The state could have argued that if appellant's problems were treatable, he could have been treated long ago before he attacked the other women and killed Gladys Kuehler. This was reasonable strategy and appellant has failed to prove otherwise.

Finally, in regards to appellant's claim that trial counsel failed to inquire about the effect of a structured environment, such as prison, appellant has failed to show that it was not reasonable trial strategy because although appellant asked trial counsel if he spoke to Dr. Merikangas about the effect of prison on appellant, he did not inquire why he did not discuss this aspect or if it was part of trial strategy. By failing to inquire, appellant has once again failed to sustain his burden of proof. Tokar, supra.

In any event, as the motion court found, this "additional information" would not have been persuasive or changed the outcome of the trial. The mere fact that appellant could do well in prison would be discredited by appellant's many conduct violations including various

altercations and an escape See (MX 33). Moreover, as trial counsel pointed out, testimony that appellant could be treated was potentially damaging. The motion court was not clearly erroneous in denying appellant's claim.

XXI.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT ADDITIONAL EVIDENCE FROM LUCY ENGLEBRECHT DURING THE PENALTY PHASE REGARDING HER RELATIONSHIP WITH APPELLANT BECAUSE BY FAILING TO QUESTION TRIAL COUNSEL APPELLANT FAILED TO OVERCOME THE STRONG PRESUMPTION OF REASONABLE TRIAL STRATEGY. IN ANY EVENT, APPELLANT WAS NOT PREJUDICED IN THAT HER TESTIMONY ADDED NO ADDITIONAL BENEFICIAL INFORMATION AND WOULD NOT HAVE CHANGED THE OUTCOME OF THE TRIAL.

Appellant alleges that his trial counsel was ineffective for failing to introduce additional evidence from Lucy Englebrecht during the penalty phase, including more information about her "close, long-term relationship" with appellant and what "he meant to her family" (App.Br.143).

Lucy Englebrecht testified during the penalty phase on behalf of the defense. Englebrecht testified that she had known appellant since 1978 and met him through a prison missionary seminar (Tr.1002-1003). Since she first met appellant while he was imprisoned, she has maintained a friendship and a "spiritual relationship" with him (Tr.1003). Englebrecht stated that she tries to help him to be a better person spiritually (Tr.1004). She visits him approximately every two or three months (Tr.1004). When appellant had been released from prison in the past, he would come to her family home, go to church with them and visit

(Tr.1004-1005). Although she had been in contact with other prisoners through her ministry, she only kept in contact with appellant and specifically sought to have visiting privileges with him (Tr.1005-1006). Englebrecht also stated that if the jury sentenced appellant to life, there could still be some meaning to his life (Tr.1006). Specifically, she believed that he was a spiritual leader among his family members and other prisoners and that he could continue to do so (Tr.1006). If appellant was sentenced to life, she would continue to visit him (Tr.1007). She also stated that even though he had been convicted of killing Kuehler and that he had attacked and tried to kill other women, her opinion of him was still the same (Tr.1007-1008).

During the evidentiary hearing, Englebrecht testified to much of the same as she did at the trial. She also testified that he had an ongoing relationship with her husband and that appellant had a positive effect on her children (PCR.Tr.35). Appellant called her "momma" and she considered him part of her spiritual family (PCR.Tr.35-36). Englebrecht also stated that when she asked appellant to do something, he would obey her and he had become more of an adult (PCR.Tr.41). She stated that appellant liked to work and that they prayed together (PCR.Tr.42). Appellant also got along with the prison personnel (PCR.Tr.42).

During cross-examination, Englebrecht testified that appellant was able to follow the rules she set for him while he visited her while out on parole (PCR.Tr.45-46). She admitted that she was surprised that appellant committed serious crimes while out on parole (PCR.Tr.47).

Trial counsel testified that he recalled speaking with Englebrecht twice before the trial and presented her testimony because he wanted to show appellant's relationships with other

people and Englebrecht was the strongest witness (PCR.Tr.80). No further questions were asked regarding Englebrecht's testimony.

The motion court denied appellant's claim, finding that her proffered testimony was not persuasive and that trial counsel was not ineffective for failing to introduce this "additional" evidence (PCR.L.F.235). The motion court also found that her testimony that appellant could conform his conduct--even though he was not on medication, would have refuted appellant's claims about adjusting in prison (PCR.L.F.235).

The motion court was not clearly erroneous in denying appellant's claim because appellant has failed to sustain his burden that it was not reasonable trial strategy and appellant was not prejudiced by the absence of the sparse additional information. Appellant did not question trial counsel if there was a strategic reason for not presenting the "additional" evidence and has therefore failed to sustain his burden of unreasonable counsel. State v. Tokar, 918 S.W.2d 753,761 (Mo.banc 1996).

Moreover, appellant has failed to show he was prejudiced. Englebrecht's additional testimony that appellant also had a relationship with her husband and that he liked to work would have added nothing to the penalty phase. It would not have changed the verdict and trial counsel was not ineffective for failing to introduce this testimony.

Finally, appellant claims in his brief that Englebrecht could have testified about appellant's relationship with her mother, that appellant had respect for women and that appellant was very protective of her (App.Br.144). Appellant did not present any evidence from Englebrecht about these issues and has failed to sustain his burden. The motion court was

not clearly erroneous in denying a claim when there is no evidence to support it. Nunley v. State, 980 S.W.2d 290,293 (Mo.banc 1998). Appellant has failed to show that it was not reasonable trial strategy to present Englebrecht's testimony in the manner in which they did and he has failed to show that he was prejudiced.

XXII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL VARIOUS FAMILY MEMBERS AND ASSOCIATES BECAUSE APPELLANT FAILED TO PLEAD FACTS WARRANTING RELIEF IN THAT HE FAILED TO IDENTIFY THE WITNESSES AND SPECIFY WHAT THEIR TESTIMONY WOULD BE. MOREOVER, APPELLANT'S CLAIM THAT THE SUPREME COURT RULE 29.15 TIME LIMITS VIOLATE DUE PROCESS HAS BEEN REPEATEDLY DENIED BY THIS COURT.

Appellant pled in his post-conviction motion that:

> In addition to the above listed persons, numerous other family members and associates of Mr. Barton should have been interviewed by defense counsel. Had they been interviewed, they would have presented evidence concerning Mr. Barton's social adjustment, positive accomplishments, and trouble childhood. Had this information been obtained and presented to the jury, there is a reasonable probability that the outcome of the penalty phase would have been different.

(PCR.L.F.27).

In denying appellant's claim, the motion court found that his claim failed to specify information sufficient to make the claim cognizable and that it gratuitously reviewed the proposed testimony and found counsel was not ineffective because the information was not

credible, substantive, nor helpful and would not have changed the outcome of the trial (PCR.L.F.245).

Appellant claims that the motion court erred in denying, without an evidentiary hearing, his claim that his trial counsel was ineffective for failing to call various family members and associates (App.Br.146). Appellant alleges that the pleading rules are restrictive and violate due process and therefore, the motion court should have considered the various affidavits of family members in consideration of his claim (App.Br.146-147).

The motion court was not clearly erroneous in denying this claim. Moore v. State, 827 S.W.2d 213, 215 (Mo.banc 1992). The motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions, which if true would entitle movant to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. State v. Blankenship, 830 S.W.2d 1, 16 (Mo.banc 1992).

Missouri is a fact pleading state, and movants in Rule 29.15 proceedings are held to a more demanding standard than other civil litigants. White v. State, 939 S.W.2d 887, 893 (Mo.banc 1997). "Requiring . . . pleadings containing reasonably precise factual allegations demonstrating . . . injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality" Id. A failure to plead facts that, taken as true, establish both elements of the test for the ineffective assistance of counsel as defined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) is a ground for the denial of an evidentiary hearing. White, supra, 939 S.W.2d at 893-894.

In the case at bar, appellant failed to plead facts which would warrant relief. Appellant

did not allege what family members would testify, what evidence they would testify to or how their absence prejudiced his defense. Morrow, supra. at 823-824. By failing to allege any facts and making only general conclusions, appellant was not entitled to an evidentiary hearing and the motion court was not clearly erroneous in denying the claim.

Appellant alleges that he was unable to properly plead the claim because of the restrictive time limits of Rule 29.15 and that these time limits violate due process (App.Br.146). This claim has been repeatedly rejected by this Court and appellant does not offer any new arguments or new citations in support. Morrow, supra. at 828; State v. Simmons, 955 S.W.2d 752,771 (Mo.banc 1997); State v. Twenter, 818 S.W.2d 641,644 (Mo.banc 1991). The motion court was not clearly erroneous in denying appellant's claim without an evidentiary hearing.

XXIII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE TRIAL COURT'S ALLEGED DISALLOWANCE OF ARGUMENT AT FINAL SENTENCING BECAUSE APPELLANT HAS FAILED TO SUSTAIN HIS BURDEN IN THAT HE DID NOT PLEAD OR PRESENT EVIDENCE REGARDING WHAT "ARGUMENT" COUNSEL SHOULD HAVE MADE.

Appellant claims that his trial counsel were ineffective for failing to object at final sentencing when the trial judge allegedly disallowed argument by counsel (App.Br.151).

At appellant's sentencing, the trial court offered to allow trial counsel to argue their Motion for New Trial (Tr.1102). Trial counsel stated that they would stand on their written motion (Tr.1103). The trial court denied appellant's motions and immediately proceeded to sentencing appellant to death and questioning him about his attorney's representation (Tr.1103-1104). No mention was made about any argument by counsel regarding sentencing.

During the evidentiary hearing trial counsel stated that he was "stunned" that he did not make an argument at final sentencing and he did not object because "[i]t was obvious at that point that the decision had been made and that regardless of what argument that I had made it was going to make no difference in the sentence that was meted out" (PCR.Tr.236).

The motion court denied appellant's claim, finding that counsel's objection would have been denied and appellant presented no evidence to sustain his burden to prove the outcome would be different if counsel would have made the objection (PCR.Tr.250).

The motion court's findings are not clearly erroneous. Although appellant alleges that trial counsel was "disallowed" from making argument, in fact, no disallowance occurred. Rather, no mention of argument occurred at sentencing by counsel or the trial court. The trial court did not "disallow" counsel from making an argument.

Moreover, appellant failed to plead or present any evidence on what argument trial counsel should have made or how that argument would have changed the outcome of the trial. A motion court does not err in denying a claim when appellant fails to introduce any evidence to support it. Nunley v. State, 980 S.W.2d 290,293 (Mo.banc 1998). By failing to plead or introduce any evidence on trial counsel's strategy for the argument or that the argument would have been allowed, appellant has failed to overcome his burden and the motion court was not clearly erroneous in denying his claim.

XXIV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE VARIOUS CLAIMS ON APPEAL BECAUSE COUNSEL WAS EFFECTIVE IN THAT THESE CLAIMS ARE MERITLESS.

Appellant alleges that his appellate counsel was ineffective for failing to raise five different claims on appeal, including:

1) Trial court's limitation on death penalty voir dire;

2) Trial court's limitation final sentencing argument;

3) Failure to dismiss charges based on double jeopardy;

4) Unconstitutionality of this Court's proportionality review; and

5) Failure of the indictment to provide notice

(App.Br.154).

Limitation on death penalty voir dire

Appellant claims that his appellate counsel was ineffective for failing to raise on direct appeal that the trial court erred in disallowing trial counsel to question prospective jurors about the source, nature, and depth of their feelings and beliefs about the death penalty (App.Br.155).

Christopher Spangler, appellant's direct appeal attorney, testified via deposition for the evidentiary hearing. Regarding this claim, Spangler testified that although he did not specifically remember what his strategic reason was for not raising this claim, that was

included in the motion for new trial, he knew he had a strategy because his practice is to review every allegation in the motion for new trial and look at the merits of that claim when considering whether to raise it at the appellate level (Spangler Depo.Tr.8). Spangler was unable to expand upon his answer without speculating or reviewing all of the records (Spangler Depo.Tr.9).

The motion court denied appellant's claim, finding that there was no error in the trial court's ruling in limiting the scope of voir dire and counsel's strategic decision was reasonable (PCR.L.F.251).

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). 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. Id. at 515.

Here, counsel testified that although he could not remember the specific reason he did not raise this claim, he stated that he would not have raised the issue if the merits did not support the claim. Counsel "winnowed" out this claim, as it had little chance of success. Mallett v. State, 769 S.W.2d 77, 83-84 (Mo.banc 1989). This was a reasonable strategy.

Moreover, appellant was not prejudiced. As the motion court found, the trial court properly limited voir dire and did not allow questions about the source, nature, and depth of

their feelings and beliefs about the death penalty. Although wide latitude should be permitted in exploring possible grounds for challenges for cause or peremptory strikes, the nature and extent of the questions counsel may ask are discretionary with the court. State v. Kreutzer, 928 S.W.2d 854, 860 (Mo.banc 1996). Trial court's limitation on open-ended questions regards jurors' feelings is a proper limitation as these queries are irrelevant. Id. at 864-865. The relevant inquiry during voir dire is whether a juror can follow the law. State v. Middleton, 995 S.W.2d 443, 461 (Mo.banc 1999). The trial court's ruling limiting the scope of voir dire was proper and this claim would not have been successful. Appellant was not prejudiced by his appellate counsel's actions.

Appellant argues that State v. Brown, 547 S.W.2d 797 (Mo.banc 1977) supports his contention that the trial court's limitation was reversible error. However, as this Court held in State v. Thompson, 985 S.W.2d 779, 790 (Mo.banc 1999), Brown, supra, is distinguishable because in Brown, the defendant was not allowed to ask the jurors whether they could follow the law. Thompson, supra. Where as here, as in Thompson, and Kreutzer, supra. the trial court did not allow questioning about the "feelings" of the jurors--an improper area of questioning for voir dire. Thompson, supra. The motion court was not clearly erroneous in denying appellant's claim.

Limitation final sentencing argument

Appellant claims that his appellate counsel was ineffective for failing to raise a claim of error relating to the trial court's denial of an argument by trial counsel at final sentencing (App.Br.154).

Although this alleged error is included in appellant's point relied on, he provided no argument and has thus abandoned this claim. State v. Hamilton, 996 S.W.2d 758,761 (Mo.App.S.D.1999).

In any event, this claim has no merit. Appellate counsel Spangler testified that he could not remember why he did not raise the claim on appeal but that he raised issues that he deemed to have merit and did not raise claims that he deemed not to have merit (Spangler Depo.Tr.8-14).

The motion court found that appellant failed to overcome the presumption that his decision was not a matter of strategy and that the claim was meritless (PCR.L.F.251).

The motion court's findings were not clearly erroneous. No objection was made at the sentencing for appellant (Tr. 1103-1104). Therefore, the claim was not preserved and appellate counsel cannot be ineffective for failing to raise an unpreserved claim. State v. Hatcher, 4 S.W.3d 145,150 (Mo.App.S.D.1999).

Moreover, as discussed in Point XXIII above, appellant has made no showing that he was prejudiced by the lack of argument, as he does not allege what that argument would have included or whether it would have changed the sentence. The motion court did not clearly err in denying his claim.

Failure to dismiss charges based on double jeopardy

Appellant claims that his appellate counsel was ineffective for failing to raise a claim that the trial court erred in failing to dismiss the charges against appellant based on double jeopardy because previous trial counsel had requested, and obtained a mistrial after the State

had failed to endorse witnesses (App.Br.154, 158-159).

Appellate counsel testified that he did not raise the claim because it was not preserved since trial counsel never raised the issue at the trial court level (Spangler Depo.Tr.11-12). Spangler also stated that since the previous trial counsel had actually requested the mistrial, it was likely that they had waived the double jeopardy argument (Spangler Depo.Tr.12).

The motion court denied appellant's claim finding that appellant failed to overcome the presumption of reasonable strategy and that the claim was meritless (PCR.L.F.251).

The motion court's findings are not clearly erroneous. First, it was reasonable strategy not to raise a claim that had not been preserved and could only have been reviewed under the plain error standard. Hatcher, supra. Moreover, as discussed above in Points V and VI, this claim was meritless because the previous counsel had waived the double jeopardy argument as they had requested the mistrial. State v. Fitzpatrick, 676 S.W.2d 831,835 (Mo.banc 1984). The motion court was not clearly erroneous in denying appellant's claim.

Unconstitutionality of this Court's proportionality review

Appellant alleges that appellate counsel was ineffective for failing to raise that this Court's proportionality review is unconstitutional (App.Br.159).

Spangler testified that he did not raise this claim as it has been repeatedly denied by this Court (Spangler Depo.Tr.13). The motion court found that this claim was meritless, that this Court has upheld sanctions imposed on attorneys who have raised this issue and counsel was reasonable (PCR.L.F.251).

As discussed above in Point VII, this claim has been repeatedly denied by this Court,

and appellate counsel cannot be ineffective for failing to raise a meritless claim.

Failure of the indictment to provide notice

Appellant also makes an allegation in his point relied on that appellate counsel was ineffective for failing to raise a claim that the indictment failed to provide notice because there is no meaningful distinction between first and second degree murder (App.Br.154, 159).

Spangler testified that he was sure he considered raising the issue on appeal (Spangler Depo.Tr.14). No further questions were asked regarding his strategy.

The motion court denied the claim finding that this claim was meritless, that this Court has upheld sanctions imposed on attorneys who have raised this issue, and counsel was reasonable (PCR.L.F.251).

The motion court's finding was not clearly erroneous. First, appellant did not inquire about counsel's strategy for not raising this claim and has failed to overcome the burden of unreasonable appellate strategy. Tokar, supra. In any event, this claim has been repeatedly denied by this Court and appellant offers no new argument on this claim. State v. Simmons, 955 S.W.2d 729, 745 (Mo.banc 1997); State v. Middleton, 998 S.W.2d 520, 524 (Mo.banc 1999). The motion court did not clearly err in denying this claim.

XXV.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS TRIAL COUNSELS' ALLEGED ERRORS CUMULATIVELY UNDERMINED THE CONFIDENCE IN THE OUTCOME OF THE CASE BECAUSE COUNSEL WAS EFFECTIVE AND APPELLANT WAS NOT PREJUDICED IN REGARD TO ANY ALLEGED ERROR AND THUS APPELLANT COULD NOT HAVE BEEN "CUMULATIVELY" PREJUDICED.

Appellant alleges that the motion court clearly erred in denying his claim that his trial counsels' alleged errors cumulatively undermined the confidence in the outcome of the trial (App.Br.160).

In denying this claim, the motion court found that appellant received effective assistance of counsel at all stages of the criminal proceedings and his convictions and sentence were not the result of an unconstitutional process (PCR.L.F.252).

The motion court's findings are not clearly erroneous. As discussed in the points above, the motion court did not err with respect to any of appellant's claims and counsel were not ineffective in regards to any claim. Since none of appellant's previous points amount to reversible error, it follows that there can be no reversible error attributable to their cumulative effect. State v. Perry, 954 S.W.2d 554, 570 (Mo.App.S.D. 1997).

This Court has rejected such a "cumulative error" theory, stating that "[n]umerous non-errors cannot add up to error." State v. Gray, 887 S.W.2d 369,390 (Mo.banc 1994); State v. Brooks, 960 S.W.2d 479,500 (Mo.banc 1997) ("If counsel's conduct is not constitutionally

ineffective in any individual instance, counsel cannot be held ineffective on the whole); State v. Whitfield, 939 S.W.2d 361,372 (Mo.banc 1997).

Since none of counsel's actions were ineffective or caused any prejudice to appellant, the "cumulative" effect is no ineffective assistance of counsel. The motion court was not clearly erroneous in denying appellant's claim.

XXVI.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT RULE 29.15 IS UNCONSTITUTIONAL DUE TO HIS TIME LIMITS BECAUSE THIS CLAIM HAS BEEN REPEATEDLY DENIED IN THAT THE LIMITS ARE CONSTITUTIONAL.

Appellant claims that Supreme Court Rule 29.15 is unconstitutional because the time limits are insufficient to properly plead and raise all of the issues in the case (App.Br.162).

As discussed *supra* in Point XXII, this Court has repeatedly rejected this claim, finding the time limits both constitutional and sufficient. State v. Simmons, 955 S.W.2d 752,771 (Mo.banc 1997); State v. Twenter, 818 S.W.2d 641,644 (Mo.banc 1991).

Appellant offers no new theory or citation to the contrary.

XXVII.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S CLAIM THAT HIS DEATH SENTENCE VIOLATES DUE PROCESS BECAUSE OF THE "ARBITRARY AND CAPRICIOUS NATURE OF THE CLEMENCY PROCESS" BECAUSE APPELLANT'S CLAIM IS NOT COGNIZABLE IN THAT IT IS NOT A CHALLENGE TO APPELLANT'S SENTENCE OR CONVICTION.

Appellant claims that the clemency process is "arbitrary and capricious" because former Governor Carnahan granted clemency to another death row inmate due to a request from Pope John Paul II (App.Br.165-166).

The motion court denied appellant's claim finding that:

> This claim is based on the late Governor Carnahan's commutation of the death sentence of Darrell Mease, purportedly at the request of Pope John Paul II. Movant has not established that he has even requested clemency and lacks any standing to challenge the process. §217.800.2, RSMo. Thus, his claim is not cognizable in this 29.15 proceeding. The exercise of the pardon power lies in the discretion of the Governor. *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970). *See also, Whitmore v. Gaines*, 24 F.3d 1032, 1034 (8th Cir. 1994). This claim is denied.

(PCR.L.F.251-252).

The motion court was not clearly erroneous in denying appellant's claim because appellant's claim is not cognizable in this proceeding. Supreme Court Rule 29.15 provides a

mechanism for an individual following a jury guilt verdict to raise claims that the "*conviction or sentence* imposed violates the constitution and laws of this state or the constitution of the United States . . . ." Rule 29.15(a) (emphasis added) and appellant's challenge to the clemency process is not within the parameters of Rule 29.15. The manner in which an executive decision is made in regard to clemency is not one in the same as a judicially-imposed conviction or sentence, and thus the motion court correctly determined that the claim was not properly before it. In addition, because appellant has not made a clemency request to date, as he acknowledges, he lacks standing to challenge the clemency process. State v. Entm't Ventures I, Inc., 44 S.W.3d 383, 387 (Mo.banc 2001) ("[T]o have standing to raise a constitutional issue, the objecting party's rights must have been affected."). The motion court was not clearly erroneous in denying this claim.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 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 March, 2002.

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IN THE
MISSOURI SUPREME COURT

WALTER BARTON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Benton County, Missouri
The Honorable Theodore Scott, Judge

RESPONDENT'S APPENDIX
