No. SC83459

IN THE
SUPREME COURT OF MISSOURI

RUFUS JAMES ERVIN,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Phelps County, Missouri
Twenty-Fifth Judicial Circuit, Division II
The Honorable David G. Warren, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

Page

TABLE OF AUTHORITIES

TABLE OF CASES

CONSTITUTIONAL PROVISIONS, STATUTES, and RULES

JURISDICTIONAL STATEMENT

This appeal is from the denial of appellant's motion for post-conviction relief under Rule 29.15 entered on March 1, 2001. Appellant filed his notice of appeal on March 19, 2001. Previously, on March 21, 1997, a jury found appellant guilty of one count of murder in the first degree, § 565.020, RSMo (1994)[1], in the Circuit Court of Phelps County, Missouri, on a change of venue from Reynolds County, Missouri. On May 15, 1997, appellant received a sentence of death upon the first degree murder conviction. This Court affirmed the judgment of conviction and sentence on November 3, 1998. State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998), cert. denied, 525 U.S. 1169 (1999). Because appellant was sentenced to death, jurisdiction of this appeal lies exclusively with the Supreme Court of Missouri. Article V, § 3, Missouri Constitution (as amended 1982).

[1] All further statutory references are to RSMo (1994) unless otherwise indicated.

STATEMENT OF FACTS

On March 21, 1997, appellant was convicted of one count of murder in the first degree, § 565.020, in the Circuit Court of Phelps County, Missouri. D.A.L.F. 123; see L.F. 256.[2] The trial court

[2]The record on appeal consists of the legal file and post-conviction motion transcript, and the following exhibits: A-D, F, H-L. Citation to the motion court's Findings of Fact, Conclusions of Law and Judgment, included in the Appendix to Appellant's Brief, will be to the Appendix as "A-_." Citation to appellant's brief will be to "App.Br. _" For purposes of consistency, Respondent will refer to the record as designated by appellant -- L.F. and H.Tr., respectively. In addition, based on the nature of appellant's claims for relief, Respondent relies upon the trial transcript, direct appeal legal file, and direct appeal supplemental legal file, herein designated "T.Tr.," "D.A.L.F.," and "D.A.S.L.F.," respectively, and respectfully requests the Court to take judicial notice of its file in appellant's direct appeal, cause number SC79968.

sentenced appellant to death, after the jury was unable to decide on the sentence. D.A.S.L.F. 327; see L.F. 70; 256. Appellant's judgment of conviction and sentence was affirmed by this Court on November 3, 1998. State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998), cert. denied, 525 U.S. 1169 (1999). The facts underlying appellant's judgment of conviction and sentence are as follows:

> On August 31, 1994, appellant telephoned Lucius House, a resident of St. Louis. Appellant told House that he had received a telephone call asking him to come to work in Arnold, Missouri, and to bring additional help. House agreed to go. Appellant drove to House's residence to transport House to the job. Keith McCallister and Henry Cook accompanied appellant and House. The men stopped to purchase alcohol on their way to the Semco Factory, where they arrived at about midnight. At 1:00 a.m. on September 1, 1994, the four men left the factory. Appellant drove to a liquor store where he purchased more alcohol for himself and the other men. He said that he was going to Leland White's property, where appellant had also lived for a period of time.
>
> Upon arriving at White's property, appellant honked the horn. McCallister exited the automobile and opened the gate. After parking the car, appellant got out and walked over to Leland White, who was standing outside of his trailer. Appellant and White shook hands. They went inside the trailer. About fifteen minutes later, House heard appellant yelling, "This is mine. This is mine." White called for help. Something hit against the trailer wall, a lamp was knocked over, and the trailer caught fire.
>
> Appellant dragged White out of the trailer after it caught fire, pulling him by something tied around White's neck. White was naked. Appellant dragged White across the driveway and propped him up against a tree. White then said to appellant, "Just go

ahead and kill me, James. Just kill me, James." Appellant picked up a brick with which he hit White four or five times on the head. Appellant began to walk away from White but returned to him after White moved. Appellant then hit White three or four additional times in the head with the brick. Appellant returned to the car and said to the others, "The motherfucker said kill me, so I did."

The four men returned to the car. Appellant attempted to drive away, but backed the vehicle onto a boulder. After examining the car and trying to free it, appellant went to White, picked him up, and took him over to the car. Appellant threw White over the hood. Appellant then told McCallister to "come on, help me throw this motherfucker in the fire." McCallister helped appellant. They threw White about three feet into the fire. Appellant and McCallister returned to the car and again tried to free the vehicle from the boulder. About an hour later, they were able to remove the vehicle from the boulder.

The automobile was not operable. Appellant decided that he should call the highway patrol and report that the house blew up. The men pushed the car back up in the driveway. Appellant and McCallister tried to throw White further into the fire. Appellant and the others then wiped White's blood from the hood of the vehicle with newspaper.

Appellant flagged a motorist and obtained a ride to the home of Don Cook, who lived eight-tenths of a mile from White. Cook was acquainted with both White and appellant. Appellant told Cook that White was dead and appellant wanted to call the sheriff. Appellant said, "We've had an explosion ...." and told Cook that White had said, "James, don't let me burn. Don't let me burn."

Cook could not reach the sheriff so he called Deputy Umphleet, who lived nearby. Umphleet went to White's trailer, as did Cook and appellant. Umphleet observed a white male lying face down on a burned-out portion of the building. Nothing was left of the residence. Appellant told Umphleet that there had been an explosion and fire and that the explosion had blown the stove from one side of the residence to the other. Umphleet noticed, however, that the stove remained connected to a propane tank. Additional law enforcement personnel arrived at the scene. Deputy Sheriff John Farrar assisted Umphleet. Approximately ten to twelve feet south of White's body, Farrar collected a brick stained with what appeared to be blood.

Jefferey McSpadden, the Reynolds County coroner, arrived. He determined that the cause of death was an open skull fracture. After speaking with McSpadden, Umphleet arrested appellant, Cook, House, and McCallister.

Sergeant Kirby Johnson of the Missouri Highway Patrol interviewed appellant on September 1, 1994. He read appellant his rights at 4:13 p.m. Between 4:18 p.m. and 4:36 p.m., Johnson taped a conversation with appellant. Appellant denied cutting White's throat, denied hitting him with a brick, and denied throwing his body into the fire. Johnson asked appellant about the discrepancies between appellant's statements and the statements of the three other men, who remained in custody. Johnson then left the room after which two other officers interrogated appellant. Finally, after a break in the proceedings, appellant yelled that he had hit White in the head with a brick.

Leland White died as a result of blunt trauma to his head. He sustained at least five separate blows to the head. White suffered, in addition, nine incised wounds that cut

across his neck. Most penetrated only through the skin and dermis. Two incisions exposed the muscles of the neck. One cut through White's trachea. There were superficial incisions over White's left shoulder and lower right side of his neck. There were seven or eight superficial incisions partially through the skin across the front of White's thigh. The jury found appellant guilty of murder in the first degree.

In the penalty phase of trial, the state presented evidence of appellant's prior convictions for assault upon a law enforcement officer and two weapons counts. The state also adduced testimony regarding appellant's arrest for driving while intoxicated. Appellant engaged in verbally abusive and physically violent conduct following the arrest. The state also adduced testimony from a former Phelps County jailer pertaining to appellant's assault upon him, which resulted in the jailer sustaining a broken right jaw joint and a bruised brain with swelling. Appellant presented evidence from two clinical psychologists.

At the close of the evidence, instructions, and arguments by counsel in the penalty phase, the jury was unable to reach a verdict on punishment. The trial court, as a consequence, sentenced appellant, as provided under *section 565.030.4(4)*. The court imposed a sentence of death.

Ervin, 979 S.W.2d at 152-154.

This Court denied appellant's motion for rehearing on December 1, 1998.

Appellant filed his pro se motion for post-conviction relief on July 23, 1997, L.F. 32; see L.F. 12, and filed his amended motion on March 1, 1999.[3] L.F. 69. In his amended motion, appellant raised

[3] Appellant filed his pro se motion for post-conviction relief prior to completion of the direct appeal

twenty-seven claims with numerous subclaims. Following the filing of Respondent's motion to dismiss without an evidentiary hearing, L.F. 256-281, appellant's response, L.F. 282-299, and discovery, the motion court denied Respondent's motion to dismiss and scheduled an evidentiary hearing. See L.F. 22-23. That court held the evidentiary hearing on February 14-17, 2000. See H.Tr. i-v.

On March 1, 2001, the motion court issued its "Amended Findings Of Fact, Conclusions Of Law And Judgment" denying relief on appellant's motion for post-conviction relief. Appellant filed his notice of appeal on March 19, 2001. See L.F. 10.

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proceedings. Pursuant to Rule 29.15(b), the pro se motion was due ninety days after the date that the mandate issued affirming the judgment of conviction and sentence. This Court issued its mandate on direct appeal on December 1, 1998. See L.F. 70. Accordingly, because the amended motion was filed on March 1, 1999, L.F. 69, it was timely filed.

POINTS RELIED ON

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT MITIGATING EVIDENCE FROM APPELLANT'S FAMILY, BECAUSE TRIAL COUNSEL PERFORMED COMPETENTLY AND/OR APPELLANT WAS NOT PREJUDICED, IN THAT

(1) COUNSEL WAS NOT PROVIDED WITH THE NAMES OF NUMEROUS FAMILY MEMBERS,

(2) COUNSEL WAS NOT MADE AWARE OF VARIOUS ASPECTS OF APPELLANT'S CHILDHOOD,

(3) A NUMBER OF FAMILY MEMBERS HAD LITTLE CONTACT WITH APPELLANT SINCE HE WAS A CHILD,

(4) MUCH OF THE TESTIMONY WOULD HAVE BEEN CUMULATIVE,

(5) NEITHER APPELLANT OR HIS MOTHER WANTED HER TO TESTIFY BECAUSE OF HEALTH PROBLEMS, AND,

(6) BASED UPON TRIAL COUNSEL'S REASONABLE BELIEF THAT AS DEFENSE WITNESSES APPELLANT'S FAMILY WOULD NOT BE PERMITTED TO REMAIN IN THE COURTROOM FOR THE JURY TO OBSERVE, WHICH COUNSEL WANTED AND WHERE APPELLANT'S MEDICAL HISTORY WOULD BE PRESENTED TO THE JURY THROUGH DEFENSE EXPERTS.

Clayton v. State, No. SC83355, 2001 Mo. LEXIS 96 (Mo. banc Dec. 4, 2001)

Lyons v. State, 39 S.W.3d 32 (Mo. banc), cert. denied, 122 S.Ct. 402 (2001)

Sloan v. State, 779 S.W.2d 580 (Mo. banc 1989), cert. denied, 494 U.S. 1060 (1990)

State v. Kenley, 952 S.W.2d 250 (Mo. banc 1997), cert. denied, 522 U.S. 1095 (1998)

II.

THE COURT SHOULD NOT REVIEW APPELLANT'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO INVESTIGATE AND REBUT EVIDENCE OF APPELLANT'S ALLEGED ASSAULT UPON CHRIS DIETRICH, BECAUSE THE CLAIM IS NOT PROPERLY BEFORE THIS COURT IN THAT APPELLANT RAISED THAT CLAIM FOR THE FIRST TIME ON APPEAL.

FURTHER, APPELLANT ABANDONED HIS CLAIM AS PRESENTED TO THE MOTION COURT -- THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO INVESTIGATE AND REBUT EVIDENCE OF APPELLANT'S ALLEGED ASSAULT UPON SHERIFF'S DEPUTY DAVID SCHOENGERT -- BECAUSE HE FAILED TO BRIEF THE CLAIM ON APPEAL.

White v. State, 939 S.W.2d 887 (Mo. banc), cert. denied, 522 U.S. 948 (1997)

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

III.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO

INVESTIGATE AND PRESENT EVIDENCE OF APPELLANT'S "GOOD CONDUCT" WHILE IN JAIL AWAITING TRIAL ON THE MURDER CHARGE, BECAUSE COUNSEL PERFORMED REASONABLY AND/OR APPELLANT WAS NOT PREJUDICED IN THAT THE EVIDENCE OF GOOD CONDUCT WAS ONLY MARGINAL, TRIAL COUNSEL DID NOT BELIEVE THAT THE EVIDENCE WOULD BE HELPFUL, AND APPELLANT COULD NOT PROVE THAT HE DID NOT BECOME PHYSICALLY ASSAULTIVE WHILE IN CUSTODY, AND THUS TRIAL COUNSEL'S DECISION WAS A MATTER OF TRIAL STRATEGY NOT SUBJECT TO CHALLENGE.

Rousan v. State, 48 S.W.3d 576 (Mo. banc 2001)

IV.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT PENALTY PHASE EVIDENCE OF APPELLANT'S PAST MEDICAL HISTORY OF HEAD INJURIES AND A SEIZURE DISORDER, BECAUSE TRIAL COUNSEL PERFORMED COMPETENTLY IN THAT THE RECORD ESTABLISHED THAT COUNSEL DID OBTAIN APPELLANT'S PAST MEDICAL RECORDS AND PROVIDED SUCH RECORDS TO THE EXPERTS HIRED BY THE DEFENSE AND THAT APPELLANT'S MEDICAL HISTORY WAS PRESENTED TO THE JURY THROUGH THE TESTIMONY OF ONE OF THE DEFENSE'S EXPERTS.

IN ADDITION, TRIAL COUNSEL DOES NOT HAVE A CONSTITUTIONAL DUTY TO PRESENT APPELLANT'S MEDICAL HISTORY THROUGH THE TESTIMONY OF APPELLANT'S FAMILY PHYSICIAN OR TO PRESENT CUMULATIVE EVIDENCE, AND COUNSEL WILL NOT BE HELD INEFFECTIVE FOR FAILING TO PRESENT TESTIMONY THAT HE DID NOT BELIEVE THE INDIVIDUAL WAS QUALIFIED TO OFFER AND WHICH WOULD NOT HAVE BEEN ADMISSIBLE.

FINALLY, THE COURT SHOULD NOT REVIEW APPELLANT'S CLAIM RAISED FOR THE FIRST TIME THAT COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING THE OBSERVATIONS, AS A LAY WITNESS, OF DOUGLAS POPE.

Bucklew v. State, 38 S.W.3d 395 (Mo. banc), cert. denied, 122 S.Ct. 374 (2001)

Jones v. State, 784 S.W.2d 789 (Mo. banc), cert. denied, 498 U.S. 881 (1990)

Skillicorn v. State, 22 S.W.3d 678 (Mo. banc), cert. denied, 531 U.S. 1039 (2000)

State v. Johnston, 957 S.W.2d 734 (Mo. banc 1997), cert. denied, 522 U.S. 1150 (1998)

V.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO HAVE APPELLANT EVALUATED BY A MEDICAL DOCTOR AND THEN PRESENTING EVIDENCE OF APPELLANT'S SEIZURE DISORDER THROUGH A MEDICAL DOCTOR, BECAUSE COUNSEL PERFORMED COMPETENTLY IN THAT

(1) THE FEDERAL CONSTITUTION DOES NOT MANDATE THAT SUCH EVIDENCE ONLY BE PRODUCED THROUGH SUCH AN EXPERT,

(2) TRIAL COUNSEL CONDUCTED A REASONABLE INVESTIGATION BY CONTACTING TWO MAJOR HOSPITALS IN ST. LOUIS AND RECEIVING REFERRALS TO THE EXPERTS ULTIMATELY HIRED,

(3) COUNSEL PRESENTED APPELLANT'S MEDICAL HISTORY TO THE JURY DURING THE PENALTY PHASE, AND

(4) THE OPINIONS OF APPELLANT'S POST-CONVICTION RELIEF EXPERT, DR. BRUCE HARRY, WERE REFUTED BY THE RECORD, RENDERED WITHOUT CONSULTATION WITH APPELLANT'S PRESCRIBING PHYSICIAN AT THE TIME OF THE TRIAL, AND ASSUMED FACTS NOT IN EVIDENCE.

FINALLY, THE COURT SHOULD NOT REVIEW APPELLANT'S CHALLENGE TO THE ADMISSIBILITY OF HIS CONFESSION, NOW RAISED IN THE CONTEXT OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, THAT WAS REVIEWED ON DIRECT APPEAL.

State v. Copeland, 928 S.W.2d 828 (Mo. banc 1996), cert. denied, 519 U.S. 1126 (1997)

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

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)

VI.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO ENSURE THAT APPELLANT WAS PROPERLY MEDICATED AT TRIAL, BECAUSE COUNSEL PERFORMED COMPETENTLY AND/OR APPELLANT WAS NOT PREJUDICED IN THAT THERE WAS NO EVIDENCE THAT TRIAL COUNSEL HAD BEEN PUT ON NOTICE AS TO ANY ADVERSE EFFECT FROM THE MEDICATION OR THAT APPELLANT EVEN TOOK THE MEDICATION THAT WAS PRESCRIBED TO HIM WHILE HELD IN THE PHELPS COUNTY JAIL.

Moore v. State, 827 S.W.2d 213 (Mo. banc 1992)

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

VII.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT EVIDENCE OF APPELLANT'S INTOXICATION THE NIGHT OF THE MURDER, BECAUSE COUNSEL PERFORMED COMPETENTLY AND/OR APPELLANT WAS NOT PREJUDICED IN THAT COUNSEL DID NOT HAVE A DUTY TO FURTHER INVESTIGATE BASED UPON APPELLANT'S STATEMENTS THAT HE HAD NOT BEEN DRINKING THAT NIGHT OR TO PRESENT TESTIMONY CONTRARY TO THE EVIDENCE.

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

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)

VIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT A LEARNING DISABILITY EXPERT DURING THE PENALTY PHASE OF TRIAL, BECAUSE COUNSEL PERFORMED COMPETENTLY IN INVESTIGATING APPELLANT'S BACKGROUND AND/OR APPELLANT WAS NOT PREJUDICED IN THAT (1) THE CONCLUSIONS OF HIS POST-CONVICTION PHASE EXPERT THAT APPELLANT HAD COGNITIVE PROBLEMS FAILED TO TAKE INTO CONSIDERATION IMPORTANT ASPECTS OF APPELLANT'S BACKGROUND, FAILED TO TAKE INTO CONSIDERATION THAT APPELLANT COMMUNICATED EFFECTIVELY WITH TRIAL COUNSEL, AND WERE COMPLETELY DIVORCED FROM THE FACTS OF THE CASE, AND (2) TRIAL COUNSEL HAD APPELLANT EVALUATED BY EXPERTS TO WHICH HE WAS REFERRED BY OTHER MEDICAL PROFESSIONALS.

Lyons v. State, 39 S.W.3d 32 (Mo. banc), cert. denied, 122 S. Ct. 402 (2001)

State v. Clemons, 946 S.W.2d 206 (Mo. banc), cert. denied, 522 U.S. 968 (1997)

State v. Kenley, 952 S.W.2d 250 (Mo. banc 1997), cert. denied, 522 U.S. 1095 (1998)

Zeitvogel v. State, 760 S.W.2d 466 (Mo. App., W.D. 1988), cert. denied, 490 U.S.

1075 (1989)

IX.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT MITIGATING EVIDENCE OF APPELLANT'S CHILDHOOD BACKGROUND, BECAUSE COUNSEL PERFORMED COMPETENTLY IN INVESTIGATING APPELLANT'S BACKGROUND IN THAT THE INFORMATION THAT APPELLANT ASSERTED SHOULD HAVE BEEN PRESENTED TO THE JURY WAS NOT DISCLOSED TO TRIAL COUNSEL OR TO THE EXPERTS THAT EVALUATED APPELLANT PRIOR TO TRIAL. TRIAL COUNSEL WILL NOT BE HELD INEFFECTIVE FOR FAILING TO DISCOVER AND PRESENT FAMILY BACKGROUND INFORMATION THAT APPELLANT AND/OR HIS FAMILY DOES NOT DISCLOSE TO COUNSEL.

Lyons v. State, 39 S.W.3d 32 (Mo. banc), cert. denied, 122 S. Ct. 402 (2001)

State v. Simmons, 955 S.W.2d 729 (Mo. banc 1997)

State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992)

X.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL

COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT EVIDENCE OF THE VICTIM'S CHARACTER -- SPECIFICALLY, EVIDENCE OF THE VICTIM'S MENTAL PROBLEMS DURING THE LATE 1960S AND/OR EARLY 1970S -- BECAUSE COUNSEL PERFORMED COMPETENTLY IN THAT THE EVIDENCE WAS NOT ADMISSIBLE DURING THE GUILT PHASE AS APPELLANT DID NOT CLAIM SELF-DEFENSE BUT THAT HE DID NOT COMMIT THE MURDER, AND THE EVIDENCE WAS INADMISSIBLE DURING THE PENALTY PHASE AS IT WAS NOT MITIGATING BECAUSE IT DID NOT BEAR UPON APPELLANT'S CHARACTER OR RELATE TO THE CIRCUMSTANCES OF THE OFFENSE. TRIAL COUNSEL WILL NOT BE HELD INEFFECTIVE FOR FAILING TO PRESENT INADMISSIBLE EVIDENCE.

Skillicorn v. State, 22 S.W.3d 678 (Mo. banc), cert. denied, 531 U.S. 1039 (2000)

State v. Chambers, 891 S.W.2d 93 (Mo. banc 1994)

State v. Hall, 982 S.W.2d 675 (Mo. banc 1998), cert. denied, 526 U.S. 1151 (1999)

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)

XI.

THE COURT SHOULD NOT REVIEW APPELLANT'S CLAIM THAT THE TRIAL COURT'S FINDING OF A STATUTORY AGGRAVATING CIRCUMSTANCE INCREASED THE MAXIMUM PENALTY, BECAUSE THE CLAIM IS NOT PROPERLY BEFORE THE COURT IN THAT APPELLANT RAISED THAT CLAIM FOR THE FIRST

TIME ON APPEAL, AND IN ANY EVENT, BY ITS EXPRESS TERMS, APPRENDI V. NEW JERSEY DOES NOT APPLY TO CAPITAL SENTENCING.

FURTHER, APPELLANT ABANDONED HIS CLAIM AS PRESENTED TO THE MOTION COURT BECAUSE HE FAILED TO BRIEF ON APPEAL THE CLAIM RAISED BELOW.

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)

State v. Black, 50 S.W.3d 778 (Mo. banc 2001)

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

XII.

THIS COURT SHOULD NOT REVIEW APPELLANT'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO CERTAIN ARGUMENTS BY THE PROSECUTOR, BECAUSE APPELLANT SOUGHT AND RECEIVED PLAIN ERROR REVIEW OF THE UNDERLYING CLAIMS ON DIRECT APPEAL, AND AN ISSUE DECIDED ON DIRECT APPEAL CANNOT BE RELITIGATED IN A POST-CONVICTION RELIEF PROCEEDING UNDER A THEORY OF INEFFECTIVE ASSISTANCE OF COUNSEL.

IN ADDITION, THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO THE VARIOUS ARGUMENTS CITED BY APPELLANT, BECAUSE COUNSEL PERFORMED COMPETENTLY IN THAT TRIAL COUNSEL'S

DECISION NOT TO OBJECT WAS A MATTER OF TRIAL STRATEGY AND THE ARGUMENTS OF WHICH APPELLANT COMPLAINS WERE PROPER AND ANY OBJECTION WOULD HAVE BEEN OVERRULED.

Antwine v. State, 791 S.W.2d 403 (Mo. banc 1990), cert. denied, 498 U.S. 1055 (1991)

Leisure v. State, 828 S.W.2d 872 (Mo. banc), cert. denied, 506 U.S. 923 (1992)

State v. Basile, 942 S.W.2d 342 (Mo. banc), cert. denied, 522 U.S. 883 (1997)

State v. Six, 805 S.W.2d 159 (Mo. banc), cert. denied, 502 U.S. 871 (1991)

XIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CHALLENGE TO MISSOURI'S CLEMENCY PROCEDURE, BECAUSE APPELLANT DOES NOT HAVE STANDING TO RAISE THE CLAIM AND IT IS NOT COGNIZABLE IN A POST-CONVICTION MOTION IN THAT APPELLANT ADMITTEDLY HAS NOT SOUGHT CLEMENCY AS PROVIDED UNDER STATE LAW AND THE CLAIM DOES NOT BEAR UPON THE CONSTITUTIONALITY OF MOVANT'S CONVICTION AND/OR SENTENCE.

State v. Entm't Ventures I, Inc., 44 S.W.3d 383 (Mo. banc 2001)

XIV.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIMS CHALLENGING THIS COURT'S PROPORTIONALITY REVIEW AND THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE CLAIM FOR APPELLATE REVIEW, BECAUSE THE CLAIM IS NOT PROPERLY BEFORE THIS COURT AND COUNSEL PERFORMED COMPETENTLY IN THAT APPELLANT CONTENDS FOR THE FIRST TIME THAT THIS COURT'S PROPORTIONALITY REVIEW DID NOT APPLY A DE NOVO STANDARD OF REVIEW, THE DETERMINATION ON DIRECT APPEAL UNDER § 565.035 CONSTITUTES THE LAW OF THE CASE, AND COUNSEL DOES NOT HAVE A CONSTITUTIONAL DUTY TO PRESENT EVIDENCE THAT THE COURT HAS PREVIOUSLY HELD NOT TO BE RELEVANT TO ITS PROPORTIONALITY REVIEW DETERMINATION.

O'Neal v. State, 766 S.W.2d 91 (Mo. banc), cert. denied, 493 U.S. 874 (1989)

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

White v. State, 939 S.W.2d 887 (Mo. banc), cert. denied, 522 U.S. 948 (1997)

XV.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY CHALLENGE MISSOURI'S DEATH PENALTY JURY INSTRUCTIONS BY PRESENTING THE STUDY OF RICHARD L. WIENER, BECAUSE COUNSEL

PERFORMED COMPETENTLY IN THAT THIS COURT HAS REPEATEDLY UPHELD THE CONSTITUTIONALITY OF THE JURY INSTRUCTIONS AT ISSUE AND SUBSEQUENTLY HAS DISCOUNTED THE STUDY CITED BY APPELLANT, AND COUNSEL WILL NOT BE HELD TO HAVE PERFORMED DEFICIENTLY FOR FAILING TO MAKE A NON-MERITORIOUS OBJECTION.

Lyons v. State, 39 S.W.3d 32 (Mo. banc), cert. denied, 122 S. Ct. 402 (2001)

State v. Deck, 994 S.W.2d 527 (Mo. banc), cert. denied, 528 U.S. 1009 (1999)

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT MITIGATING EVIDENCE FROM APPELLANT'S FAMILY, BECAUSE TRIAL COUNSEL PERFORMED COMPETENTLY AND/OR APPELLANT WAS NOT PREJUDICED, IN THAT

(1) COUNSEL WAS NOT PROVIDED WITH THE NAMES OF NUMEROUS FAMILY MEMBERS,

(2) COUNSEL WAS NOT MADE AWARE OF VARIOUS ASPECTS OF APPELLANT'S CHILDHOOD,

(3) A NUMBER OF FAMILY MEMBERS HAD LITTLE CONTACT WITH APPELLANT SINCE HE WAS A CHILD,

(4) MUCH OF THE TESTIMONY WOULD HAVE BEEN CUMULATIVE,

(5) NEITHER APPELLANT OR HIS MOTHER WANTED HER TO TESTIFY BECAUSE OF HEALTH PROBLEMS, AND,

(6) BASED UPON TRIAL COUNSEL'S REASONABLE BELIEF THAT AS DEFENSE WITNESSES APPELLANT'S FAMILY WOULD NOT BE PERMITTED TO REMAIN IN THE COURTROOM FOR THE JURY TO OBSERVE, WHICH COUNSEL WANTED AND WHERE APPELLANT'S MEDICAL HISTORY WOULD BE PRESENTED TO THE JURY THROUGH DEFENSE EXPERTS.

Appellant contends that trial counsel was ineffective for failing to investigate and present the testimony of his family members during the penalty phase of trial. App.Br. 33.

The essence of appellant's claim, however, is that this Court should reverse the motion court's findings and conclusions based upon (1) counsel's failure to discover appellant's family members that appellant himself failed to provide to counsel, (2) counsel's failure to discover family history information that neither appellant nor his mother disclosed to counsel, (3) counsel's failure to present witnesses who had had little contact with appellant during his adulthood, (4) counsel's failure to present cumulative testimony, (5) counsel's failure to have appellant's mother testify notwithstanding the fact that both appellant and his mother did not want her to testify due to the mother's health problems, and (6) counsel's strategic decision to have appellant's mother and sister remain present before the jury throughout the trial rather than be precluded from attending the trial because of their status as witnesses, where appellant's experts would testify to appellant's family history as provided and his medical and psychological background.

In his appellate brief, appellant himself acknowledges that he only provided trial counsel with the names of his siblings - Delores Nelson, Danita Hodge, Carolyn Rayford, Mamie Ervin, Carlos "Flynnolyn" Ervin. App.Br. 33. Counsel also had appellant's mother's name, Ossie McNeal, and spoke with her many times. H.Tr. 1184-1185. Mrs. McNeal did not provide counsel with the history of her troubled childhood, her mental and physical problems when appellant was a child, or of other family problems. H.Tr. 1185-1188. "Appellant's counsel cannot be deemed ineffective for failing to discover evidence of abuse that appellant's family did not share with them during the investigation." Lyons v. State, 39 S.W.3d 32, 41 (Mo. banc), cert. denied, 122 S.Ct. 402 (2001). Moreover, because counsel had no reason to believe that appellant and his mother were being less than frank about appellant's childhood, counsel had no duty to contact all of appellant's siblings. See State v. Kenley, 952 S.W.2d 250, 266 (Mo. banc 1997) ("'In

any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments. . . . The defendant must overcome the presumption that, under the circumstances, that challenged action might be considered sound trial strategy.'" (quoting Strickland v. Washington, 466 U.S. 668, 691, 689 (1984); internal citations omitted), cert. denied, 522 U.S. 1095 (1998).

Appellant also apparently believes that counsel had a constitutional duty to discover his other family members by talking to those people that appellant did provide counsel with the names of. App.Br. 34 ("[S]ince he did not talk to the witnesses given to him, counsel also failed to talk to any other relatives who were close to Mr. Ervin . . . ."). If, however, those other family members were as close to appellant as he now claims, counsel should have been able to rely upon appellant to provide counsel with those names. Trial counsel testified that he was only provided with the names of appellant's siblings. H.Tr. 1020; see A-8. Appellant's non-sibling relatives -- Phoebe Townsend, Essie Dorris, Abram Carr, or Robert Xavier Nelson -- could not testify that counsel had been provided with their names. H.Tr. 698, 740, 716-717, 102. Appellant did not testify at the evidentiary hearing, compare H.Tr. i-v, and thus has not presented any evidence refuting counsel's testimony. Because counsel was not made aware of these individuals as potential witnesses, counsel was not ineffective for failing to interview them or present their testimony. Sloan v. State, 779 S.W.2d 580, 582 (Mo. banc 1989), cert. denied, 494 U.S. 1060 (1990); State v. Gilpin, 954 S.W.2d 570, 577 (Mo. App., W.D. 1997); State v. Duckett, 849 S.W.2d 300, 306 (Mo. App. S.D. 1993).

Appellant further contends that counsel was ineffective for failing to present the testimony of appellant's mother. App.Br. 39. In support of his claim, appellant relies upon the testimony of his mother that she would have testified but was never asked to. App.Br. 39. Appellant's argument is in complete

disregard to the credibility findings of the motion court, where trial counsel testified that neither appellant nor his mother wanted appellant's mother to testify, because of medical problems. H.Tr. 1191-1993; see A-8. "[T]his court must defer to the motion court's determination of credibility." State v. Sanders, 945 S.W.2d 449, 453 (Mo. App., W.D. 1997); State v. Twenter, 818 S.W.2d 628, 635 (Mo. banc 1991). Moreover, as found by the motion court, much of the information that Mrs. McNeal testified to at the evidentiary hearing was not provided to trial counsel or appellant's experts at the time of trial. A-8.

In addition, Mrs. McNeal's testimony regarding her childhood would not have been admissible, as it was not relevant. State v. Nicklasson, 967 S.W.2d 596, 620 (Mo banc), cert. denied, 525 U.S. 1021 (1998); see also Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a *defendant's* character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis added; internal footnote omitted).

The testimony of Abram Carr, in addition to the fact that counsel had not been provided with this name, A-22, would have been cumulative. A-21. The testimony of appellant's sister, Delores Nelson, regarding appellant's medical condition, would have been cumulative. "Under Missouri law, an attorney is not ineffective for failing to put on cumulative evidence." Clayton v. State, No. SC83355, 2001 Mo. LEXIS 96 *19 (Mo. banc Dec. 4, 2001); State v. Johnston, 957 S.W.2d 734, 755 (Mo. banc 1997), cert. denied, 522 U.S. 1150 (1998).

Of appellant's family members that counsel was provided their names, Danita Hodge, Carolyn Rayford, and Carlos "Flynnolyn" Ervin had had little contact with appellant in recent years. H.Tr. 114, 134-136, 158, respectively. Indeed, while appellant complains of counsel having not contacted his siblings,

not all of appellant's siblings even knew before trial that he was charged with first degree murder and facing the death penalty. H.Tr. 116 (Danita Hodge), 162 (Carlos "Flynnolyn" Ervin). Counsel will not be held ineffective for failing to present the testimony of witnesses that were not very close to appellant or that had little information about the appellant's present life. State v. Hall, 982 S.W.2d 675, 688 (Mo. banc 1998), cert. denied, 526 U.S. 1151 (1999).

Finally, because trial counsel was not aware of many of the facts of appellant's upbringing, the fact that appellant's medical history would be presented to the jury through appellant's experts, and that appellant and his mother did not want her to testify, counsel's decision to not present the testimony of appellant's mother and sister but instead to have them support appellant before the jury by their presence throughout the entire trial, where he reasonably believed that they would otherwise be excluded from the trial, H.Tr. 1248-1249, was trial strategy not subject to challenge.

Base upon the foregoing, Point I should be denied.

II.

THE COURT SHOULD NOT REVIEW APPELLANT'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO INVESTIGATE AND REBUT EVIDENCE OF APPELLANT'S ALLEGED ASSAULT UPON CHRIS DIETRICH, BECAUSE THE CLAIM IS NOT PROPERLY BEFORE THIS COURT IN THAT APPELLANT RAISED THAT CLAIM FOR THE FIRST TIME ON APPEAL.

FURTHER, APPELLANT ABANDONED HIS CLAIM AS PRESENTED TO THE MOTION COURT -- THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO INVESTIGATE AND REBUT EVIDENCE OF APPELLANT'S ALLEGED ASSAULT UPON SHERIFF'S DEPUTY DAVID SCHOENGERT -- BECAUSE HE FAILED TO BRIEF THE CLAIM ON APPEAL.

Before the motion court, under ground 8(J), appellant contended that trial counsel rendered ineffective assistance based upon his failure to investigate and prepare for the penalty phase of the trial in relation to the State's intention "to introduce evidence of an alleged assault *on a sheriff's deputy, David Schoengert*, while Mr. Ervin was incarcerated in the Phelps County Jail." L.F. 118 (emphasis added). That is the claim reviewed by the motion court: "The Court makes the following findings and conclusions in regard to the claim that counsel was ineffective for not further investigating the incident between *Deputy Schowengerdt* and Movant, and presenting evidence at trial . . . ." A-66 (emphasis added).

Now on appeal, for the first time, appellant contends

> that trial counsel was ineffective for failing to investigate and rebut Mr. Ervin's alleged assault and alleged threats to kill his cellmate, *Dietrich*, ... [and that] Mr. Ervin was prejudiced as the State presented the alleged assault and alleged threats of *Dietrich* as a reason to give Mr. Ervin death and had this inaccurate charge been rebutted, there is a reasonable probability of a life sentence . . . .

App.Br. 46 (emphasis added).

Because appellant did not raise a claim of ineffective assistance of trial counsel for failure to investigate the assault on Chris Dietrich before the motion court, this Court should not consider the claim. White v. State, 939 S.W.2d 887, 904 (Mo. banc), cert. denied, 522 U.S. 948 (1997); Twenter, 818 S.W.2d at 641. And because appellant's Point Relied On and argument thereunder do not address the claim as raised and decided by the motion court, claim 8(J) is abandoned. State v. Clay, 975 S.W.2d 121, 144 (Mo. banc 1998) ("The claims about Lay's testimony in this appeal are different from those raised in the Rule 29.15 motion, and thus are waived."), cert. denied, 525 U.S. 1085 (1999); see also Rule 30.06(e) ("The argument *shall* substantially follow the order of 'Points Relied On.'" (emphasis added); State v. Heitman, 473 S.W.2d 722, 727-728 (Mo. 1971). Accordingly, Point II should be denied.[4]

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[4]Upon the claim presented to it, the motion court denied relief, having found that

> Movant's trial counsel testified at the hearing that he had spoken with Movant about the incident involving Deputy Schowengerdt, and realized that there were two very different versions of what had taken place. Based on that information, Mr. Hadican decided not to attempt to rebut Deputy Schowengerdt's version, as he did not want to turn the penalty phase into a trial on the assault case.

A65. See H.Tr. 1225-1227, 1247-1248. That appellant may disagree with trial counsel's trial strategy is not a proper basis for holding that counsel rendered ineffective assistance.

III.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF APPELLANT'S "GOOD CONDUCT" WHILE IN JAIL AWAITING TRIAL ON THE MURDER CHARGE, BECAUSE COUNSEL PERFORMED REASONABLY AND/OR APPELLANT WAS NOT PREJUDICED IN THAT THE EVIDENCE OF GOOD CONDUCT WAS ONLY MARGINAL, TRIAL COUNSEL DID NOT BELIEVE THAT THE EVIDENCE WOULD BE HELPFUL, AND APPELLANT COULD NOT PROVE THAT HE DID NOT BECOME PHYSICALLY ASSAULTIVE WHILE IN CUSTODY, AND THUS TRIAL COUNSEL'S DECISION WAS A MATTER OF TRIAL STRATEGY NOT SUBJECT TO CHALLENGE.

Before the motion court, appellant contended that trial counsel was ineffective for failing to investigate and present evidence of appellant's good conduct while in jail, both prior to the murder charge when he was held in St. Louis County Jail, and while awaiting trial in Phelps County Jail on that charge. L.F. 109. According to appellant, St. Louis County jail records reflected that appellant did not cause problems, and Phelps County jailer Dennis Green would have testified that he "observed Mr. Ervin to be nearly a 'model' prisoner." L.F. 109.

In relation to appellant's St. Louis County Jail conduct, the motion court found that

> no reference is made to 1988, and the records do not provide any information concerning his conduct in jail during those thirty-one (31) days. Movant did not provide

any testimony at the hearing in respect to his custody in St. Louis County Jail. This portion of Movant's claim fails for lack of proof. See Tokar, 918 S.W.2d at 768 (counsel is presumed competent, and, absent proof that counsel's acts and omissions were anything other than strategic, claim of ineffective assistance fails).

A-53. Appellant does not challenge that determination on appeal, and the claim is abandoned. Clay, 975 S.W.2d at 144 ("The claims about Lay's testimony in this appeal are different from those raised in the Rule 29.15 motion, and thus are waived.").

Regarding the portion of appellant's claim relating to his pretrial incarceration in Phelps County, the motion court decided the claim as follows:

> While Mr. Green testified that Movant did not cause problems for Green and was cooperative with him, Mr. Green did not testify that Movant was "nearly a 'model' prisoner " as asserted in his motion. See Am.Mot. at 41. Rather, Mr. Green testified that Movant did not cause more problems than other prisoners. Nor does the record support Movant's assertion "that Deputy Schowengerdt -- who claimed that Mr. Ervin assaulted him -- acted in an abusive and abrasive manner around inmates, and would provoke and 'stir up' inmates by swearing and cussing at them." Mr. Green testified that while his style with the prisoners was to act as a "bud," Deputy Schowengerdt projected more authority. According to Mr. Green, all of the jail personnel swore at the prisoners.
>
> Dennis Green testified that he was not present at the time that Movant assaulted Deputy Schowengerdt. Counsel testified at the hearing that he did not believe evidence of Movant's conduct in jail would have been helpful. Because Mr. Green's testimony does not establish that Movant did not assault Deputy Schowengerdt or that Movant's

misconduct was provoked by Deputy Schowengerdt, Movant has failed to demonstrate that he was prejudiced by counsel's decision not to present evidence of his conduct while held in the Phelps County Jail. See State v. Clemons, 946 S.W.2d 206, 226 (Mo. banc), cert. denied, 522 U.S. 968 (1997).

> Counsel's presentation of the penalty phase of a criminal trial is a matter of professional judgment. Whether that judgment is effective or ineffective is measured by whether the advocacy was reasonable under the circumstances, not by the sentence the defendant receives. Clemmons v. State, 785 S.W.2d 524, 527 (Mo. banc 1990). Counsel has a duty to make a reasonable investigation of possible mitigating evidence or to make a reasonable decision that such an investigation is unnecessary. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. However, counsel's "election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness ..."

Antwine v. State, 791 S.W.2d 403, 407 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988).

A-53-A-55.

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. . . ." Moore v. State, 827 S.W.2d 213, 215 (Mo. banc 1992). Thus appellant carries the burden

of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original).

Appellant argues that "had the jury heard that Mr. Ervin was cooperative and had not caused any problems for anyone, there is a reasonable probability that the jury would have sentenced Mr. Ervin to life." App.Br. 54. Appellant mischaracterizes and misstates the evidence. First, the evidence is merely that appellant, while held in the Phelps County Jail and while Dennis Green was on duty, generally did as he was supposed to. In addition, however, Mr. Green testified during the evidentiary hearing that appellant also got into a few arguments while in jail -- what may be described as standard occurrences or "flare ups." H.Tr. 934-935. And contrary to there being evidence that appellant did not "cause[] problems for anyone," the State established at trial through the testimony of David Schoengert, a former deputy with the Phelps County Sheriff's Department, T.Tr. 942-945, and Gary Miller, a police officer, T.Tr. 926-928, that appellant became physically assaultive while in custody.[5] See Ervin, 979 S.W.2d at 157-158. Moreover, trial counsel testified that he did not believe the evidence of appellant's conduct in jail would be very helpful. H.Tr. 1060. Indeed, the State would have rebutted such evidence through its cross-examination of Dennis Green, bringing to the jury's attention that Green was not present when appellant assaulted Deputy Schoengerdt, and that appellant was involved in arguments while in jail, and would only have served to highlight appellant's assaultive behavior while in custody -- something trial counsel sought to avoid. See H.Tr. 1227.

[5]On appeal, appellant has abandoned his challenge that trial counsel was ineffective in investigating and presenting evidence in relation to appellant's assault upon Mr. Schoengert. See supra, at 39.

Here, trial counsel decided not to present the evidence, based upon his determination that it was not helpful. Trial counsel does not have a constitutional duty to present mitigating evidence. Rousan v. State, 48 S.W.3d 576, 583 (Mo. banc 2001).

Based upon the foregoing, Point III should be denied.

IV.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT PENALTY PHASE EVIDENCE OF APPELLANT'S PAST MEDICAL HISTORY OF HEAD INJURIES AND A SEIZURE DISORDER, BECAUSE TRIAL COUNSEL PERFORMED COMPETENTLY IN THAT THE RECORD ESTABLISHED THAT COUNSEL DID OBTAIN APPELLANT'S PAST MEDICAL RECORDS AND PROVIDED SUCH RECORDS TO THE EXPERTS HIRED BY THE DEFENSE AND THAT APPELLANT'S MEDICAL HISTORY WAS PRESENTED TO THE JURY THROUGH THE TESTIMONY OF ONE OF THE DEFENSE'S EXPERTS.

IN ADDITION, TRIAL COUNSEL DOES NOT HAVE A CONSTITUTIONAL DUTY TO PRESENT APPELLANT'S MEDICAL HISTORY THROUGH THE TESTIMONY OF APPELLANT'S FAMILY PHYSICIAN OR TO PRESENT CUMULATIVE EVIDENCE, AND COUNSEL WILL NOT BE HELD INEFFECTIVE FOR FAILING TO PRESENT TESTIMONY THAT HE DID NOT BELIEVE THE INDIVIDUAL WAS QUALIFIED TO OFFER AND WHICH WOULD NOT HAVE BEEN ADMISSIBLE.

FINALLY, THE COURT SHOULD NOT REVIEW APPELLANT'S CLAIM RAISED FOR THE FIRST TIME THAT COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING THE OBSERVATIONS, AS A LAY WITNESS, OF DOUGLAS POPE.

Before the motion court, appellant asserted under paragraph 8(I) that counsel was ineffective for failing to investigate and present during the penalty phase the following: medical records from St. Louis County Dept. of Community Health and Medical Care (1/7/76); records from Arcadia Valley Hospital (10/12/95); Dr. J. David Auner or medical records from St. Anthony's Medical Center (4/25/86); counselor Douglas Pope or his records; Dr. Steven D. Mellies, D.O. or his medical records; R.A. Peggy Goldfader, M.A. and M.A. Felchlia, M.A. or their records; Dr. J. David Auner or medical records (12/28/89); and records from Arcadia Valley Hospital (3/29/90). See L.F. 109-117.

The motion court determined that the record refuted appellant's claim. Specifically, the court below resolved appellant's claim as follows:

> The record refutes movant's claim: the very medical records that movant cites were provided to and considered by Stephen V. Courtois, Ph.D. and F. Timothy Leonberger, Ph.D., the psychologist (certified forensic examiner) and neuropsychologist who evaluated movant pretrial pursuant to Chapter 552, RSMo. See S.L.F., Vol. II, 229-233, 296-299, respectively.
>
> * * * * *
>
> The only records that are not included in the records assembled by trial counsel that are cited by Movant are those from St. Louis County Dept. of Community Health and Medical Care (1/7/76). Review of those records (Plaintiff's Exhibit 11), as admitted into evidence during the evidentiary hearing, reflects that Movant was treated for a stab wound at that time. At trial, Dr. Leonberger testified as to the incident. Tr. 957. The other records obtained by counsel themselves do not reference the 1976 incident. State's Exhibit J.

Dr. Mellies, Goldfader, and Felchlia did not testify at the evidentiary hearing. Movant will not be heard to complain that counsel did not present their testimony at trial having failed to demonstrate that these experts were available and willing to testify at trial. Jones, 979 S.W.2d at 187. Douglas Pope did testify. His qualifications include a master's degree in Divinity and Pastorial Care Counseling. Mr. Pope testified that he was employed as a psychotherapist and that he began counseling Movant in the spring of 1989 for several months, and that Movant reported that he had seizures and that he was on medication to control them. The Court concludes that Mr. Pope, who is not licensed under Chapter 337, RSMo., and had no medical training, would not have qualified to testify as an expert. Compare State v. Garrett, 682 S.W.2d 153, 155 (Mo. App., S.D. 1984) ("By reason of education or specialized experience, a witness who possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion nor drawing correct conclusions qualifies as an expert."). Nor would any report by Mr. Pope have been admissible. Compare State v. Candela, 929 S.W.2d 852, 866 (Mo. App., E.D. 1996) ("Expert witnesses are entitled to rely on hearsay evidence as support for their opinions, as long as that evidence is of a type reasonably relied upon by other experts in the field; such evidence need not be independently admissible.").

Moreover, counsel did obtain the records Movant cites, and the information regarding Movant's medical history was presented to the jury through Dr. Leonberger's testimony during the penalty phase. Tr. 957-962. Regarding the guilt phase of trial, the Court rejects Movant's claim that the information contained in the reports from Arcadia

Valley Hospital, St. Anthony's Medical Center, Dr. Auner, Dr. Mellies, and Ms. Goldfader and Ms. Felchlia, if admitted, would have established that Movant could not have deliberated the night of the murder. Significantly, Movant insisted at trial that he did not murder Leland White, that he did not cut his throat, that he did not hit him in the head with a brick. Tr. 825. A defense that Movant was not capable of deliberation is inconsistent with Movant's own account of the incident, that he did not commit the murder, "and, if offered during trial, presents the substantial risk of diluting the efficacy" of an innocence theory. Harris, 870 S.W.2d at 816; see Roll, 942 S.W.2d at 377. The strategic decision to pursue one theory vigorously "necessarily required trial counsel to eschew any other effective defense that threatened to weaken the chosen course. Reasonable strategic decisions are not transformed into ineffective counsel claims because a jury rejects the theory of the case." Harris, 870 S.W.2d at 816. Moreover, the reports and information range from 1976 to 1991. No evidence was presented that Movant experienced a seizure at the time Leland White was murdered, and more significantly, that if he had had a seizure, that he would have been physically capable of acting. See Antwine, 791 S.W.2d at 411-412. In fact, at trial Dr. Leonberger specifically testified during cross-examination that if Movant had had a "generalized tonic clonic seizure, he couldn't have done it [the murder]. A partial complex seizure, it would be very, very -- almost out of the question." Tr. 979. A-59-A-63.

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced

thereby. . . ." Moore, 827 S.W.2d at 215. Thus appellant carries the burden of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original). Moreover,

> [t]rial counsel's decision not to call a witness is presumed to be trial strategy unless otherwise clearly shown. . . . Strategic choices made after thorough investigation are essentially unchallengeable. . . . To establish ineffectiveness of trial counsel for failing to call a witness, movant must show that the witness could have been located by reasonable investigation, that the witness would testify if called, and that the testimony would provide a viable defense.

Bucklew v. State, 38 S.W.3d 395, 398 (Mo. banc) (internal citations omitted), cert. denied, 122 S.Ct. 374 (2001).

Appellant does not dispute that the very records that he complained of were not properly investigated and presented to the jury were in fact investigated, but contends that the motion court clearly erred in denying relief because trial counsel did not present appellant's medical history through appellant's family physician. App.Br. 62. Without citation to relevant authority, appellant contends that "medical doctors carry greater status and authority than do psychologists in the eyes of many jurors, especially on medical topics." App.Br. 62.[6] Counsel does not have a constitutional duty to present evidence of a

[6]The case in which appellant does cite, Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995), App.Br. 62, is not on point. In Tate, defense counsel failed to present any evidence that the defendant suffered from organic brain damage, which was well-documented from the time of the defendant's childhood. Glenn, 71 F.3d at 1208.

defendant's medical or mental condition through a former treating physician or through a medical doctor as opposed to a psychologist. "Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable." Kenley, 952 S.W.2d at 266. Moreover, the record reflects that trial counsel extensively researched appellant's medical background and consulted with medical professionals before ultimately being referred to the psychologists. H.Tr. 1194-1205. Further, appellant merely speculates that the presentation of the same evidence to the jury through his treating physician, Dr. Auner, rather than through Dr. Leonberger, would have been "more persuasive and compelling to jurors . . . ." App.Br. 62. Such speculation is not a basis for finding that the motion court clearly erred. Jones v. State, 784 S.W.2d 789, 794 (Mo. banc) (Billings, J., concurring), cert. denied, 498 U.S. 881 (1990).[7]

[7]By his contention that counsel had a duty to present appellant's medical records through the testimony of a medical doctor, appellant seeks the retroactive application of a new rule of constitutional law, which is precluded by Teague v. Lane, 489 U.S. 288, 311, 109 S.Ct. 1060, 1075-1076, 103 L.Ed.2d 334 (1989).

Appellant also invites the Court to speculate regarding trial counsel's decision not to present the medical records themselves, which were cumulative to the testimony provided by appellant's retained experts. A-62. According to appellant, "[a]s experts retained by the defense, they undoubtedly were viewed with suspicion by jurors." App.Br. 63. Appellant cites no relevant authority for his proposition that counsel is constitutionally required to present "pre-offense records" to provide "vital corroboration and credibility to the psychologists' testimony." App.Br. 63.[8] "Failing to present cumulative evidence is not ineffective assistance of counsel." Johnston, 957 S.W.2d at 755. Because the evidence for which appellant complains was not presented to the jury was in fact presented, the motion court did not commit clear error.

Regarding counsel's decision not to present the testimony of Douglas Pope, for the first time appellant now contends that "Pope could have testified to his observations of Mr. Ervin, ... [and that] Pope is no different than any other lay witness. Pope's expertise was not the important factor in Mr. Ervin's case, rather Pope's observations of Mr. Ervin before the offense was critical." App.Br. 62. Before the motion court, however, appellant asserted that counsel was ineffective for failing to present the *opinions* of Douglas Pope, through his testimony or records, based upon his *evaluations* of appellant. L.F. 112. Presentation of opinions from evaluations is quite distinct from the presentation of observations, that appellant now relies. App.Br. 62. The Court should not consider this claim. White, 939 S.W.2d at 904; Twenter, 818 S.W.2d at 641. As for the claim of ineffectiveness presented to the motion court in relation to Douglas Pope, appellant makes no attempt to demonstrate that that court clearly erred. Counsel testified that he did not believe the witness was competent to testify to the opinions he had made in regard

[8] See supra, 51 n.6.

to appellant's medical condition. H.Tr. 1199. As the motion court found, neither the testimony of Douglas Pope or his reports would not have been admissible. A-61-A-62. Counsel does not have a constitutional duty to present evidence which he does not believe credible and of which would not have been admissible. Skillicorn v. State, 22 S.W.3d 678, 687 (Mo. banc), cert. denied, 531 U.S. 1039 (2000); Clay, 975 S.W.2d at 143. The motion court did not clearly err.

Based upon the foregoing, Point IV should be denied.

V.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO HAVE APPELLANT EVALUATED BY A MEDICAL DOCTOR AND THEN PRESENTING EVIDENCE OF APPELLANT'S SEIZURE DISORDER THROUGH A MEDICAL DOCTOR, BECAUSE COUNSEL PERFORMED COMPETENTLY IN THAT

(1) THE FEDERAL CONSTITUTION DOES NOT MANDATE THAT SUCH EVIDENCE ONLY BE PRODUCED THROUGH SUCH AN EXPERT,

(2) TRIAL COUNSEL CONDUCTED A REASONABLE INVESTIGATION BY CONTACTING TWO MAJOR HOSPITALS IN ST. LOUIS AND RECEIVING REFERRALS TO THE EXPERTS ULTIMATELY HIRED,

(3) COUNSEL PRESENTED APPELLANT'S MEDICAL HISTORY TO THE JURY DURING THE PENALTY PHASE, AND

(4) THE OPINIONS OF APPELLANT'S POST-CONVICTION RELIEF EXPERT, DR. BRUCE HARRY, WERE REFUTED BY THE RECORD, RENDERED WITHOUT CONSULTATION WITH APPELLANT'S PRESCRIBING PHYSICIAN AT THE TIME OF THE TRIAL, AND ASSUMED FACTS NOT IN EVIDENCE.

FINALLY, THE COURT SHOULD NOT REVIEW APPELLANT'S CHALLENGE TO THE ADMISSIBILITY OF HIS CONFESSION, NOW RAISED IN THE CONTEXT OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, THAT WAS REVIEWED ON DIRECT APPEAL.

During the penalty phase at trial, the two experts that previously examined appellant, Dr. Leonberger, a neuropsychologist, and Dr. Armour, a clinical psychologist, testified regarding appellant's medical condition, including his seizure disorder. T.Tr. 956-969, 988-990. Before the motion court, appellant contended that trial counsel was ineffective for failing to have appellant evaluated by a psychiatrist -- i.e., a medical doctor -- as opposed to Drs. Leonberger and Armour. Appellant alleged that "psychologists lack the necessary training and experience to adequately and fully diagnose, understand and explain the causes and effects of a medical conduction such as seizure disorder. . . . The opinion of a medical doctor was also necessary in Mr. Ervin's case to investigate and prove that Mr. Ervin was not competent to stand trial." L.F. 98-99 (emphasis in original).

After summarizing the evidence presented in relation to this claim, the motion court denied relief as follows:

> Regarding Movant's claim that he was not competent to stand trial, the Court concludes that the claim should have been raised on direct appeal. Guinan v. State, 726 S.W.2d 754, 756 (Mo. banc 1986), cert. denied, 484 U.S. 873 (1987). Rule 29.15 is not a substitute for direct appeal, and matters that properly should have been raised by direct appeal may not be litigated in a post-conviction proceeding. Amrine, 785 S.W.2d at 536; State v. Twenter, 818 S.W.2d 628, 636 (Mo. banc 1991). The Court also finds that Movant has presented no evidence that would reasonably have put the trial court and counsel on notice to doubt Movant's competency to stand trial, see State v. Tokar, 918 S.W.2d 753, 762-763 (Mo. banc), cert. denied, 519 U.S. 933 (1996); State v. Richardson, 923 S.W.2d 301, 328 (Mo. banc), cert. denied, 519 U.S. 972 (1996); cf.

State v. Roll, 942 S.W.2d 370, 376 (Mo. banc), cert. denied, 522 U.S. 954 (1997) ("Absent some suggestion of mental instability, counsel has no duty to initiate an investigation of the accused's mental condition." The need for an investigation is not indicated where a defendant has the present ability to consult rationally with counsel and to understand the proceedings.") (internal citation and quotation marks omitted).

* * * * *

The Court finds Dr. Harry's testimony unpersuasive. First, Dr. Harry gave no weight to Movant's trial testimony that he had not been drinking the night of the murder. Moreover, voluntary intoxication, whether by alcohol or medication, is not a defense to first degree murder. State v. Erwin, 848 S.W.2d 476, 482 (Mo. banc), cert. denied, 510 U.S. 826 (1993). And absent involuntariness, it makes no legal difference whether Movant was under the influence of alcohol, medication, or the combination thereof on the night of the murder. State v. Walter, 918 S.W.2d 927, 930 (Mo. App., E.D. 1997). Second, while testifying that the records indicated that Movant's seizures were controlled in 1991, Dr. Harry did not know what the normal blood levels for the seizure medication was for Movant at that time, and no evidence was presented to the effect that, for Movant, those levels obtained while in custody were not appropriate. Moreover, review of Movant's earlier medical records reflects that his Dilantin blood levels have generally been subtherapeutic. See, e.g., State's Exhibit J, Dr. Auner letter dated December 28, 1989; Dr. Mellies letter dated January 16, 1990. Further, Dr. Harry apparently assumed that Movant was taking the medication as prescribed, and based his conclusions upon the

medication logs. Yet the Court heard credible testimony from Dennis Green, a former jailer for the Phelps County Sheriff's Department that while Movant was given his daily medication in the morning, the jail staff did not verify that Movant took his medication. The Court also rejects Dr. Harry's conclusions in light of the fact that Movant was, according to the medication logs, distributed the same medications in the months both before and after the month of trial, March, 1997, yet Movant cites no other incident of disruptive or assaultive behavior during that time. Indeed, he alleged that he was a model prisoner, and presented testimony that, at least for former jailer Dennis Green, Movant was cooperative and did not cause problems. Finally, the Court also notes that while Dr. Harry testified that Movant had six seizures when he evaluated Movant at the Potosi Correctional Center, no evidence was presented as to the medication Movant was then prescribed and if any, whether he was taking it, and Movant's current medication status. Throughout the course of the four-day hearing, the Court did not observe any seizure-like symptoms as described by Dr. Harry or Movant's family.

The Court rejects Movant's claim that counsel was ineffective for failing to present a medical doctor. First, "trial counsel cannot be held ineffective for failing to shop for a more favorable expert witness." State v. Copeland, 928 S.W.2d 828, 845 (Mo. banc 1996) (citing State v. Mease, 842 S.W.2d 98, 114 (Mo. banc 1992), cert. denied, 508 U.S. 918 (1993)), cert. denied, 519 U.S. 1126 (1997). Nor does the constitution require that counsel present the testimony of a medical doctor, even if the defendant has a medical condition. Indeed, Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), cited by Movant, Am.Mot. at 31, does not stand for the proposition that a

"competent " mental evaluation is one performed by a psychiatrist only. Rather, Ake "dealt with an attempt by counsel to have a psychiatrist appointed by the court and the dilemma of establishing cause for such an appointment without having to reveal defense strategy." Tokar, 918 S.W.2d at 765. There is no Missouri law setting forth a checklist for what would or what would not constitute a "competent " mental examination for the purposes of Chapter 552 and presenting mitigation evidence. And finally, Movant failed to present any evidence that the mental health professionals hired on behalf of Movant, and recommended by individuals associated with Washington University School of Medicine, were incompetent. The Court finds this claim particularly preposterous in light of Movant's claim that counsel was ineffective for failing to present records from Douglas Pope, see Am.Mot. at 44-45, who treated Movant in 1989 and 1990, and has a master's degree in Divinity and Pastoral Care Counseling -- and not a medical licence.

A-28-A-29, A-36-A-38.

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. . . ." Moore, 827 S.W.2d at 215. Thus appellant carries the burden of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original).

Trial counsel had appellant evaluated by both a psychologist and a neuropsychologist, after contacting professionals at both Saint Louis University Hospital and Washington University School of Medicine and providing those experts with appellant's medical records. H.Tr. 1203-1205. Appellant

presented no evidence that Drs. Leonberger and Armour were not qualified to render the opinions they did, and in essence seeks to hold counsel ineffective for failing to shop for a more favorable expert witness. Counsel is under no such duty. State v. Copeland, 928 S.W.2d 828, 845 (Mo. banc 1996), cert. denied, 519 U.S. 1126 (1997). To the extent that appellant contended before the motion court that the federal constitution required that trial counsel investigate and present evidence of a medical and/or psychiatric condition through a medical doctor, L.F. 99, appellant seeks the retroactive application of a new rule of constitutional law, precluded by Teague, 489 U.S. at 311, 109 S.Ct. at 1075-1076, 103 L.Ed.2d 334.

Regarding appellant's reliance upon the effect of alcohol, as discussed infra, at 66-70, appellant presented no evidence that he had in fact consumed any alcohol on the night of the murder. In fact, the record establishes the contrary. T.Tr. 847 (appellant's trial testimony that he had not been drinking that night); H.Tr. 1227-1228 (trial counsel's testimony that appellant told him he had not drank the night Leland White died). And regarding the purported effect of appellant's seizure medication, on the record previously before this Court, "[t]here is no evidence that [appellant] took any medication that day." Ervin, 979 S.W.2d at 161. Appellant failed to present any new evidence otherwise. Nor did appellant present any evidence that he had had seizures at the time he killed the victim.

Additionally, Dr. Harry's opinion that appellant would not have been competent to stand trial if he was receiving the medications he was prescribed, H.Tr. 325, assumed that appellant was in fact taking the medication he was prescribed, compare H.Tr. 943-945, and was rendered without consulting appellant's prescribing physician at the time of trial, H.Tr. 409, to ascertain whether appellant's seizures were under control and what adverse effects, if any, the medication that was prescribed was having upon appellant. Dr. Harry's opinion was also contrary to the evidence, including trial counsel's conclusion, based upon a career of approximately 250 trials, H.Tr. 1156, that appellant was able to communicate effectively with

counsel, the lack of any noticeable drug effects upon appellant, and that appellant never complained to counsel that he could not understand counsel, the prosecutor, the witnesses, the proceedings, or was otherwise having problems. H.Tr. 1207-1215. Nor could Dr. Harry testify that appellant experienced seizures at the time that he stood trial. H.Tr. 396.

Finally, appellant's attempt to relitigate the admissibility of statement to police, now presented as a claim of ineffective assistance, compare Ervin, 979 S.W.2d at 160-161 with App.Br. 69-70, should be rejected. State v. Jones, 979 S.W.2d 171, 181 (Mo. banc 1998), cert. denied, 525 U.S. 1112 (1999).

Based upon the foregoing, Point V is without merit and should be denied.

VI.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO ENSURE THAT APPELLANT WAS PROPERLY MEDICATED AT TRIAL, BECAUSE COUNSEL PERFORMED COMPETENTLY AND/OR APPELLANT WAS NOT PREJUDICED IN THAT THERE WAS NO EVIDENCE THAT TRIAL COUNSEL HAD BEEN PUT ON NOTICE AS TO ANY ADVERSE EFFECT FROM THE MEDICATION OR THAT APPELLANT EVEN TOOK THE MEDICATION THAT WAS PRESCRIBED TO HIM WHILE HELD IN THE PHELPS COUNTY JAIL.

Relying upon medication logs and the testimony of Dr. Bruce Harry, M.D., appellant contends that the motion court erred in rejecting his claim that trial counsel failed to investigate and object to appellant being overmedicated before and during trial. App.Br. 72.

The motion court rejected appellant's claims, as were presented to it, as follows:

> Citing Riggins v. Nevada, 504 U.S. 127, 136-140, 112 S.Ct. 1810, 1815-1818, 118 L.Ed.2d 479 (1992), Movant first contends that he was "improperly and involuntarily medicated during trial, and the side-effects from Mr. Ervin's medications adversely impacted his outward appearance, the content of his testimony on direct and cross-examination, his ability to follow the proceedings, and his ability to assistance and communicate with counsel." Am.Mot. at 38. Movant also contends trial counsel was ineffective for allowing the overmedication. Id. at 38-39.

The Court rejects this claim on a number of bases:

First, this is a claim of competency to stand trial: "The standard for competence to stand trial is whether the defendant has 'sufficient present ability to *consult with his lawyer* with a reasonable degree of rational understanding' and has 'a rational as well as *factual understanding of the proceedings* against him.'" Tokar, 918 S.W.2d at 762 (emphasis added; quoting Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960)). This claim should have been raised on direct appeal. Guinan v. State, 726 S.W.2d 754, 756 (Mo. banc 1986), cert. denied, 484 U.S. 873 (1987). Rule 29.15 is not a substitute for direct appeal, and matters that properly should have been raised by direct appeal may not be litigated in a post-conviction proceeding. Amrine, 785 S.W.2d at 536; Twenter, 818 S.W.2d at 636.

Second, Movant has presented no evidence that would reasonably have put the trial court and counsel on notice to doubt movant's competency to stand trial, see Tokar, 918 S.W.2d at 762-763; Richardson, 923 S.W.2d at 328, which, as discussed supra, is in effect what movant contends resulted from the overmedication. Trial counsel's testimony at the evidentiary hearing, however, refutes this claim -- i.e., that Movant did not complain that he was being over-medicated, that he was experiencing difficulty with his memory or physical sensations, or was unable to understand the proceedings. Cf. Roll, 942 S.W.2d at 376 ("Absent some suggestion of mental instability, counsel has no duty to initiate an investigation of the accused's mental condition." The need for an investigation is not indicated where a defendant has the present ability to consult rationally with counsel and to understand the proceedings.") (internal citation and quotation marks omitted).

> Finally, Movant presented no evidence that he was subject to "[t]he forcible injection of medication into a nonconsenting person's body. . . .", which could give rise to constitutional violation. Compare Riggins, 504 U.S. at 134, 112 S.Ct. at 1814. To the contrary, there is no evidence establishing that in fact Movant was taking the daily medication distributed to him in the morning. And trial counsel testified at the evidentiary hearing that nothing about Movant's behavior at trial, or anything Movant said to counsel, put counsel on notice to inquire into Movant's competency to stand trial; in fact, Movant was attentive at trial.

A-49-A-50.

Appellant does not renew on appeal his claim that he was involuntarily medicated at trial, and thus has abandoned the claim. Clay, 975 S.W.2d at 144 ("The claims about Lay's testimony in this appeal are different from those raised in the Rule 29.15 motion, and thus are waived.").

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. . . ." Moore, 827 S.W.2d at 215. Thus appellant carries the burden of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original).

While appellant extensively sets forth the side effects that the medications appellant was prescribed have been documented to produce, App.Br. 72-74, appellant presented no evidence that he did in fact experience such side effects. Indeed, the evidence failed to establish that petitioner took the medicine as prescribed or that he even took them at all. See H.Tr. 939-945. Instead, appellant relies upon the

testimony of Dr. Harry, App.Br. 74 (citing H.Tr. 289, 291), who admittedly was not at trial and could not testify first-hand to what side effects appellant did or did not experience, H.Tr. 396, 401, 408, who did not verify that appellant had in fact been taking the medication that was prescribed while in custody, H.Tr. 409, and who did not even consult with appellant's prescribing physician. H.Tr. 409. On the other hand, trial counsel testified that he did not observe appellant experience any adverse effects. H.Tr. 1207-1215. Appellant did not testify at the evidentiary hearing, compare H.Tr. i-v, and thus has not presented any evidence refuting counsel's testimony.

Point VI should be denied.

VII.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT EVIDENCE OF APPELLANT'S INTOXICATION THE NIGHT OF THE MURDER, BECAUSE COUNSEL PERFORMED COMPETENTLY AND/OR APPELLANT WAS NOT PREJUDICED IN THAT COUNSEL DID NOT HAVE A DUTY TO FURTHER INVESTIGATE BASED UPON APPELLANT'S STATEMENTS THAT HE HAD NOT BEEN DRINKING THAT NIGHT OR TO PRESENT TESTIMONY CONTRARY TO THE EVIDENCE.

Both prior to trial and during the guilt phase, appellant said he had not drank alcohol on the night of the murder of Leland White. See, e.g., D.A.S.L.F. 242; T.Tr. 847. Appellant contends that trial counsel had a constitutional duty to ignore his client's repeated statements denying voluntary intoxication and to "look at the objective evidence from officers at the scene and eyewitnesses, to discover the truth." App.Br. 82-83.

The motion court rejected appellant's claim as follows:

> Movant contends that trial counsel rendered ineffective assistance of counsel because he "failed to investigate and present to the jury in guilt and penalty phase testimony of Deputy Leo Umphleet that Mr. Ervin, and all his companions . . . were intoxicated when he saw them at the scene of the offense at 6:45 a.m. on September 1, 1994, the morning immediately after the night of the offense." Am.Mot. at 39-40. According to movant, this

testimony would have impeached the testimony of Lucius House, one of movant's companions and an eyewitness, would have supported a defense of diminished capacity to negate the element of deliberation, would have supported the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and would have provided the basis for giving the statutory mitigator that defendant was under the influence of extreme mental or emotional disturbance.

The record refutes movant's claim that he was intoxicated: During his evaluation by Dr. Courtois, movant specifically said he had not been drinking. S.L.F., Vol. II, 242. Movant told Dr. Leonberger that "he drank socially, and defined this as 6 or 9 beers on a 2-3 times per month basis." S.L.F., Vol. II, 299. At trial, movant testified that he purchased alcohol for the other men with him, Tr. 804-808, and that he had not been drinking. Tr. 847. And at the evidentiary hearing, trial counsel testified that movant told him that he had not been drinking the night of the murder.

Further, "a jury may not consider [voluntary] intoxication on the issue of the defendant's mental state." Erwin, 848 S.W.2d at 482.

Regarding the impeachment of Lucius House, failure to call an impeachment witness is not ineffective assistance of counsel because the testimony, even if true, would not establish a viable defense. State v. Funke, 903 S.W.2d 240, 245 (Mo.App., E.D. 1995); State v. Day, 859 S.W.2d 194, 196 (Mo.App., E.D. 1993). Also, Movant did not present the testimony of Deputy Umphleet; while Deputy Umphleet died in October, 1999, the Public Defender made its entry of appearance on January 21, 1999. Thus

> Movant has failed to prove this claim. McRoberts, 837 S.W.2d at 22; Burton, 817 S.W.2d at 929; see also Patterson, 826 S.W.2d at 40; Tettamble, 818 S.W.2d at 332. In any event, House himself testified at trial that Movant had bought a half pint of liquor for House after being picked up by Movant at 9:30 p.m., Tr. 566-567, and that sometime after leaving the factory at 1:00 a.m., Movant bought a pint of vodka, which House and companion Cook shared, Tr. 571. Thus the evidence that House had been drinking the night of the murder was before the jury. Movant was therefore not prejudiced. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 674. Ground 8(G) is denied.

A-51-A-52.

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. . . ." Moore, 827 S.W.2d at 215. Thus appellant carries the burden of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original).

Appellant did not testify in support of his Rule 29.15 motion. Appellant invites the Court to speculate that appellant had been drinking, notwithstanding his past repeated denials -- including his trial testimony, see T.Tr. 847 (appellant testified that he did not drink vodka or wine and had not drank any of the purchased beer prior to arriving at Leland White's residence), and representations to trial counsel, H.Tr. 1057-1058, 1227-1228 -- based upon evidence that appellant bought alcohol for the men accompanying him the night of the murder and testimony that beer cans were found in appellant's car. App.Br. 82. Such speculation is not evidence and is refuted by appellant's own testimony. Nor does the fact that appellant

failed to preserve the testimony of the officer first to arrive at the crime scene, Deputy Leo Umphleet, before that officer's death, present a basis for treating any speculation of what his testimony might have been as evidence.

Notwithstanding the fact that counsel met with appellant at least thirty times, H.Tr. 1158, spoke with appellant extensively about his medical background, H.Tr. 1194, and felt that he had a "very close" relationship with appellant, H.Tr. 1179, appellant now asserts that he "was not a reliable source of information." App.Br. 82. Appellant failed to present any evidence demonstrating that his self-report of no alcohol use the night of the murder should be considered any less reliable than his prior self-reports of alcohol use to examining medical personnel. Compare State's Exhibit J, Documents #4, see also Plaintiff's Exhibit 53, at 6.

Significantly, appellant fails to explain how counsel was supposed to present evidence of intoxication during the penalty phase when appellant explicitly denied to the jury during the guilt phase that he had been drinking. See T.Tr. 847. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). To the extent that appellant argues trial counsel has a constitutional duty to look beyond information supplied by the defendant when that information pertains to alcohol use, appellant seeks the retroactive application of a new rule of constitutional law, precluded by Teague, 489 U.S. at 311, 109 S.Ct. at 1075-1076, 103 L.Ed.2d 334.

Based upon the foregoing Point VII is without merit and should be denied.

VIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT A LEARNING DISABILITY EXPERT DURING THE PENALTY PHASE OF TRIAL, BECAUSE COUNSEL PERFORMED COMPETENTLY IN INVESTIGATING APPELLANT'S BACKGROUND AND/OR APPELLANT WAS NOT PREJUDICED IN THAT (1) THE CONCLUSIONS OF HIS POST-CONVICTION PHASE EXPERT THAT APPELLANT HAD COGNITIVE PROBLEMS FAILED TO TAKE INTO CONSIDERATION IMPORTANT ASPECTS OF APPELLANT'S BACKGROUND, FAILED TO TAKE INTO CONSIDERATION THAT APPELLANT COMMUNICATED EFFECTIVELY WITH TRIAL COUNSEL, AND WERE COMPLETELY DIVORCED FROM THE FACTS OF THE CASE, AND (2) TRIAL COUNSEL HAD APPELLANT EVALUATED BY EXPERTS TO WHICH HE WAS REFERRED BY OTHER MEDICAL PROFESSIONALS.

Before the motion court, appellant contended that trial counsel was ineffective for failing to investigate and present the testimony of a learning disability expert, such as Theresa Burns. According to appellant, Ms. Burns could have testified in the penalty phase to the results of her learning disability evaluation of appellant, including that appellant's "disabilities are in the areas of auditory processing, visual processing, fluid reasoning and oral language." L.F. 32. Appellant further asserted that there was a reasonable probability that the jury would have sentenced him to life without the possibility of parole,

particularly based upon "evidence that Mr. Ervin functions, overall, at the level of a five to ten-year-old child, since this would have shown the jury that cognitively, intellectually, and ability-wise, Mr. Ervin is far younger than his chronological age." L.F. 32.

The motion court denied appellant's claim as follows:

> The Court finds the following in regard to Ms. Burns' testimony and the claim of ineffective assistance of counsel: First, trial counsel testified that he was referred to Drs. Leonberger and Armour after consulting with mental health professionals from Washington University School of Medicine. "[T]rial counsel cannot be held ineffective for failing to shop for a more favorable expert witness." Copeland, 928 S.W.2d at 845 (citing Mease, 842 S.W.2d at 114). Second, while Ms. Burns discussed various test results that she said showed that Movant had learning disabilities, she did not relate her testimony to the facts of the case. Significantly, Ms. Burns did not take into consideration circumstances the night of the murder showing that Movant was capable of functioning, that he understood cause and effect and the consequences of his actions, and that he could look out for his own interests. This deficiency in Ms. Burns evaluation could readily have been exploited by the prosecutor on cross-examination. Ms. Burns' testimony would have been marginal at best, and would have been significantly diminished by the fact that she did not take into account or attempt to reconcile the facts of the case. Third, in addressing Movant's learning disabilities, Ms. Burns offers no explanation for the fact that notwithstanding his learning disabilities, Movant was able to enter junior college after passing an entrance examination and that his withdrawing from college was not academically-related but based on transportation problems, that he served in the United States military for ten or eleven years,

working as a medic and rifleman before being honorably discharged, and has otherwise been employed as a mechanic and machine worker.

A-39-A-40.

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. . . ." Moore, 827 S.W.2d at 215. Thus appellant carries the burden of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original).

At the evidentiary hearing, appellant himself did not present the testimony of a "learning disability expert," but as his witness clarified during cross-examination, "I'm a speech pathologist, speech-language pathologist." H.Tr. 613. Appellant's expert reached her conclusions without consideration of considerable aspects of appellant's vocational and educational background, including, for example, his more than ten-year military career, H.Tr. 610-611, that in conjunction with the Chapter 552 evaluation, appellant stated that he dropped out of high school to go to work rather than because school was too difficult, H.Tr. 608, and that appellant had been admitted into a community college. H.Tr. 608-609. While Ms. Burns spent five hours administering tests to appellant, she spent a mere fifteen minutes interviewing him. H.Tr. 644. And significantly, after being made aware that appellant had been corresponding with trial counsel by letter, H.Tr. 626, see State's Exhibits B, C, and D, Ms. Burns admitted that Movant's letters were coherent and that he was able to express ideas. H.Tr. 638-641. Finally, while appellant contends that the fact "[t]hat he functioned as a 5-10 year old was something the jury should have heard. Children and those with mental impairments are less culpable than those without such impairments," App.Br. 86, Ms. Burns could not

testify as to what effect appellant's cognitive abilities had upon the actions he took the night he killed Leland White. H.Tr. 622-624.

Without consideration of appellant's actual vocational and educational history and the impact of any learning disability upon his conduct the night of the murder, appellant fails to demonstrate that counsel rendered ineffective assistance for failing to present evidence that would have had only marginal mitigating value. Moreover, appellant's reliance upon Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), App.Br. 85, is misplaced. Accord Lyons, 39 S.W.3d at 40. In Williams, trial counsel did not have the defendant evaluated, but presented a taped excerpt to the jury from a psychiatrist that "did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone." Id. at 369, 120 S.Ct. at 1500, 146 L.Ed.2d 389. Here, counsel had appellant evaluated by both a psychologist and neuropsychologist, that had been recommended to trial counsel. H.Tr. 1027-1029, 1203-1205. "Counsel's presentation of penalty phase evidence is a matter of professional judgment." State v. Clemons, 946 S.W.2d 206, 223 (Mo. banc), cert. denied, 522 U.S. 968 (1997). That appellant disagrees with trial counsel's choice of expert does not provide a basis for relief. Kenley, 952 S.W.2d at 268 (absent a demonstration of the impropriety in the initial selection of his experts, ". . . defense counsel is not obligated to shop for an expert witness who might provide more favorable testimony."). In appellant's case, "[n]o evidence was presented at the hearing to explain how his learning disabilities . . . could have affected his criminal behavior. Consequently, the appellant has failed to establish how any of this evidence could have influenced the decision of the jury." Zeitvogel v. State, 760 S.W.2d 466, 471 (Mo. App., W.D. 1988), cert. denied, 490 U.S. 1075 (1989).

Point VIII should, accordingly, be denied.

IX.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT MITIGATING EVIDENCE OF APPELLANT'S CHILDHOOD BACKGROUND, BECAUSE COUNSEL PERFORMED COMPETENTLY IN INVESTIGATING APPELLANT'S BACKGROUND IN THAT THE INFORMATION THAT APPELLANT ASSERTED SHOULD HAVE BEEN PRESENTED TO THE JURY WAS NOT DISCLOSED TO TRIAL COUNSEL OR TO THE EXPERTS THAT EVALUATED APPELLANT PRIOR TO TRIAL. TRIAL COUNSEL WILL NOT BE HELD INEFFECTIVE FOR FAILING TO DISCOVER AND PRESENT FAMILY BACKGROUND INFORMATION THAT APPELLANT AND/OR HIS FAMILY DOES NOT DISCLOSE TO COUNSEL.

Before the motion court, appellant contended that counsel rendered ineffective assistance "in that counsel failed to investigate and call Dr. Alice Vlietstra, Ph.D., or a similarly qualified childhood development expert, who would have testified in penalty phase to the results of a childhood development evaluation of Mr. Ervin." L.F. 102. Appellant thereafter listed various family background facts that Dr. Vlietstra or a similarly qualified expert would have testified to. L.F. 102-103. According to appellant, "[t]he jury in Mr. Ervin's case heard nothing about the abusive, dysfunctional household in which Mr. Ervin grew up, and the lasting psychological scars this left on him. L.F. 103-104.

After summarizing the evidence presented at the evidentiary hearing upon this claim, the motion court denied relief as follows:

> The Court finds the following in regard to Dr. Vlietstra's testimony and the claim of ineffective assistance of counsel: First, trial counsel testified that he was referred to Drs. Leonberger and Armour after consulting with mental health professionals from Washington University School of Medicine. As previously stated, "trial counsel cannot be held ineffective for failing to shop for a more favorable expert witness." Copeland, 928 S.W.2d at 845 (citing Mease, 842 S.W.2d at 114). Second, Dr. Vlietstra's conclusions did not take into consideration the specific facts of this case, including that Movant was capable of functioning, that he understood cause and effect and the consequences of his actions, and that he could look out for his own interests. The Court also finds Dr. Vlietstra's testimony incredible, as she seemed to ignore the fact that while Movant's siblings grew up in the same environment, they had gone on with their lives. Also, no testimony was given as to the existence and extent of the alleged sexual abuse.

A-43-A-44.

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. . . ." Moore, 827 S.W.2d at 215. Thus appellant carries the burden of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original).

At trial, to the extent he was provided with the information, Dr. Leonberger testified to appellant's family background, T.Tr. 995, to appellant's educational and work history, T.Tr. 955-956, and to appellant's medical history, T.Tr. 957-962. Dr. Armour also "took a social history" from appellant, T.Tr. 988, but appellant failed to disclose the information that he now complains was not presented. See H.Tr. 1189 (trial counsel testified that he would have wanted the additional family background information, to provide that information to the examining experts). Dr. Leonberger testified at trial that appellant "denied any history of sexual or physical abuse." T.Tr. 955. "Appellant's counsel cannot be deemed ineffective for failing to discover evidence of abuse that appellant's family did not share with them during the investigation." Lyons, 39 S.W.3d at 41. All of the information that appellant contended should have been presented to the jury was not previously provided to counsel. H.Tr. 1185-1190. That appellant and/or his family decided to come forward with this information after appellant was convicted and sentenced to death, in furtherance of appellant's post-conviction relief motion, is not a proper basis for a determination that trial counsel rendered ineffective assistance of counsel. Cf. State v. Simmons, 955 S.W.2d 729, 749 (Mo. banc 1997) ("[Appellant] is now attempting to blame his attorneys for the incomplete evaluations, when it is clear that the lack of a complete evaluation was due to his own voluntary actions."), cert. denied, 522 U.S. 1129 (1998). And while appellant disagrees with the motion court's reliance upon Dr. Vlietstra's failure to take into consideration that appellant's siblings, who grew up in the same environment, have grown up to lead productive lives, see App.Br. 91-92, the State could legitimately attack the mitigating circumstance that appellant purportedly grew up in an abusive environment by showing that none of appellant's siblings had also committed murder. See State v. Whitfield, 837 S.W.2d 503, 512 (Mo. banc 1992).

Based upon the foregoing, Point IX should be denied.

X.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT EVIDENCE OF THE VICTIM'S CHARACTER -- SPECIFICALLY, EVIDENCE OF THE VICTIM'S MENTAL PROBLEMS DURING THE LATE 1960S AND/OR EARLY 1970S -- BECAUSE COUNSEL PERFORMED COMPETENTLY IN THAT THE EVIDENCE WAS NOT ADMISSIBLE DURING THE GUILT PHASE AS APPELLANT DID NOT CLAIM SELF-DEFENSE BUT THAT HE DID NOT COMMIT THE MURDER, AND THE EVIDENCE WAS INADMISSIBLE DURING THE PENALTY PHASE AS IT WAS NOT MITIGATING BECAUSE IT DID NOT BEAR UPON APPELLANT'S CHARACTER OR RELATE TO THE CIRCUMSTANCES OF THE OFFENSE. TRIAL COUNSEL WILL NOT BE HELD INEFFECTIVE FOR FAILING TO PRESENT INADMISSIBLE EVIDENCE.

In ground Q of his amended motion, appellant contended that trial counsel rendered ineffective assistance for failing "to investigate and call in guilt and/or penalty phase witnesses who would have testified to the character, background and life history of Lee White[, the murder victim]." L.F. 132.

The motion court denied relief as follows:

> Movant contends that trial counsel was ineffective for failing to investigate and present evidence "about Mr. White's character, background and life history [which] was essential for the jury to be able to understand the relationship between Mr. White and Mr.

Ervin, and to understand Mr. White's conduct and statements on the night of his death." Am.Mot. at 64. Through depositions, movant presented the testimony of Donald Konold, Keith McFarland, and Timothy Ross, each who worked with the victim in the late 1960s and/or early 1970s at Arkansas State University, and testified to the victim's character at that time.

Movant's claim fails for a lack of proof as to subparagraphs 1, 2, 4, 5, 8, 9, and 10 of paragraph 8(Q). In any event, all of the evidence presented and alleged is inadmissible as a matter of law. See State v. Hall, 982 S.W.2d 675, 681 (Mo. banc 1998) ("Evidence of the victim's character is generally inadmissible except in specific instances" - limited to when the defendant asserts self-defense and then only as to the victim's reputation for violence), cert. denied, 526 U.S. 1151 (1999). Counsel will not be held ineffective for failing to present inadmissible evidence. State v. Chambers, 891 S.W.2d 93, 110 (Mo. banc 1994). Ground 8(Q) is denied.

A-76-A-77.

As the motion court found, subparagraphs 1, 2, 4, 5, 8, 9, and 10 failed for lack of proof. Appellant failed to present the testimony of Larry Ball, Charles Kenner, Roger Lambert, Irene Martz, Harry Douma, and Ronn Foss, the individuals named in subparagraphs 1, 2, 4, 5, 8, and 9. Regarding subparagraph 10, the motion court did not permit admission of the letters referenced in that claim, as appellant failed to provide those letters to the State. H.Tr. 1097-1098.[9] Subparagraph 10, thereafter, also

[9]While the letters were properly excluded for failure to disclose, Respondent also opposed the admission of the exhibit on hearsay and relevancy grounds. See H.Tr. 1097. "Counsel is not ineffective

failed for lack of proof, and appellant improperly relies upon those letters, submitted in an offer of proof as Exhibit #54, in support of his claim. See App.Br. 95.

A post-conviction movant must establish by a preponderance of the evidence on a claim of ineffective assistance of trial counsel "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. . . ." Moore, 827 S.W.2d at 215. Thus appellant carries the burden of proving "that but for counsel's unprofessional conduct, there was a *reasonable probability* of a different result." Id. (emphasis in original).

While appellant argued before the motion court that the evidence of the victim's mental illness was "mitigating since it would have supported the inference that Mr. Ervin did not deliberate on his actions on the night of the offense," L.F. 132, whether appellant deliberated on his actions when he murdered the victim presented an issue for the jury to resolve during the guilt phase. § 565.020.1. As the motion court held, evidence of the victim's character is generally inadmissible and is limited to when the defendant asserts self-defense and the victim's character is only admissible as to a reputation for violence. Hall, 982 S.W.2d at 681. Having been found guilty of committing murder in the first degree, appellant would have this Court hold counsel ineffective for failing to attempt to relitigate petitioner's guilt during the penalty phase. Therefore, evidence of the victim's mental illness, based upon events wholly unrelated to the incident -- i.e., including testimony of colleagues that worked with Mr. White in the late 1960s and/or early 1970s -- simply was not relevant to the jury's decision whether it should impose a death sentence if it determined that

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for failing to offer inadmissible hearsay." Skillicorn, 22 S.W.3d at 687.

appellant was death penalty eligible. Lockett, 438 U.S. at 604, 98 S.Ct. at 2964-2965, 57 L.Ed.2d 973 ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a *defendant's character* or record and *any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death.") (emphasis added; internal footnote omitted). Trial counsel will not be held ineffective for not presenting inadmissible evidence. State v. Chambers, 891 S.W.2d 93, 110 (Mo. banc 1994).

Point X should be denied.

XI.

THE COURT SHOULD NOT REVIEW APPELLANT'S CLAIM THAT THE TRIAL COURT'S FINDING OF A STATUTORY AGGRAVATING CIRCUMSTANCE INCREASED THE MAXIMUM PENALTY, BECAUSE THE CLAIM IS NOT PROPERLY BEFORE THE COURT IN THAT APPELLANT RAISED THAT CLAIM FOR THE FIRST TIME ON APPEAL, AND IN ANY EVENT, BY ITS EXPRESS TERMS, APPRENDI V. NEW JERSEY DOES NOT APPLY TO CAPITAL SENTENCING.

FURTHER, APPELLANT ABANDONED HIS CLAIM AS PRESENTED TO THE MOTION COURT BECAUSE HE FAILED TO BRIEF ON APPEAL THE CLAIM RAISED BELOW.

Before the motion court, appellant contended that he

> was denied his rights to due process and equal protection of law, to trial by jury, to be free from double jeopardy and to be free from cruel and unusual punishment . . . in that Mr. Ervin was sentenced to death by the trial judge, after the jury was unable to agree on punishment, and there was no evidence before the trial judge that the jury had unanimously found the existence of a statutory aggravating circumstance.

L.F. 142.

For the first time, now on appeal, appellant contends that "Mr. Ervin had a right to have the jury find any fact that increased his punishment, and to make that finding beyond a reasonable doubt. . . . Finding such an aggravator increases the maximum punishment from life without parole to death." App.Br. 100, 101. In support of this new claim, appellant cites the following: "*Jones v. United States*, 119 S.Ct.

1215 (1999); and *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000). *See also In re Winship*, 397 U.S. 358 (1970)." App.Br. 101. Review of appellant's amended motion readily reflects that appellant's prior citation to In re Winship was solely for the proposition that the State must prove any aggravating circumstance beyond a reasonable doubt, L.F. 143, that no citation was previously made to Jones or Apprendi, compare L.F. 142-145, and that the motion court was not presented with the claim that a sentence of death is an increase in sentence that requires a jury finding of an aggravating circumstance. Compare L.F. 142-145. Accordingly, the Court should not consider this claim. White, 939 S.W.2d at 904; Twenter, 818 S.W.2d at 641.

Moreover, contrary to appellant's suggestion otherwise, a sentence of death is included in the maximum range of punishment, § 565.020.2, and thus does not involve an increase in punishment requiring a jury finding. "*Apprendi* does not invalidate capital sentencing schemes that require judges to find specific aggravating circumstances. 530 U.S. at 496-97, 120 S. Ct. at 2366, 147 L. Ed. 2d at 459; *State v Johns*, 34 S.W.3d 93, 114 n. 2 (Mo. banc 2000)." State v. Black, 50 S.W.3d 778, 792 (Mo. banc 2001) (citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

Finally, having failed to present any argument on the issue that was presented to the motion court, appellant has abandoned that claim. Clay, 975 S.W.2d at 144 ("The claims about Lay's testimony in this appeal are different from those raised in the Rule 29.15 motion, and thus are waived."); see also Rule 30.06(e) ("The argument *shall* substantially follow the order of 'Points Relied On.'" (emphasis added); Heitman, 473 S.W.2d at 727-728.

XII.

THIS COURT SHOULD NOT REVIEW APPELLANT'S CLAIMS THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO CERTAIN ARGUMENTS BY THE PROSECUTOR, BECAUSE APPELLANT SOUGHT AND RECEIVED PLAIN ERROR REVIEW OF THE UNDERLYING CLAIMS ON DIRECT APPEAL, AND AN ISSUE DECIDED ON DIRECT APPEAL CANNOT BE RELITIGATED IN A POST-CONVICTION RELIEF PROCEEDING UNDER A THEORY OF INEFFECTIVE ASSISTANCE OF COUNSEL.

IN ADDITION, THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO THE VARIOUS ARGUMENTS CITED BY APPELLANT, BECAUSE COUNSEL PERFORMED COMPETENTLY IN THAT TRIAL COUNSEL'S DECISION NOT TO OBJECT WAS A MATTER OF TRIAL STRATEGY AND THE ARGUMENTS OF WHICH APPELLANT COMPLAINS WERE PROPER AND ANY OBJECTION WOULD HAVE BEEN OVERRULED.

Before the motion court, appellant raised thirty-six instances wherein he contended trial counsel should have raised an objection. L.F. 153-162. The motion court denied relief on the basis that, on direct appeal, this Court rejected the claims of improper argument upon plain error review. Appellant claims that

the motion court's findings are erroneous because the standard of Strickland prejudice is different than that of plain error on direct appeal[10], and is contrary to Kyles v. Whitley, 514 U.S. 419 (1995). App.Br. 109.

This Court has repeatedly held that a post-conviction movant cannot relitigate an issue decided on direct appeal under the guise of ineffective assistance of counsel. Leisure v. State, 828 S.W.2d 872, 874 (Mo. banc), cert. denied, 506 U.S. 923 (1992); Amrine v. State, 785 S.W.2d 531, 536 (Mo. banc), cert. denied, 498 U.S. 881 (1990); Roberts v. State, 775 S.W.2d 92, 94 (Mo. banc 1989), cert. denied, 494 U.S. 1039 (1990); O'Neal v. State, 766 S.W.2d 91, 92-93 (Mo. banc 1989); see also Franklin v. State, 24 S.W.3d 686, 693 (Mo. banc), cert. denied, 531 U.S. 951 (2000); Jones, 979 S.W.2d at 181; State v. Redman, 916 S.W.2d 787, 793 (Mo. banc 1996). This limitation exists because "if issues, apparently finally decided, may be reopened and reviewed simply because a litigant has an additional citation to offer or a different theory to suggest there would never be an end to litigation." Gailes v. State, 454 S.W.2d 561, 564 (Mo. 1970). The relitigation of these issues would result in a loss of precious judicial resources. Moreover, this Court has stated that "[w]e will not permit motion counsel to convert unpreserved error into viable error by arguing incompetence. Defendants may be held to the consequences of counsel's failure to object, whether the failure is the result of a strategic decision, or is due to inadvertence." Jones, 784 S.W.2d at 793.

[10]This Court heard oral argument on this issue on December 11, 2001, in the case of Tyrone L. Hill v. State of Missouri, No. SC83877.

The motion court's findings were not clearly erroneous. This Court decided these issues on direct appeal by finding "no manifest injustice or miscarriage of justice, even assuming, *arguendo*, that the statements were improper. Ervin, 979 S.W.2d at 163. Appellant has merely changed the theory of the error to ineffective assistance of counsel. As stated above, appellant cannot relitigate an issue that was decided on direct appeal under the guise of ineffective assistance of counsel. Appellant's claim must fail.

Moreover, the minor difference in the standards for plain error and Strickland prejudice does not undermine Missouri court's long-time policy that claims cannot be relitigated under a different theory. In determining Strickland prejudice, the question is "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Id., 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d 674. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Plain error results when the court finds that a "manifest injustice or miscarriage of justice has resulted" from the error. Supreme Court Rule 30.20. In the context of an improper argument, a "miscarriage of justice or manifest injustice" will result and "a conviction will be reversed for improper argument only if it is established that the comment in question had a decisive effect on the jury's determination. . . . When reviewing an argument for plain error, the burden is on the defendant to prove the decisive significance." State v. Winfield, 5 S.W.3d 505, 516 (Mo. banc 1999) (internal citations omitted), cert. denied, 528 U.S. 1130 (2000). And in the context of plain error consideration of unobjected to closing arguments, as in the case with claims of ineffective assistance of counsel, "trial strategy looms as an important consideration." State v. Clayton, 995 S.W.2d 468, 478 (Mo. banc), cert. denied, 528 U.S. 1027 (1999).

But even if appellant may relitigate the underlying claims under an ineffective assistance theory, he is not entitled to relief.

On appeal, appellant does not specifically cite to the Court the specific arguments that counsel was ineffective for failing to object to. Compare App.Br. 110-111. Of the thirty-six arguments before the motion court that appellant asserted counsel should have objected to, L.F. 153-162, appellant challenges the motion court's resolution of four arguments cited in ground 8(X), including subparagraphs 25, 27, 29, and 35.

Appellant alleged the following in subparagraph 25:

> 25. Failed to object during the State's closing argument, when they argued "You can imagine how -- certainly, it's got to be very painful to have your throat cut, the way his throat was cut." (Tr. 883) [sic] The Prosecuting Attorney was asking the jury to put themselves in Mr. White's place as a victim, rather than to focus on the facts, and this argument was only made to inflame the passion of the jurors with facts not in evidence.

L.F. 160; see App.Br. 110.

Notwithstanding his assertion that this is the "very argument condemned in *Storey* [901 S.W.2d 886 (Mo. banc 1995)]," App.Br. 110, appellant has taken the prosecutor's comment completely out of context. The argument arose as follows:

> And we know one more thing just as surely as you know anything that happened in that trailer. And that is that Lee White's throat was cut. It was cut nine times in that trailer. There was also a cut on the leg. His throat was cut nine times in that trailer before he came out, and he's bleeding at that point. Lucius House gives you that. And the autopsy findings and the pictures that you can have back in that jury room, if you request

them, they show that his throat was slashed. You know what happened in that trailer just as surely as you know anything.

But what else do we know, after they come out of the trailer? The testimony here is something that may at first sound a little strange. Lee White said what may seem like a strange thing. He says, more or less, he says, "Just go ahead and kill me. Come back and kill me." You may think that's strange, but just think about it a moment. Lee White is an older man. He's retired. He's obviously not living out with a wife and kids or anything. He's out there on his piece of property. He's been working, the testimony was, for years, improving it, putting a trailer out there. The defendant, he treated him like a son these 20 years or so. Made him the sole heir of his last will and testament. And where is Lee White at this point? He's just had his throat cut by James Ervin. And he's being left. Dr. Zaricor tells you, with a wound he's going to bleed to death from, possibly even basically drown in his own blood perhaps, laying there. He's laying there bleeding to death. *You can imagine how -- certainly, it's got to be very painful to have your throat cut, the way his throat was cut.* He's laying there bleeding to death, dying, watching his trailer and everything he has burn to the ground, and what did he say? He said, "Please, just come back and finish me off." It's not that strange that he said it. . . .

T.Tr. 882-883 (emphasis added).

As the argument in its entirety indicates, the prosecutor was not impermissibly asking the jury to put themselves in the victim's place for the sake of arousing fear in the jury, but rather to assist the jury in understanding why it was that the victim asked appellant to kill him. Thus the prosecutor's argument is in no way similar to the situation presented in Storey, 901 S.W.2d at 901. In addition to the fact that the

argument was not objectionable, trial counsel testified that he rarely objects to closing argument, as a matter of strategy. H.Tr. 1217-1218.

In the next argument that appellant contends on appeal that the motion court should have granted relief, appellant asserted below as follows:

> 27. Failed to object when the State argued to the jury, "... it is a great country, and this defendant even acknowledged that. Because he is aware and he points out to you that he has a jury here. That he has a defense attorney. That he has a judge. And he's had his trial. But Lee White was also entitled to a trial before the punishment of was death imposed upon him, by him. But he didn't get one. Because on September 1, 1994, there was no jury to listen to the facts. Mr. White had no lawyer to stand up and argue for him. There was no judge to oversee the proceedings that were taking place in that trailer and then out in the yard in front of it. Mr. White was afforded none of that. And that was the injustice." (Tr. 914). This was an improper argument because it implies that Mr. Ervin should be punished because he exercised his right to go to trial.

L.F. 160; see App.Br. 110.

Appellant complains that trial counsel did not object during the State's guilt phase closing argument where "[t]he prosecutor asked the jury to punish Mr. Ervin, because he exercised his constitutional rights, while the victim did not get those same rights. App.Br. 110.

In its entirety, the argument at issue is as follows:

Mr. Hadican makes reference to a great country. And it is a great country. And this defendant even acknowledged that. Because he is aware and he pointed out to you that he has a jury here. That he has a defense attorney. That he has a judge. And he's had his trial.

But Lee White was also entitled to a trial before the punishment of death was imposed upon him, by him. But he didn't get one. Because on September 1, 1994, there was no jury there to listen to the facts. Mr. White had no lawyer to stand up and argue for him. There was no judge to oversee the proceedings that were taking place in that trailer and then out in the yard in front of it. Mr. White was afforded none of that. And that was the injustice.

Because in addition, in this great country, if you are murdered, and if your murderer is proven guilty beyond a reasonable doubt of murder in the first degree, then that is the verdict that is returned. So send that message to Mr. Ervin. This is a great country. Lee White gets justice.

* * * * *

T.Tr. 914-915.

"The statement cannot be reasonably read to portray [appellant's] exercise of his [constitutional rights] as an aggravating circumstance." Antwine v. State, 791 S.W.2d 403, 410 (Mo. banc 1990), cert. denied, 498 U.S. 1055 (1991). Rather, the prosecutor's statements did not seek to punish appellant for exercising his constitutionals right, instead reflecting appellant's disregard for the law in that he took it upon himself to decide whether the victim should die. Read in context, the prosecutor's statement also highlights

the nature and seriousness of the crime. Id. Because the prosecutor's arguments were not objectionable, and based upon counsel's practice of generally not objecting to closing argument, the claim is without merit.

Under subparagraph 29, appellant contended he was entitled to post-conviction relief as follows:

> 29. Failed to object when the State argued to the jury that they were to consider, as victim impact evidence, the "harm" Mr. Ervin had done to the officers and their families who were allegedly assaulted by Mr. Ervin (Tr. 997). This was improper because the victim impact evidence the jury is to consider is that of the charged offense on the victim's family.

L.F. 160-161; see App.Br. 110-111.

Appellant contends that trial counsel should have objected to improper victim impact evidence. App.Br. 110-111. To the contrary, the prosecutor's argument did not pertain to victim impact evidence but to appellant's character as reflected by his conduct -- i.e., evidence in aggravation:

> You must look at all the evidence in aggravation. All the evidence from the first stage of the trial. The nature of this murder. The reason for this murder. What was done after the murder - throwing this elderly gentleman's body into a fire. And then look at the new evidence. What type of person did this. What has this person who did this to Mr. White done before. How many officers has that person assaulted. What have been the damages to those persons whom that defendant has previously assaulted. And when you take all that evidence in aggravation, that evidence warrants your consideration of the death penalty.

T.Tr. 997.

It is permissible to characterize a defendant's criminal conduct where the evidence supports that characterization. State v. Carson, 883 S.W.2d 534, 536 (Mo. App., E.D. 1994). Because the State may present any evidence regarding the defendant's character during the penalty phase of trial, State v. Six, 805 S.W.2d 159, 166-167 (Mo. banc), cert. denied, 502 U.S. 871 (1991), the prosecutor properly may refer to that evidence in closing argument. Any objection would have been without merit.

Finally, appellant contends that he is entitled to relief based upon his subparagraph 35:

> 35. Failed to object when the State, in voir dire, made the statement to two separate venire panels that an aggravating circumstance might be like the killing of a law enforcement officer (Tr. 261, 307). This referred to other cases not before the jury, and continued to mislead the jury by implying that the State had some outside knowledge about Mr. Ervin and the case. It was particularly egregious in this case, because the State knew that it would be adducing evidence about two prior assaults on law enforcement personnel.

L.F. 162; see App.Br. 111.

Counsel will not, however, be held ineffective for failing to make a non-meritorious objection. State v. Basile, 942 S.W.2d 342, 350 (Mo. banc), cert. denied, 522 U.S. 883 (1997). The prosecutor's statement was not argument, but was in explanation of what is an aggravating circumstance. The challenged comments arose as follows:

> And what's an aggravating circumstance? In Missouri there's about 17 of them listed in the statutes. Listed in the law books. And these are circumstances which make a first degree murder case worse than another first degree murder case. *An example of an*

> *aggravating circumstances* [sic], *which is not applicable to this case*, would be if someone murdered a police officer in the line of duty. That would be one of the 17 aggravating circumstances and something which, in a hypothetical case, we may attempt to prove during the second phase of the trial. . . .

T.Tr. 281-282; see also T.Tr. 353 (emphasis added). Here the prosecutor plainly is providing an example of a statutory aggravating circumstance, and expressly told the venire members that this case did not involve that particular aggravating circumstance. A correct statement of law is not objectionable. State v. Richardson, 923 S.W.2d 301, 321 (Mo. banc), cert. denied, 519 U.S. 972 (1996). Moreover, trial counsel testified that, as a matter of strategy, he does not object to every argument that might be objectionable, as he believes it to be "bad jury practice." H.Tr. 1217.

Based upon the foregoing, where trial counsel did not object as a matter of strategy, and any objection would have been rejected as non-meritorious, Point XII should be denied.

XIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CHALLENGE TO MISSOURI'S CLEMENCY PROCEDURE, BECAUSE APPELLANT DOES NOT HAVE STANDING TO RAISE THE CLAIM AND IT IS NOT COGNIZABLE IN A POST-CONVICTION MOTION IN THAT APPELLANT ADMITTEDLY HAS NOT SOUGHT CLEMENCY AS PROVIDED UNDER STATE LAW AND THE CLAIM DOES NOT BEAR UPON THE CONSTITUTIONALITY OF MOVANT'S CONVICTION AND/OR SENTENCE.

Appellant contends that "[a]t issue in Mr. Ervin's 29.15 proceedings was the arbitrary and capricious nature of Missouri's clemency proceedings (L.F.140-42)." App.Br., 112. In support of his claim, appellant makes reference to the decision of the late Governor Mel Carnahan to grant clemency to former death row inmate Darrell Mease. Id.

Upon review of this claim, the motion court held as follows:

> Movant lacks standing to raise this claim, as movant failed to present any evidence that he sought and was denied clemency. See § 217.800.2, RSMo. (providing for applications for pardon, commutation of sentence, or reprieve). Further, movant's claim challenges the constitutionality of § 217.800 and Art. 4, Section 7 of the Missouri Constitution, and as such is not cognizable in a postconviction proceeding under Rule 29.15. Moreover, "[t]he exercise of the power of pardon lies in the uncontrolled discretion of the governor, ..." Whitaker v. State, 451 S.W.2d 11, 15 (Mo. 1970). That movant

may disagree with the manner in which that discretion is exercised does not bear upon the constitutionality of Missouri's death penalty scheme. Compare State v. Brown, 998 S.W.2d 531, 552 (Mo. banc), cert. denied, 120 S.Ct. 431 (1999); Jones, 979 S.W.2d at 181; State v. Carter, 955 S.W.2d 548, 562 (Mo. banc 1997), cert. denied, 523 U.S. 1052 (1998). Ground 8(R) is denied. For the foregoing reasons, and because it was filed in violation of Rule 29.15(g), the Court also denies Movant's "Motion For Life Without Parole Sentence Based On Claim 8(R) Of Amended Rule 29.15 Motion."

A-78.

Appellant contends that the claim was properly brought in the motion court because "constitutional claims should be raised at the earliest opportunity." App.Br. 113. While that is an accurate statement of a general principle, appellant ignores the fact that 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). Appellant's citation to State v. Chambers, 891 S.W.2d 93 (Mo. banc 1994), App.Br. 113, is not on point, and appellant fails to cite any authority for the proposition that the claim herein at issue is cognizable in a Rule 29.15 proceeding. To the contrary, 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, App.Br. 113, 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.").

Based upon the foregoing, Point XIII should be denied.

XIV.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIMS CHALLENGING THIS COURT'S PROPORTIONALITY REVIEW AND THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE CLAIM FOR APPELLATE REVIEW, BECAUSE THE CLAIM IS NOT PROPERLY BEFORE THIS COURT AND COUNSEL PERFORMED COMPETENTLY IN THAT APPELLANT CONTENDS FOR THE FIRST TIME THAT THIS COURT'S PROPORTIONALITY REVIEW DID NOT APPLY A DE NOVO STANDARD OF REVIEW, THE DETERMINATION ON DIRECT APPEAL UNDER § 565.035 CONSTITUTES THE LAW OF THE CASE, AND COUNSEL DOES NOT HAVE A CONSTITUTIONAL DUTY TO PRESENT EVIDENCE THAT THE COURT HAS PREVIOUSLY HELD NOT TO BE RELEVANT TO ITS PROPORTIONALITY REVIEW DETERMINATION.

Appellant contends that the motion court erred in rejecting his claim that this Court's proportionality review violates appellant's rights to due process. App.Br. 115.

In rejecting appellant's claim, the motion court held as follows:

> Movant claims that the Missouri Supreme Court's proportionality review is inadequate, citing Harris v. Blodgett, 853 F.Supp. 1239, 1286 (W.D. Wash. 1994), affirmed on other grounds, Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995). Am.Mot. at 81. The Missouri Supreme Court has considered Harris v. Blodgett and the claim movant

advances here and has rejected both. State v. Clay, 975 S.W.2d 121, 146 (Mo. banc 1998), cert. denied, 525 U.S. 1085 (1999). Indeed, the analysis of the lower federal court in Harris v. Blodgett was not used by the United States Court of Appeals for the Ninth Circuit when it affirmed that decision in Harris v. Wood, supra. And as described in In the Matter of Personal Restraint of Benn, 952 P.2d 116, 145-147 (Wash. 1998), Harris v. Blodgett is contrary to controlling precedent and is not being followed. In addition, the Missouri Supreme Court has consistently and repeatedly rejected challenges to the manner in which it conducts proportionality review, see, e.g., State v. Rousan, 961 S.W.2d 831, 854 (Mo. banc), cert. denied, 118 S.Ct. 2387 (1998); Brooks, 960 S.W.2d at 501; State v. Taylor, 929 S.W.2d 209, 233 (Mo. banc 1996), cert. denied, 519 U.S. 1152 (1997), as has the Eighth Circuit Court of Appeals, see, e.g., Kilgore v. Bowersox, 124 F.3d 985, 996 (8th Cir. 1997), cert. denied, 118 S.Ct. 2352 (1998); Bannister v. Delo, 100 F.3d 610, 627 (8th Cir. 1996), cert. denied, 117 S.Ct. 2526 (1997); Jones v. Delo, 56 F.3d 878, 888 (8th Cir. 1995), cert. denied, 517 U.S. 1109 (1996); Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1075 (1995). Finally, claims of ineffectiveness for failing to preserve a claim on appeal are not cognizable, as this does not affect the fairness of the trial. Brown, 950 S.W.2d at 933; Loazia, 829 S.W.2d at 570. Relief on ground 8(U) is denied. For the foregoing reasons, and because it was filed in violation of Rule 29.15(g), the Court also denies Movant's "Motion For Life Without Parole Sentence Based On Claim 8(U) Of Amended Rule 29.15 Motion, And Materials In Support Thereof."

A-81-A-82.

Without regard to longstanding precedent, appellant invites this Court to reconsider State v. Clay, 975 S.W.2d 121, 146 (Mo. banc 1998), in light of Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), App.Br. 115, pertaining to the applicable standard of review of punitive damage awards. Appellant cites the following practices as violative of his right to due process: that the Court does not apply a de novo standard of review to its proportionality review, that the Court's database does not comply with § 565.035.6, and that the Court fails to consider cases where the defendant received a sentence of life without the possibility of parole. App.Br. 115.

For the first time now on appeal, appellant asserts that the Court does not apply a de novo standard of review. App.Br. 115. Appellant did not raise that contention in his "Amended Motion To Vacate Sentence And Judgment," compare L.F. at 148-149, and is therefore precluded from doing so before this Court. White, 939 S.W.2d at 904; Twenter, 818 S.W.2d at 641.

Regarding appellant's other complaints regarding this Court's proportionality review conducted on direct appeal, the Court's resolution of that claim is the law of the case. Crews v. State, 36 S.W.3d 419 (Mo. App., E.D.) (per curiam) (citing State v. Graham, 13 S.W.3d 290, 293 (Mo. banc 2000)). That appellant may have disagreed with the Court's decision is a matter that should have been raised in his "Motion For Rehearing And Supporting Suggestions," filed on or about November 16, 1998 on direct appeal. Appellant did not properly raise the issue in his motion for rehearing, and there is no authority for appellant's attempt to relitigate that issue in his post-conviction relief proceedings. O'Neal, 766 S.W.2d at 92; Christensen v. State, 875 S.W.2d 576, 578 (Mo. App., W.D. 1994).

As for appellant's contention before the motion court that counsel was ineffective for failing to preserve the issue by objecting to the procedures in conducting proportionality review and for failing to present certain evidence on the matter, L.F. 149, this Court has previously rejected the same claim,

reiterating its oft-stated holding that the Court's proportionality review is not unconstitutional and citing numerous cases for that proposition:

> Appellant contends that trial counsel were ineffective for failing to more exhaustively challenge this Court's method of proportionality review. He argues that this Court fails to engage in meaningful proportionality review because it fails to consider all similar cases and does not maintain a complete database of cases, resulting in an arbitrary imposition of the death penalty. Movant contends that his trial attorneys rendered him ineffective assistance of counsel because they failed to offer studies to accompany their motion claiming that death penalty proportionality review procedure by this Court is unconstitutional.
>
> Section 565.035.3(3), RSMo 1994, specifically requires this Court to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." The term "similar cases," as interpreted by this Court, means other cases where death has been imposed. *See State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998), *cert. denied*, 525 U.S. 1085, 119 S. Ct. 834, 142 L. Ed. 2d 690 (1999); *State v. Rousan*, 961 S.W.2d 831, 854-55 (Mo. banc), *cert. denied*, 524 U.S. 961, 118 S. Ct. 2387, 141 L. Ed. 2d 753 (1998). That method of comparing similar cases is proper and does not violate due process. *See McCleskey v. Kemp*, 481 U.S. 279, 306-07, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987). *See also Walton v. Arizona*, 497 U.S. 639, 655-56, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990). This Court's method of proportionality review has been held not to violate due process. *See Tokar v.*

Bowersox, 198 F.3d 1039, 1052 (8th Cir. 1999); *Ramsey v. Bowersox*, 149 F.3d 749, 754 (8th Cir. 1998); *Murray v. Delo*, 34 F.3d 1367, 1376-77 (8th Cir. 1994), *cert. denied*, 515 U.S. 1136, 132 L. Ed. 2d 819, 115 S. Ct. 2567 (1995).

This Court has repeatedly denied similar claims of defects in our method of proportionality review. *See State v. Smith*, 32 S.W.3d 532, 559 (Mo. banc 2000); *State v. Johnson*, 22 S.W.3d 183, 193 (Mo. banc), *cert. denied*, 121 S. Ct. 322, 148 L. Ed. 2d 259 (2000); *State v. Winfield*, 5 S.W.3d 505, 516-17 (Mo. banc 1999), *cert. denied*, 528 U.S. 1130, 120 S. Ct. 967, 145 L. Ed. 2d 838 (2000); *State v. Middleton*, 998 S.W.2d 520, 530 (Mo. banc), *cert. denied*, 528 U.S. 1054, 120 S. Ct. 598, 145 L. Ed. 2d 497 (1999); *State v. Barnett*, 980 S.W.2d 297, 309 (Mo. banc), *cert. denied*, 525 U.S. 1161, 143 L. Ed. 2d 77, 119 S. Ct. 1074 (1998); *State v. Johnson*, 968 S.W.2d 123, 134-35 (Mo. banc), *cert. denied*, 525 U.S. 935, 119 S. Ct. 348, 142 L. Ed. 2d 287 (1998).

The motion court did not clearly err.

Lyons, 39 S.W.3d at 44-45.

Thus the fact that trial counsel did not present matters to the trial court that this Court has repeatedly held are not applicable to its proportionality review determination does not provide a basis for holding counsel's performance constitutionally deficient.

Based upon the foregoing, Point XIV should be denied.

XV.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPERLY CHALLENGE MISSOURI'S DEATH PENALTY JURY INSTRUCTIONS BY PRESENTING THE STUDY OF RICHARD L. WIENER, BECAUSE COUNSEL PERFORMED COMPETENTLY IN THAT THIS COURT HAS REPEATEDLY UPHELD THE CONSTITUTIONALITY OF THE JURY INSTRUCTIONS AT ISSUE AND SUBSEQUENTLY HAS DISCOUNTED THE STUDY CITED BY APPELLANT, AND COUNSEL WILL NOT BE HELD TO HAVE PERFORMED DEFICIENTLY FOR FAILING TO MAKE A NON-MERITORIOUS OBJECTION.

Appellant contends that trial counsel rendered ineffective assistance of counsel because he failed to present at trial evidence to establish that Missouri's death penalty jury instructions are confusing. App.Br. 118. Specifically, before the motion court appellant asserted that trial counsel should have obtained and presented a copy of the study by Richard L. Wiener.

The motion court denied appellant's claim as follows:

> Movant contends that counsel rendered ineffective assistance of counsel because he failed to present evidence demonstrating that the Missouri penalty phase jury instructions are unconstitutional. According to movant, counsel should have presented the study by Richard L. Wiener, published in the Journal of Applied Psychology.

In State v. Deck, 994 S.W.2d 527, 542-543 (Mo. banc), cert. denied, 120 S.Ct. 508 (1999), the Missouri Supreme Court found that Dr. Wiener's study "must be discounted" because he did not study actual jurors and because "in the context of the instructions as a whole, the term 'mitigating' is always contrasted with the term 'aggravating' so that no reasonable person could fail to understand that 'mitigating' is the opposite of 'aggravating.'" Counsel cannot be held ineffective for failing to adduce evidence about a study that the Missouri Supreme Court has found to be unpersuasive. See also Jones, 979 S.W.2d at 180 ("This research [by Dr. Wiener] does not necessarily support a conclusion that the jurors in this case were unable to understand the MAI instructions. This Court has decided that the MAI instructions are constitutional and that counsel's failure to object to possible jury misunderstanding does not support claims of ineffective assistance of counsel."). Nor is counsel ineffective for failing to raise an objection to an instruction when the objection would have been meritless. State v. Dreiling, 830 S.W.2d 521, 525 (Mo.App., W.D. 1992). Further, claims of instructional error are beyond the scope of a motion for postconviction relief and are matters for direct appeal. State v. Shurn, 866 S.W.2d 447, 468 (Mo. banc 1993), cert. denied, 513 U.S. 837 (1994). Ground 8(T) is denied.

A-81.

This exact claim has previously been rejected by this Court:

Appellant contends that the motion court clearly erred in denying his claim that counsel were ineffective in failing to more exhaustively challenge the penalty phase instructions. Appellant's counsel filed a pre-trial motion that alleged, among other things,

that the penalty phase instructions were "misleading to the jury," and counsel proffered alternative instructions. Appellant claims that counsel in addition should have presented evidence of Dr. Richard Wiener's study that purports to show that Missouri's penalty phase instructions are not well understood by jurors.

Counsel in this case acted reasonably, and appellant was not prejudiced. A claim similar to the one presented here was considered in *State v. Deck*, 994 S.W.2d 527, 542-43 (Mo. banc), *cert. denied*, 528 U.S. 1009, 120 S. Ct. 508, 145 L. Ed. 2d 393 (1999). In *Deck*, the defendant argued that the penalty phase instructions and the mitigating circumstances instructions in particular were "too easily misunderstood." 994 S.W.2d at 542. At the hearing on a motion for new trial, the defendant called Dr. Wiener, who explained that his conclusion was based upon his study that showed that jurors have the most difficulty with the concept of mitigation. *Id*. This Court determined that Wiener's study was flawed in part because the people interviewed for the study did not act as jurors. They were given hypothetical facts that were different from the facts in *Deck*, and they did not hear the testimony of witnesses, observe the evidence, or deliberate with eleven other jurors. More particularly, read in the context of the instructions as a whole, the term "mitigating," said this Court in *Deck*, is always contrasted with the term "aggravating" so that no reasonable person could fail to understand the meaning of the term. 994 S.W.2d at 542-43.

As in *Deck*, the jurors in the present case did not participate in Wiener's study. The jurors in the study were not placed in a trial setting that matched appellant's case, and,

most significantly, there is no reason whatsoever to believe that any of appellant's jurors misunderstood the instructions; the language of the instructions is plainly understandable.

Similarly, in *State v. Jones*, 979 S.W.2d 171, 181 (Mo. banc 1998), *cert. denied*, 525 U.S. 1112, 142 L. Ed. 2d 785, 119 S. Ct. 886 (1999), the defendant claimed that counsel was ineffective for "failing to challenge the MAI instructions through presenting evidence that jurors do not understand the instructions." *Id*. In *Jones*, the defendant asserted that Dr. Wiener could have testified about his study that purports to demonstrate that jurors do not understand the instructions. *Id*. This Court responded that Dr. Wiener's research does not necessarily support a conclusion that the jurors in *Jones* were unable to understand the MAI instructions. Furthermore, the MAI instructions are constitutional. Counsels' failure to object to possible jury misunderstanding in *Jones* did not support claims of ineffective assistance of counsel. *Id*. This case is not distinguishable from *Jones*.

* * * * *

Lyons, 39 S.W.3d at 43-44; see State v. Deck, 994 S.W.2d 527, 542-543 (Mo. banc), cert. denied, 528 U.S. 1009 (1999).

Appellant attempts to distinguish Deck, asserting that "[i]n *Deck*, this Court was reviewing a completely different issue -- whether the trial court abused its discretion in failing to define 'mitigation' based on questions the jury had asked." App.Br. 119. To the contrary, as stated by this Court, "[t]he essence of Deck's argument is that the penalty phase instructions, and the mitigating circumstances instructions in particular, are too easily misunderstood." Deck, 994 S.W.2d at 542. Not only does appellant misstate the issue before this Court in Deck, but in addition fails to acknowledge Lyons, wherein

the issue herein presented was squarely before the Court. Finally, counsel will not be held ineffective for failing to make non-meritorious objections. Clay, 975 S.W.2d at 135. This Court has repeatedly upheld the constitutionality of the instructions at issue. See, e.g., Jones, 979 S.W.2d at 181; State v. Kinder, 942 S.W.2d 313, 339 (Mo. banc 1996), cert. denied, 522 U.S. 854 (1997).

Based upon the foregoing, the Court should deny Point XV.

CONCLUSION

WHEREFORE, for the reasons herein stated, the respondent respectfully submits that the judgment denying appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one true and correct copy of the foregoing and one diskette containing a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of December, 2001, to:

Melinda K. Pendergraph
3402 Buttonwood
Columbia, MO 65201-3724

_____
CASSANDRA K. DOLGIN

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned counsel hereby certifies that this brief complies with Rule 55.03 and the type-volume limitation, in that this brief was prepared with WordPerfect 9.0 (Times New Roman 13 point font) and contains 22726 words as identified by the word-processing software, excluding the cover page, signature block and certificates of service and of compliance. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses with Norton Anti-Virus software and found virus-free.

_____
CASSANDRA K. DOLGIN