

No. SC93371

**In the
Missouri Supreme Court**

WALTER BARTON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from Cass County Circuit Court
Seventeenth Judicial Circuit, Division Two
The Honorable Michael Wagner, Judge**

RESPONDENT'S BRIEF

**CHRIS KOSTER
Attorney General**

**GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

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STATEMENT OF FACTS

Defendant was convicted by a jury for the third time of the first-degree murder of 81-year-old Gladys Kuehler and, for the third time, sentenced to death. This Court affirmed the conviction and sentence on direct appeal. *State v. Barton*, 240 S.W.3d 693 (Mo. banc 2008), *cert. denied*, 555 U.S. 842 (2008).

This Court described the evidence at trial, which is viewed in the light most favorable to the verdict, *id.* at 696, as follows:

The victim, who was 81 years old, was the manager of a mobile home park in Ozark, Missouri, and lived in a trailer she owned there. On the morning of October 9, 1991, Carol Horton, another resident of the park, went to the victim's trailer to assist her because she was infirm and unable to move about without the use of a cane. Horton left for a while to shop for the victim and to retrieve her mail and returned at about 11:00 a.m. When Horton saw the victim at that time, the victim was sitting on a daybed she kept in her living room, and she looked like she was "doing okay."

Around noon that day, Appellant came to Horton's trailer. Appellant regularly frequented the park, but Horton had not seen him in a week, and Appellant told her he had been living in his car. He was in a "happy-go-lucky" mood, talking and "dancing around" to radio music in Horton's trailer. He stayed at Horton's until around 2:00 p.m., when he said he was

going to the victim's trailer to see if the victim would lend him \$20.00, and he returned about 10-15 minutes later, still in a good mood.

Between 2:00 and 3:00 p.m., several people had contact with the victim at her trailer. Teddy Bartlett and his wife, and Sharon Strahan, all former residents of the trailer park, visited the victim around 2:00 p.m. and stayed until sometime around 2:45. While they were there, Dorothy Pickering, who co-owned the trailer park with her husband, Bill, and who was at the park with her husband cleaning a trailer, stopped by the victim's trailer to pick up some rent payments. A man named Roy also stopped by to return a fan and a magazine to the victim. In addition, at about 2:30, Debbie Selvidge, the victim's granddaughter, called the victim and spoke to her briefly. The visitors all left when the victim said she was not feeling well and was going to take a nap.

Meanwhile, appellant told Horton that he was going back to the victim's trailer and left sometime around 3:00. As Bartlett and Strahan left, Strahan noticed appellant standing at the driver's side door of a pickup truck parked near the victim's trailer talking to someone inside the truck. Shortly thereafter, around 3:15 p.m., Bill Pickering called the victim's trailer because his wife said the victim wanted to talk to him about someone moving into the park. A male voice answered the telephone, and Pickering asked to speak with the victim. The man

hesitated, and then said, “She’s in the bathroom.” Pickering then told the man who he was and asked to have the victim call him back.

Around 4:00 p.m., about an hour after he left Horton’s trailer, appellant returned and asked to use her restroom, which she permitted. After a while, Horton noticed that appellant had been in there for a long time, and she had never heard the toilet flush, so she went to check on him and saw him at the sink. He said he had been working on a car and was washing his hands. All told, appellant spent about ten minutes or so in the bathroom. Horton also noticed, however, that appellant’s mood had changed, and now, instead of being jovial as he was before, he was distant and seemed in a hurry. He asked her if she would take him to the “Fast Track” to get his car, but she said she could not, because she was going to the victim’s trailer. At that point, appellant said, in a “very strong,” definite voice, “No, don’t . . . Ms. Gladys is lying down taking a nap.” Horton went anyway, knocking on the victim’s door around 4:15 p.m., but there was no answer, and Horton then left the park to get her car washed.

In the meantime, Selvidge called the victim at 4:00 p.m., as the two watched the same television program together everyday while talking on the telephone. When there was no answer, Selvidge went to the trailer to check on her grandmother. She knocked for some time, but there was no answer, and she noticed that there were no lights on, which was unusual,

because the victim always left the porch light on when leaving the trailer. Selvidge then left the park to seek help from her mother.

At about 4:30, Horton returned home and went back to the victim's trailer to check on her, but again received no answer to her knocking. Between 6:00 and 6:30, Selvidge arrived back at the park and went to Horton's trailer, asking about the victim and telling Horton she had been trying to call the victim since 4:00. The two of them then returned to Selvidge's mother's house to try to call the victim again, and when they still were unsuccessful, they went back to the park and asked appellant, who had been at a neighbor's trailer, to help knock on the door again. The three took turns knocking on the door and calling out the victim's name, and appellant went over to the end of the trailer where the victim's bedroom was located and knocked on the side of the trailer. There still was no response so they decided to contact the police.

Horton and Selvidge then drove to the nearby town square, flagged down an Ozark police officer, and led him back to the park. After unsuccessfully attempting to enter the victim's trailer, the officer called for a locksmith, and then left to take care of another call. A short time later, the locksmith arrived and opened the front door, and Selvidge, Horton, and appellant entered the trailer.

Once inside, they called the victim's name, but received no answer. Selvidge started to walk down the hallway leading to the victim's bedroom when appellant said, "Ms. Debbie, don't go down the hall. Ms. Debbie, don't go down the hall." Selvidge noticed that the victim's clothes were in the bathroom by the stool and that the toilet lid was up, which was unusual. She then turned on the lights in the victim's bedroom and screamed as she found the victim, "practically nude," lying on the floor between her bed and closet. The victim had been stabbed numerous times, with her throat cut ear-to-ear and with her intestines eviscerating from some of her wounds. Selvidge started to bend down to touch the victim, but Horton, who had followed Selvidge down the hall to the bedroom, told her not to do so. Selvidge then went back into the hall, pushed past Horton and appellant, who was following Horton, and went back to the living room. Appellant said to Horton, "Let me see," and looked over Horton's shoulder into the bedroom at the victim, but he never got close to the body or the blood in the bedroom. Appellant did not get upset upon seeing the victim, but remained calm, showing no emotion, and when he went back into the living room, he "comforted" Selvidge, telling her that he was "so sorry."

The police officer soon returned to the trailer, and after seeing that the victim had been stabbed, he cleared the scene and called for help.

After paramedics arrived, the officer interrogated those persons present. He asked appellant if he had seen the victim that day, and appellant told him that he had seen her between 2:00 and 2:30 that afternoon when he had asked her to lend him \$20.00. He said that the victim told him she would lend him the money, but would have to write a check, which she would do later that day. Appellant claimed that this was the last time he had been there. However, appellant later spoke with a Highway Patrol investigator and told him that he was the one who answered the telephone call that Bill Pickering made at 3:15 that afternoon. Because that call occurred between when the victim was last seen alive and when she was found dead, the officers took appellant into custody.

At that point, the officer noticed what appeared to be blood on the elbow and shoulder of appellant's shirt, and appellant responded that he had gotten the blood on him when he slipped while pulling Selvidge away from the victim's body. Selvidge, however, reported that she had not gone in the room past the victim's feet, that she had no blood on her clothes, that nobody had fallen in the room, and that appellant and Horton had remained behind her while she was in the room. Police also noticed that neither Selvidge nor Horton had blood on them, that the victim's blood on the floor was "pretty well dried," as if it had been there for a while, and

that there was no wet blood to slip on where the witnesses were standing in the room.

The investigation of the scene also revealed that there was blood on the sink of the victim's bathroom and on a table in the bathroom. The victim's checkbook was found. Although the victim regularly entered every check she wrote in her check register, there was no entry for check # 6027 – that check was missing. Several knives also were seized from the scene, including one that was part of a set that was cleaner than the others and facing a different direction in the block, and another knife that was later found in a drainage ditch. Although none of these knives were positively identified as the murder weapon, the examiners did not exclude any of those knives as the murder weapon.

Three days after the murder, a young girl was cleaning up trash along a nearby highway with a group from her church when she found the missing check, # 6027, folded up and discarded in a ditch. The check was dated the same day of the murder and made payable to appellant for \$50.00. Handwriting analysis confirmed that the victim had written everything on the check.

Tests conducted on appellant's clothing revealed that there was human blood on his shirt, blue jeans, and boots, and DNA tests conducted on the blood from appellant's shirt showed that it was the victim's blood. A

blood spatter expert testified that some of the blood found on appellant's shirt, as well as two spots on appellant's jeans, were consistent with stains created by a "medium-to-high-energy impact," meaning the blood was ejected from the source by a blow or "transfer of energy" and not by simply rubbing up against already-present blood.

An autopsy conducted on the victim revealed that she was stabbed well in excess of 50 times, including being stabbed twice through her open right eye and once in the left eyelid, twice in the neck, eleven times in the left side of her chest, three times in the right chest, four times in the abdomen, twice to the back of the left hand (characterized as defensive wounds), twice to the back of the left arm, twenty-three times in the back, and three times in the left flank. There were at least two large slash wounds across her neck, one of which contacted the bone. There were also two X-shaped slash wounds to the abdomen, through one of which the victim's left lung collapsed, and one of her ribs fractured from the force of the attack. The cause of death was exsanguinations due primarily to the wounds to her neck as well as the numerous other stab wounds. There was also at least one blunt force injury to the victim's head, and some bruising and injury to the victim's genital area that led examiners to the conclusion that the victim was sexually assaulted.

At some point after the murder, appellant was incarcerated in the Lawrence County jail, where inmate Katherine Allen was serving as a trusty, serving meals and doing laundry. From time to time, she and appellant argued, and on more than one occasion, appellant threatened her, asking her if she knew what he was in jail for and saying that he would kill her “like he killed that old lady.”

Appellant did not testify, but called four witnesses: A resident of the trailer park who testified that she had dinner with the appellant on the night of the murder and did not see blood on him; two Highway Patrol criminalists – one of whom testified that a hair found on the victim and one found in the bedroom did not exhibit the same characteristics as appellant’s hair – and the other who could not positively identify one of the seized knives as the murder weapon; and a Highway Patrolman who testified to “inconsistencies” in Katherine Allen’s testimony regarding her statements to him.

During the penalty phase, the state presented evidence that appellant had been convicted of two prior felony offenses: 1) assault with intent to kill with malice aforethought for robbing a gas station at gunpoint and then assaulting the female clerk by hitting her over the head with a full paint can; and 2) assault in the first degree for assaulting another female grocery store clerk during another attempted robbery. The

state also recalled Debra Selvidge who presented victim impact testimony. Appellant called two friends, whom he originally met through a prison ministry, and his wife, whom he met through an inmate “pen friend organization,” all of whom testified about the effect executing appellant would have on their lives.

At the conclusion of the penalty phase, the jury made affirmative findings on all three statutory aggravating circumstances submitted – that the murder was outrageously wanton and vile and that the appellant had two prior assaultive criminal convictions – and recommended a sentence of death. In accordance with the jury’s verdict, the court sentenced appellant to death for first-degree murder.

Id., 240 S.W.3d at 696-700.

This Court’s mandate issued on January 15, 2008. Defendant filed a *pro se* Rule 29.15 motion on April 11, 2008, which was amended by appointed counsel (following an extension of time) on July 21, 2008 (PCRL.F. 11-16, 75-451).

The motion court denied relief following an evidentiary hearing on February 14, 2013 (PCRL.F. 969-1031).

On March 25, 2013, Defendant filed a Motion for an Order Allowing Appeal as a Poor Person (PCRL.F. 1097-1098). The motion court granted this motion on March 27, 2013 (PCRL.F. 1099).

Defendant filed his notice of appeal on March 25, 2013 (PCRL.F. 1032-1101).

ARGUMENT

I.

The motion court did not clearly err by denying Defendant’s claim, after an evidentiary hearing, that counsel was ineffective for failing to investigate false allegations of prison inmate Larry Arnold concerning a previous trial, and Defendant was not prejudiced because the motion court determined the allegations were false and that Arnold was not a credible witness. In addition, trial counsel reviewed Arnold’s letter containing vague allegations, turned it over to the prosecutor, and interviewed Arnold prior to trial. Arnold did not testify at trial and could not be compelled to testify because he invoked the Fifth Amendment. Moreover, Defendant’s claim that the trial judge would have prohibited the State from seeking the death penalty in this trial based on occurrences in a previous trial is refuted by the record.

The motion court found that inmate Larry Arnold’s “claims are not credible[,]” found “nothing that Mr. Arnold asserted in his deposition to be credible[,]” and held that Arnold’s claim that he was granted conjugal visits with his girlfriend in exchange for his testimony at a previous trial “is untrue.” (PCRL.F. 987, 1007, 1023). Arnold did not testify at this trial, nor did the State read his previous testimony. (PCRL.F. 987). The motion court found that this

“evidence does not prove any misconduct on the part of the prosecutor.” (PCRL.F. 987).

The motion court observed that Arnold has convictions “for second-degree murder, burglary, armed criminal action and assault, and is serving a sentence of life plus 280 years[,]” found that his claims “are not credible[,]” and found that Arnold acknowledged that Arnold (not the State) had “initiated the conversations with the Sheriff’s Department about testifying and that he never indicated to the State that his testimony was fabricated.” (PCRL.F. 987).

In addition, the motion court found that because Arnold’s deposition testimony in this postconviction action was not credible, Defendant “failed to present any competent or substantial evidence to establish that the earlier testimony of [Arnold and two other jailhouse witnesses] was perjured.” (PCRL.F. 1007). Arnold’s story and his then-girlfriend’s story were inconsistent and contradictory and the court found neither of them credible (PCRL.F. 986-987, 997).

Moreover, Arnold told trial counsel Brad Kessler before the trial “that he was not going to testify and ‘plead the Fifth.’” (PCRL.F. 1000). In fact, Arnold’s testimony at an earlier trial (the testimony which is alleged to have been tainted) was never read at trial after Arnold asserted his Fifth Amendment

rights. (Tr. 718, 723). Hence, the motion court found that Defendant could not have been prejudiced. (PCRL.F. 987, 1023-1024).¹

Finally, Defendant's attempt to relitigate previous trials under the guise of a claim that, had he been aware of Arnold's false claims, the trial judge would have forbidden the State from seeking the death penalty in this trial on the grounds of prosecutorial misconduct flies in the face of the record. The trial judge specifically stated on the record that he had denied the defense's attempt to seek such relief based on other allegations of previous misconduct because he was without power to grant it (Tr. 1069, 1176).

A. Standard of Review

The motion court's findings and conclusions are presumptively correct. *Storey v. State*, 175 S.W.3d 116, 125 (Mo. banc 2005). Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." Rule 29.15(k); *Woods v. State*, 176 S.W.3d 711, 712 (Mo. banc 2005). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire

¹ The motion court also found that Arnold had approached deputies with his information and was not prompted by the State to come forward, and that he had never indicated to the State that his testimony was fabricated (PCRL.F. 986, 987).

record, the court is left with a definite and firm impression that a mistake has been made. *Id.*

To be entitled to post-conviction relief for ineffective assistance of counsel the defendant must show by a preponderance of the evidence that his attorney failed to exercise the level of skill and diligence that a reasonably competent attorney would exercise in a similar situation, and that he was thereby prejudiced. *McLaughlin v. State*, 378 S.W.3d 328, 337 (Mo. banc 2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *Premo v. Moore*, 131 S.Ct. 733, 739 (2011). To establish deficient performance, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. at 688. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *Premo*, 131 S.Ct. at 739.

"[T]he purpose of the effective assistance guarantee of the Sixth Amendment. . . is simply to ensure that criminal defendants receive a fair trial." *Strickland*, 466 U.S. at 689. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

“[S]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690-691.

A trial strategy decision may only serve as a basis for ineffective assistance of counsel if the decision is unreasonable; the choice of one reasonable trial strategy over another is not ineffective assistance. *McLaughlin*, 378 S.W.3d at 337.

When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 695.

In order to be entitled to relief on the ground that counsel failed to call a witness, a movant must prove: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would have testified if called; and (4) the witness’s testimony would have produced a viable defense. *Vaca v. State*, 314 S.W.3d 331, 335-336 (Mo. banc 2010); *Hutchison v. State*, 150 S.W.3d 294, 304 (Mo. banc 2004).

When counsel is charged with failing to conduct an adequate investigation, the question is whether counsel fulfilled the obligation to either conduct a

reasonable investigation or to make a reasonable decision that a particular investigation was unnecessary. *Hill v. State*, 301 S.W.3d 78 (Mo. App. S.D. 2010). “[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008) (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)). “In the real world containing real limitations of time and human resources, criminal defense counsel is given a heavy measure of deference in deciding what witnesses and evidence are worthy of pursuit.” *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991).

The motion court is not required to believe a witness’s testimony, and the appellate court defers to the motion court’s credibility determinations. *Watson v. State*, 210 S.W.3d 434, 437 (Mo. App. S.D. 2006). The motion court was free to believe or disbelieve any evidence, whether contradicted or undisputed. *Mendez v. State*, 180 S.W.3d 75, 80 (Mo. App. S.D. 2005). The finding of the motion court that the evidence did not support this error is sufficient to reject an allegation that trial counsel was ineffective. *Garrison v. State*, 992 S.W.2d 898, 902 (Mo. App. E.D. 1999).

B. There was no deal to trade “sex for testimony”

Because this Court defers to the motion court’s credibility findings, and the motion court found that neither Arnold nor his girlfriend were credible

witnesses, and that Arnold was never promised conjugal visits in exchange for testimony (PCRL.F. 997, 1023, trial counsel was not ineffective for failing to call a witness whose testimony would not have been credible about events which did not take place. Nor was Defendant prejudiced by such a failure.

In addition, trial counsel did speak to Arnold prior to trial and Arnold told him, accurately, that he intended to invoke his Fifth Amendment rights; Arnold did not testify at trial. Counsel effectively torpedoed Arnold's testimony by persuading the trial judge that Arnold could not be declared unavailable simply for invoking his Fifth Amendment rights. Counsel discouraged the prosecution from calling Arnold by turning his letter over to the prosecutor. The combination of these strategic choices resulted in this jury, in contrast to others, never hearing Arnold's testimony that Defendant confessed the crime and its particulars to him (which the motion court expressly found had not been proven to be perjured).² Counsel was not ineffective and Defendant was not prejudiced.

² The motion court found that a previous prosecutor in a previous trial had promised to write a letter to the Parole Board in Arnold's behalf and did so. The motion court also found that Defendant "was allowed to have visits with his girlfriend, but he was never promised conjugal visits." (PCRL.F. 1023). By the time of this trial, Arnold had been denied parole, complained of the time he had been kept waiting to testify, and then invoked his Fifth Amendment rights.

C. The trial court would not have prohibited the death penalty.

Because the claim pertains only to previous trials, Defendant has created a “fig leaf” for raising it in this appeal by contending that, had he known of Arnold’s false allegations, the trial judge would have prohibited the State from seeking the death penalty or dismissed the case. The judge denied Defendant’s motion for such relief on the grounds of prior prosecutorial misconduct at trial (Tr. 1069). The judge made it plain that he did not intend to dismiss the case and specifically held that he lacked the power to prohibit the State from seeking the death penalty; hence, one additional claim that has been found to be not credible would not have altered his ruling. Judge Dandurand stated:

...I asked counsel to brief the issue of whether there was any precedent whatsoever that would give me the option of saying as a sanction against the State that I can tell the State that they can’t seek the death penalty, and after reviewing the suggestions filed by both sides, I found that I didn’t have that power.

(Tr. 1176).

Because there was no credible evidence to support it, because the witness in question did not testify at trial, because counsel interviewed the witness and effectively prevented his testimony against Defendant from coming in, because the witness would have not have provided a viable defense, and because Defendant was not prejudiced, Defendant’s first point should be rejected.

II.

The motion court did not clearly err by holding, after an evidentiary hearing, that Defendant failed to prove by a preponderance of the evidence that the State violated either *Brady* or Rule 25.03 by failing to turn over evidence of misdemeanor convictions obtained by Victim's granddaughter 11-12 years after the murder. The motion court found that the State was unaware of witness Debbie Selvidge's 2002 and 2003 misdemeanor convictions, that the State exercised due diligence but the convictions did not appear during a criminal history check run through the MULES system, and that Defendant was not prejudiced because the defense's trial strategy was to get Selvidge off the stand as quickly as possible. The motion court further found that had they been used for impeachment, these minor convictions would not have altered the jury's assessment of her testimony.

Defendant contends that the motion court clearly erred by rejecting his *Brady* and Rule 25.03 claims that the State failed to disclose two misdemeanor convictions acquired by witness Debbie Selvidge during the period between his third and fourth trials (11-12 years after the events at issue). The motion court found that the State exercised due diligence by running a criminal history check through the MULES system, that the prosecutor (now Judge Bradley) testified that he considers MULES to be a reliable and a good source for obtaining a

criminal history, that the defense’s trial strategy was to get Debbie Selvidge (the Victim’s granddaughter who discovered her body) off the witness stand “as quickly as possible, a sound strategy given her status as a ‘victim’ of this murder,” and that the impeachment would have been so minor it would not have altered the jury’s assessment of her credibility or changed the outcome of the trial (PCRL.F. 1004, 1006, 1018-1020, 1022; Ex. 305 at 20-22).

The convictions in question were for misdemeanor assault in the third degree and violation of an order of protection, both apparently pertaining to a romantic rival (PCRL.F. 1005).

A. Standard of Review

“A freestanding claim of prosecutorial misconduct is generally not cognizable in a Rule 29.15 proceeding.” *State v. Tisius*, 183 S.W.3d 207, 212 (Mo. banc 2006). Claims of trial error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances. *Id.*

Under the United States Supreme Court’s ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), due process requires the prosecution to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment. *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. banc 2001). The suppression by the prosecution of evidence favorable to an accused upon request

violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution. *Id.*

“[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.” *Kyles v. Whitley*, 514 U.S. 419, 436-437 (1995). Showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. *Kyles*, 514 U.S. at 437. “Evidence is material ‘only when there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense.’” *State v. Salter*, 250 S.W.3d 705, 714 (Mo. banc 2008), quoted in *State v. Shore*, 344 S.W.3d 292, 298 (Mo. App. S.D. 2011).

The defendant has the burden of proving all of the elements establishing a *Brady* violation. *United States v. Sturdivant*, 513 F3d 795, 803 (8th Cir. 2008). These elements are: (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the suppression prejudiced the defendant. *Merriweather v. State*, 294 S.W.3d 52, 54 (Mo. banc 2009); *State v. Goodwin*, 43 S.W.3d at 812. If defendant knew of the evidence at the time of trial, the State cannot be faulted for non-disclosure. *See, State v. Myers*, 997 S.W.2d 26, 33 (Mo. App. S.D. 1999); *See also, State v. Salter*, 250 S.W.3d at 714.

B. The motion court's findings

The motion court found that the State was unaware of these convictions and did not disclose them and that the defense had no recollection or knowledge about whether they knew of these convictions and thus did not know if the decision to not impeach Ms. Selvidge was matter of trial strategy or not (PCRL.F. 1005). The motion court held:

Assuming that these were not disclosed and were not known to the defense, this Court nevertheless is firmly convinced that these records would not have changed the outcome of the trial. Convictions can, of course, be used to impeach a witness. (§ 491.050, RSMo.) But not every conviction for every crime is equally compelling. A third degree assault misdemeanor and violating an order of protection are not the types of violations that would seriously impeach the credibility of a witness. In this case, the only disputed portion of Ms. Selvidge's testimony concerns whether Movant did, or did not, move her away from the victim's body. Ms. Selvidge's credibility is important. Nevertheless, this Court is firmly convinced that any attempt at impeachment with these two misdemeanor convictions would not alter the jury's assessment of Ms. Selvidge's testimony. These are not the type of convictions that have any material effect on someone's credibility.

(PCRL.F. 37-38).

The motion court found that the State made “a diligent effort” to determine whether Selvidge and all other witnesses had a criminal history and provided a criminal history of all the State’s witnesses, including Selvidge (PCRL.F. 1006; Ex. 305; PCRL.F. 764-766, Bradley Depo. at 20-22). While not successful in uncovering these misdemeanor convictions, the motion court found that the State exercised due diligence by running a criminal history check through the MULES system (PCRL.F. 38). “Even after running a criminal history, Prosecutor Bradley was not aware of Ms. Selvidge’s misdemeanor convictions. (Bradley depo, p. 22). Prosecutor Bradley testified that he considers running the criminal histories through MULES to be reliable and a good source for obtaining a criminal history. (Bradley depo, p. 34).” (PCRL.F. 1004, 766, 778).

“The State made a reasonable, diligent search, but did not find these misdemeanor convictions. Movant never actually offered any evidence as to how his post-conviction counsel obtained these records . . .” (PCRL.F. 1022).

The motion court further held that the legal presumption that trial counsel had specific reasons for not raising certain issues, or not engaging in specific areas of cross-examination, was particularly appropriate in assessing the conduct of Defendant’s trial attorneys, who expressed a desire to get certain witnesses (including Selvidge) off the stand as expeditiously as possible, and to focus on the issues they deemed crucial to the defense (PCRL.F. 1018-1019).

Trial counsel testified that his strategy was to get Selvidge off the witness stand as quickly as possible, which the motion court considered “a sound strategy given her status as a ‘victim’ of this murder.” (PCRL.F. 1018-1019).

The motion court further held:

The Court notes that it has already determined that this information about Ms. Selvidge would not have changed the outcome of the trial. Indeed, there is reason to doubt that Movant’s counsel would have used this information for impeachment purposes, even had it been available. The goal of the defense was to get Ms. Selvidge off the witness stand as soon as possible.

(PCRL.F. 1022).

C. The motion court’s findings are not clearly erroneous.

Generally, the mere failure to impeach a witness does not entitle the movant to postconviction relief. *State v. Phillips*, 940 S.W.2d 512, 524 (Mo. banc 1997). “When the testimony of the witness would only impeach the state’s witnesses, relief on a claim of ineffective assistance of counsel is not warranted.” *McClendon v. State*, 247 S.W.3d 549, 556-557 (Mo. App. E.D. 2007); *Borst v. State*, 337 S.W.3d 95, 106 (Mo. App. W.D. 2011). “Where . . . the issue is impeachment, movant must show that had the witness been impeached, it would have provided a viable defense or otherwise met the *Strickland* standard.” *Black v. State*, 151 S.W.3d 49, 55 (Mo. banc 2004); *Borst*, 337 S.W.3d at 106.

“The formulation of materiality” is the same as the test for prejudice under *Strickland v. Washington*. *Kyles v. Whitley*, 514 U.S. at 436 (citing *Strickland*, 466 U.S. at 687). Materiality is considered collectively, not item by item. *Id.*

Rule 25.03(A)(7) provides that the State shall, upon written request of defendant’s counsel, disclose to defendant’s counsel such part or all of the following material and information within its possession or control designated in said request: “Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial[.]”

While the State may have failed to disclose misdemeanor convictions of which its prosecutors were unaware, inadvertently, despite its exercise of “due diligence,” the violations were not material under *Brady* and there is no *Strickland* prejudice. The fact that Ms. Selvidge may have developed anger issues toward a romantic rival some 11 to 12 years after discovering her grandmother’s dead body would not have significantly impacted her credibility in any way that would have altered the outcome at trial, as the motion court specifically held.

The uncontroverted testimony of the State’s expert established that Defendant had Victim’s DNA at multiple locations on his clothes and boots, including medium to high-velocity blood spatter that could not have resulted from a transfer stain from Ms. Selvidge. In fact, even Defendant did not claim during closing argument that Defendant had received the blood from Selvidge,

instead asserting that he slipped in blood and made contact with the bloody bed spread, propelling blood onto his clothes. (Tr. 1034).

Nor was the claim that he got the blood from Selvidge the version of events Defendant described to trial counsel, Brad Kessler. Kessler testified that Defendant claimed he had entered the room and touched the Victim on the forehead as she lay in the bed and then ran away; Kessler admitted this story was inconsistent with the physical evidence, which according to a blood spatter expert the defense consulted, established that Defendant had three different types of blood stains on his clothing and boots, a fact inconsistent with the Defendant's story (PCR Tr. 454-459).

Defendant's second point should be rejected.³

³ In *State v. Adams*, 791 S.W.2d 761 (Mo. App. W.D. 1990), the Court of Appeals affirmed the denial of postconviction relief on a claim that the motion court erred by refusing to allow the movant to adduce evidence that the State suborned perjury at trial and in ruling that prosecutorial misconduct is not cognizable in a postconviction action. *Id.* at 765. The Court of Appeals held that prosecutorial misconduct was not cognizable because the matter is more properly one for direct appeal. *Id.* The motion court did not clearly err by declining to allow the movant to present evidence of prosecutorial misconduct at an evidentiary hearing. *Id.* Because Defendant's evidence established that

III.

The motion court did not clearly err by holding, following an evidentiary hearing, that Defendant failed to establish that six pages of handwritten notes from an unidentified person pertaining to witness Carol Horton contained in a Christian County prosecutor's file established a violation of *Brady* or Rule 25.03. Defendant already had Carol Horton's preliminary hearing testimony concerning the timeline and alleged radio noise, Defendant failed to establish a foundation for the admissibility of these notes, and there was no reasonable probability of a different outcome at trial.

Defendant contends that six pages of handwritten notes the State disclosed after trial from the prosecuting attorney's file in Christian County

counsel could not recollect whether they were aware of Ms. Selvidge's misdemeanor convictions at trial or not, Defendant failed to meet his burden of proof on an issue required to make this claim cognizable in a Rule 29.15 proceeding. As the motion court held, Defendant failed to establish how (or when) he learned of these convictions. *Brady* applies where, after trial, the defense discovers new information that the prosecution knew at trial. *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2010). If the defense knew about the evidence at the time of trial, no *Brady* violation occurred. *Id.*

established a violation of *Brady* and Rule 25.03 because they could have been used to impeach witness Carol Horton’s testimony by establishing that she had previously said she had heard a radio at the Victim’s trailer at 4:15 on the day of the murder. Defendant contends this is significant because Defendant was seen after 4:00 p.m. doing repair work.⁴

The standard of review for denial of postconviction relief is as outlined under Point I. The standard for reviewing *Brady* and Rule 25.03 claims is outlined in Point II.

A. Motion court findings

The motion court found that, even assuming *arguendo* (which was not established) that the notes were of a statement by Ms. Horton, the only potential inconsistency was regarding whether Ms. Horton heard anything during her first visit to the trailer that afternoon to check on Victim. The motion court found that the unidentified note said “4:15 goes to V’s trailer – no response – hear radio.” (Ex. 253; PCRL.F. 1013). The motion court held that, “Even if we assume that the statements in the notes can be attributed to Ms. Horton, they are not new information nor material.” (PCRL.F. 45). “. . . [T]rial counsel already

⁴Interestingly, the notes also represent that Defendant left Horton’s trailer after his lengthy hand-washing session at 4:00 p.m., so they hardly establish an alibi if he was not seen doing repair work until later. *See*, Ex. 253 at 2-3.

knew of this fact because Ms. Horton testified at the preliminary hearing that at 4:15 she went to the Victim's trailer and the radio was playing. (Ex. 234, p.19)." (PCRL.F. 1013-1014).

Carol Horton Watkins testified at the evidentiary hearing that when she went to the Victim's trailer the first time, she thought she might have heard a sound like static from a radio, but only very briefly (PCRL.F. 988, 1013). The motion court held that "this one small shred of information, even if relevant and inadmissible, would not possibly have altered the outcome of the trial." (PCRL.F. 1014).

The motion court further held that the Defendant had been "simply unable to establish this information is admissible" or even that any part of it was admissible (PCRL.F. 1011). The motion court held that:

Ms. Horton could not be impeached with the notes unless or until Movant established both 1) who wrote the notes, and 2) the notes actually reflect statements made by Ms. Horton. Movant failed to sustain his burden to prove that these notes would lead to relevant, admissible evidence that could be exculpatory. (PCRL.F. 1012-1013).

While the State stipulated that these were notes from the Christian County Prosecutor's file, the author of the notes, as well as the basis for the information contained in the notes, "is unknown and unexplained. Thus, the

exhibit is hearsay and of extremely limited evidentiary value.” (PCRL.F. 1008). The motion court held that, beyond the stipulation that they were in the files of the Christian County Prosecutor’s Office,

...Movant presented no evidence about those “notes.” We do not know if they were in the file in 1993, 2000, 2006, or 2010. Movant did not identify who the author of the “notes” is. Prosecutor Bradley did not recognize these notes and indicated he had not prepared them. (Bradley depo, pp. 34-35). This is not an insignificant shortcoming in the Movant’s case. Without knowing who the author is, we do not know if the notes were from an actual interview with Ms. Horton, or were the unknown author’s summary of police reports, were his/her summary of the preliminary hearing testimony, or were the unknown author’s personal recollections of what the evidence was or would be.

(PCRL.F. 1010).

The motion court held that the U.S. Supreme Court holds that when undisclosed information is not admissible at trial, it is “not ‘evidence’ at all.” *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (polygraph). Where the suppressed evidence was not competent evidence, there is no *Brady* violation. *Warren v. State*, 482 S.W.2d 497, 500 (Mo. 1972). It is not sufficient to speculate what might have been uncovered if the State had not suppressed certain information. *Wood*, 516 U.S. at 6.

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). “The likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 131 S Ct. 770, 792 (2011).

The motion court further observed that trial attorney Bruns had impeached Horton with prior testimony from her 2006 trial on a significantly more important issue than whether she heard a radio or not, dealing with the Defendant’s behavior after he came back from the Victim’s trailer, but “that impeachment of Ms. Horton did not appear to have succeeded in affecting the jury’s assessment of Ms. Horton’s credibility.

Any uncertainty or inconsistency that Ms. Horton had in 2006 about whether she did or did not hear a radio, or static from a radio, briefly would not have affected or altered the outcome of the trial.” (PCRL.F. 1014).

The motion court held that, “even were a jury to believe that a radio was playing in the victim’s home at one point, and then was not heard later, this would not lead to a conclusion that some other person entered the victim’s home and murdered her. This is not ‘plausible and persuasive evidence to support a theory of innocence.’ *Buchli v. State*, 24[2] S.W.3d [449] at 454 [(Mo. App. W.D. 2007)].” (PCRL.F. 1015). The motion court concluded that the Defendant had “failed to sustain his burden to prove this claim. He has not identified the source

of this note, including a failure to identify any piece of admissible evidence. Nor has Movant established that any such evidence would be exculpatory or would have changed the outcome of the trial.” (PCRL.F. 1015).

The court further observed that it did not believe these inconsistencies were significant and that they would be easily explainable due to the passage of time (PCRL.F. 1003).

B. No *Brady* violation and no *Strickland* prejudice

Brady applies where, after trial, the defense discovers new information that the prosecution knew at trial. *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2010). If the defense knew about the evidence at the time of trial, no *Brady* violation occurred. *Id.*

Because the defense already had identical testimony from Horton from the preliminary hearing, there was no *Brady* violation and Defendant suffered no *Strickland* prejudice. The preliminary hearing testimony was even more useful for impeachment purposes because it was identifiable, whereas Defendant established no foundation that these notes were admissible, and thus again, no *Brady* violation.

Defendant’s third point should be rejected.

IV.

The motion court did not clearly err by denying, following an evidentiary hearing, Defendant's claim that counsel was ineffective for failing to cross-examine Victim's granddaughter, Debbie Selvidge, on exactly what time in the mid-afternoon she last spoke with Victim where Selvidge had consistently testified she was not certain of the exact time of the call, the motion court found there had been no material change in Selvidge's testimony, trial counsel testified that their strategy was to get Selvidge off the witness stand as soon as possible, and there was no reasonable probability of a different outcome.

Defendant's fourth point contends that the motion court clearly erred in holding that trial counsel was not ineffective for failing to cross-examine Victim's granddaughter, Debbie Selvidge concerning when she last spoke with Victim on the phone to highlight prior "inconsistencies" regarding the exact time and length of her conversation. The motion court found that there was neither a change in her testimony, nor was it material; any inconsistencies were not significant and were easily explainable; such impeachment had previously been conducted at a prior trial and was ineffective; defense counsel had a strategic reason for wanting the witness off the stand as soon as possible; and there would

not have been a reasonable probability of a different outcome at trial (PCRL.F. 1003, 1018-1019, 1021).

A. Standard of review

The standard of review of denied postconviction relief and for ineffective assistance of counsel claims is as outlined under Point I.

Generally, counsel's decision “not to impeach a witness with a prior inconsistent statement is a matter of trial strategy and cannot be the basis for finding ineffective assistance of counsel.” *Byrd v. State*, 329 S.W.3d 718, 725 (Mo. App. S.D. 2010), quoting *Reynolds v. State*, 87 S.W.3d 381, 385 (Mo. App. S.D. 2002); *see also*, *State v. Mahoney*, 165 S.W.3d 563, 568 (Mo. App. S.D. 2005) (“Subjects covered during cross-examination are generally matters of trial strategy and left to the judgment of counsel”). “The mere failure to impeach a witness does not entitle a movant to postconviction relief.” *Fry v. State*, 244 S.W.3d 284, 287 (Mo. App. S.D. 2008).

To prevail, Defendant must show that counsel's “failure to present the impeachment evidence was unreasonable and outside the realm of trial strategy.” *Id.* at 288.

B. Motion court findings

Defendant contends that Ms. Selvidge testified at this trial, which occurred nearly 15 years after the murder, that she last spoke to Victim at 2:30

p.m., but at prior trials she had “always” testified that she spoke to the Victim for 20 to 25 minutes between 3:00 and 3:30 p.m. (Amended Motion at 108). The motion court held:

This is not true. In the 1994 trial, Ms. Selvidge testified:

Q. About what time if you know?

A. Not the exact time, no, but it was in the afternoon.

* * *

Q. And when was that if you know?

A. After I tried to get a hold of her about mid-afternoon.

I’m not sure of the time, but - -

(1994 Trial Tr. 496).

In the 1998 trial, Ms. Selvidge was cross-examined by Movant’s trial attorney about a recollection of the times she called, and impeached with her deposition testimony about those times (1998 Trial Tr. 475-478). This impeachment, the same impeachment Movant criticizes his latest trial counsel for omitting, did not have any impact on Ms. Selvidge’s credibility. Furthermore, during this trial, Ms. Selvidge again testified she was not certain of the time she called the victim:

A. It was mid-afternoon.

Q. When you say mid-afternoon are you certain of the time?

A. I'm not certain of the time but I know it was mid-afternoon.

(1998 Trial Tr. 442).

Thus, Movant's claim that Ms. Selvidge's 2006 testimony is inconsistent is simply not true. Nor is there evidence that the outcome would have been different had trial counsel cross-examined Ms. Selvidge about these alleged inconsistencies.

(PCRL.F. 1020-1021).

C. Trial strategy

As previously noted, the motion court found that trial counsel testified that his strategy was to get Ms. Selvidge off the stand as quickly as possible, which the motion court held was "a sound strategy given her status as a 'victim' of this murder." (PCRL.F. 1019, 1022). The motion court found this testimony credible.

At the evidentiary hearing, postconviction counsel cited the following testimony from the 1994 trial as potential impeachment material:

QUESTIONS [sic]: And when you spoke to grandmother after 3:00, you talked to her at least twenty-five minutes?

ANSWER: I don't know how long it was but we talked.

(PCR Tr. 534-535; 1994 Trial Tr. 520).⁵

When trial counsel Bruns was asked why he didn't impeach Ms. Selvidge with that prior testimony, he testified:

I remember that she was a very emotional witness and I was told by the other lawyers there to get her off the stand. She was - - she is a granddaughter, I believe, of the victim and it's always difficult to cross-examine and there's always - - bad things can happen.

(PCR Tr. 535).

Bruns went on to testify, "She was a witness that I think everyone was scared and I was scared of what could come out of her mouth." (PCR Tr. 535-536).

Defendant admitted answering Victim's phone in her trailer about 3:15 and speaking with Bill Pickering (Ex. 247 at 538-539, 620-622). Selvidge testified that she had a daily routine to talk with Victim while watching a television show at 4:00 p.m. but couldn't reach her on the date of the murder (Ex. 247 at 505-506).

It was therefore apparent that the previously unsuccessful, suggested impeachment would not have provided a viable defense. *See, Middleton v. State,*

⁵ This also disproves the allegation that the witness had "always" testified that she had talked to her grandmother for 20 to 25 minutes after 3:00 p.m.

80 S.W.3d 799, 810 (Mo. banc 2002) (counsel's failure to elicit additional facts from witness not prejudicial where jury in previous trial sentenced defendant to death after hearing the additional testimony). Selvidge's prior testimony would only have established that she was uncertain as to when in the mid-afternoon her first phone call with Victim took place, and would not have necessitated the conclusion that it took place after Pickering's phone call at 3:15, which was answered by Defendant. Moreover, such testimony would not have impeached Selvidge's testimony that Victim could not be reached at 4:00 p.m., a time that Selvidge was sure about because it was a daily ritual.

The motion court's findings are not clearly erroneous and the defense's "virtually unchallengeable" trial strategy was empirically reasonable.

Moreover, there is no prejudice in light of the overwhelming evidence of guilt. Medium to high-velocity blood spatter with Victim's DNA was found on Defendant's shirt and jeans was explainable by the attack but not by any of Defendant's three shifting explanations. Defendant was the last person known to be inside the trailer between the time Victim was last seen alive and the discovery of her body, he washed his hands for a suspicious length of time and had a marked change of demeanor after returning from her trailer, he answered her phone but did not put Victim on as requested by the caller during the window of the attack, he exhibited consciousness of guilt by actively discouraging others from either going to the murder scene or venturing down the

hallway to the where the body was found, and by initially denying to police that he had returned to the trailer, and he knocked on the portion of the trailer where the body was found. Defendant went to the trailer to receive a check from Victim, and an uncharacteristically unrecorded check to Defendant in Victim's handwriting was found abandoned just blocks away. Moreover, he threatened to kill a female inmate who rejected his attention "like I killed that old lady."⁶

Defendant's fourth point should be rejected.

⁶ The trial can also be relied upon as having produced a just result because the evidence at the evidentiary hearing established that even an expert consulted by the defense at a forum designed to save people from the death penalty found there were three kinds of bloodstains on Defendant's clothing and boot, which were not consistent with Defendant's account of how he acquired them.

V.

The motion court did not clearly err by denying relief following an evidentiary hearing on Defendant's claim that trial counsel was ineffective for failing to call Michelle Hampton Workman as a witness to testify that she saw Defendant repairing a neighbor's deck because no such claim was raised in the amended motion. Moreover, the motion court's finding that the decision not to call the witness was a matter of sound trial strategy is not clearly erroneous and Defendant was not prejudiced where the witness had testified in previous trials and Defendant had still been convicted and given the death penalty.

Defendant's fifth claim is that trial counsel was ineffective for failing to call Michelle Hampton Workman as a witness to testify that she saw Defendant working on neighbor Carol Horton's deck on the afternoon of the murder. The motion court found that the claim was waived because it was not raised in the amended motion, which raised a claim that the witness should have been called to testify that she didn't see any blood on Defendant at the time she saw him working on the deck at 4 p.m. the day of the murder, a question which was not posed at the evidentiary hearing (PCRL.F. 980-981, 1025; Amended Motion at 30).

The motion court found that the decision not to call this witness was a matter of trial strategy, an attempt to not duplicate what had failed in the past.

(PCRL.F. 1025). The motion court held that the witness had previously testified on this issue during a 1992 deposition and at a 1998 trial (PCRL.F. 980).

The standard of review is as outlined under Point I.

A. The claim should not be reviewed.

Because Defendant has changed his claim to assert that counsel was ineffective for failing to call Workman to testify about the time she saw Defendant, instead of whether she saw blood on Defendant, Defendant's claim was waived and should not be reviewed.

"In actions under Rule 29.15 [or Rule 24.035], 'any allegations or issues that are not raised in the Rule 29.15 [or Rule 24.035] motion are waived on appeal.'" *McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. banc 2012) (quoting *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. banc 2011)). "Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal.'" *Id.* "Furthermore, there is no plain error review in appeals from post-conviction judgments for claims that were not presented in the post-conviction motion." *Id.* (citing *Hoskins v. State*, 329 S.W.3d 695, 696-697 (Mo. banc 2010)).

B. The witness would not have provided a viable defense.

Workman testified at the evidentiary hearing that prior to having her memory refreshed by 1998 testimony, she was unable to say whether "it was 4:00 versus 5:00" when she saw Defendant repairing Horton's deck (PCR Tr. 86). Postconviction counsel refreshed her recollection prior to testifying at the

evidentiary hearing with her testimony in 1998; she then testified, it was “about 4:00, 4:20” when she saw Defendant working on Horton’s deck (PCR Tr. 84-85).

In any event, Workman’s testimony would not have established a viable defense since Debbie Selvidge had been unable to reach Victim by phone at 4:00, so testimony that Defendant was seen thereafter in another place was not inconsistent with Victim already being dead by that time. Defendant had admitted answering Victim’s phone in her trailer about 3:15 p.m.

Horton, whose deck was being repaired, testified at trial that when she came back to her trailer at 4:30 after unsuccessfully attempting to contact Victim at her trailer, Defendant was at her neighbor’s and that he then came over and fixed the loose board on her front porch (Tr. 464-465). In the face of the testimony of the person whose porch was actually repaired by Defendant, Workman’s proposed testimony would not have established a viable defense on the timeline.

C. No deficient performance or prejudice

Moreover, there was no showing of either deficient performance or prejudice where the witness testified at the previous trial and Defendant was still convicted and given the death penalty. *Middleton v. State*, 80 S.W.3d 799, 810 (Mo. banc 2002) (failure to elicit additional testimony from mother in death penalty case resulted in no prejudice where additional testimony was elicited at previous trial and jury still sentenced defendant to death).

Trial counsel was aware of the witness and presumptively made a trial strategy decision not to call her, which is “virtually unchallengeable,” particularly where, as the motion court held, “defense counsel testified that one of their decisions was not to try the same things that had failed in the previous trial, including calling the same witnesses.” (PCRL.F. 1025). *Strickland*, 466 U.S. at 690-691; *see, Middleton*, 80 S.W.3d at 810.

Moreover, there was no prejudice to Defendant in light of the overwhelming evidence of guilt, including the fact that medium to high-velocity blood spatter with Victim’s DNA was found on his shirt and jeans explainable by the attack but not by any of Defendant’s three shifting explanations. Defendant was the last person known to be inside the trailer between the time Victim was last seen alive and the discovery of her body; he washed his hands for a suspicious length of time and had a marked change of demeanor after returning from her trailer; he answered her phone but did not put Victim on as requested by the caller during the window of the attack; he exhibited consciousness of guilt by actively discouraging others from either going to the murder scene or venturing down the hallway to where the body was found, and by initially denying to police that he had returned to the trailer; and he knocked on the portion of the trailer where the body was found. Defendant went to Victim’s trailer to receive a check during the window of the murder, and a check in Victim’s handwriting made out to Defendant (dated the day of the murder) but

uncharacteristically unrecorded by Victim was found abandoned just blocks away. Moreover, Defendant threatened to kill a female inmate who rejected his attention “like I killed that old lady.”⁷

Point V should be rejected.

⁷ The trial can also be relied upon as having produced a just result because the evidence at the evidentiary hearing established that even an expert consulted by the defense at a forum designed to save people from the death penalty found there were three kinds of bloodstains on Defendant’s clothing and boot, which were not consistent with Defendant’s account of how he acquired them.

VI.

The motion court did not clearly err by denying Defendant’s claim following an evidentiary hearing that trial counsel was ineffective for failing to call a blood spatter expert because trial counsel did consult a blood spatter expert and reasonably concluded that such testimony would have bolstered the State’s case. Moreover, Defendant’s trial strategy was to vigorously cross-examine what trial counsel viewed based on many years of experience as a weak State’s witness and to argue that alleged blood spatter evidence was “junk science.”

Defendant’s sixth point is that trial counsel was ineffective for failing to call a blood spatter expert. But as Kessler put it, “It was our trial strategy not to prove the State’s case by calling our own expert who may have very well have proven the State’s case.” (PCR Tr. 458).

The motion court found that Defendant did consult a blood spatter expert and learned that Defendant had three different types of blood stains on his clothing, a fact which was inconsistent with Defendant’s explanation of what happened and which trial counsel believed would help the State prove its case. Experienced defense counsel therefore made a reasonable trial strategy decision to portray blood spatter testimony as “junk science” and to cross-examine the State’s expert and thereby successfully avoided the evidence that there were

three different types of blood stains on Defendant's clothing, and that this combination of stains was inconsistent with Defendant's account.

A. Standard of review

The standard of review is as outlined under Point I. "[S]trategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable[.]" *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. 2006) (quoting *Strickland*, 466 U.S. at 690); *McLaughlin v. State*, 378 S.W.3d 328, 377 (Mo. banc 2012).

"When counsel is charged with failing to conduct an adequate investigation we look to whether [he] fulfilled [his] obligation to either conduct a reasonable investigation or to make a reasonable decision that a particular investigation was unnecessary." *Hill v. State*, 301 S.W.3d 78 (Mo. App. S.D. 2010), quoting *Fisher v. State*, 192 S.W.3d 551, 555 (Mo. App. S.D. 2006). "[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008) (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)). Counsel was entitled to rely on an expert's conclusions and was not obligated to search for another expert. *Winfield v. State*, 93 S.W.3d 732, 741 (Mo. banc 2003).

B. The motion court's findings

The motion court found that:

...the defense did communicate with an expert, and attended a seminar given by Mr. Larry Renner at a death penalty training conference attended by two of Movant's trial attorneys. While Mr. Renner does not recall the encounter, the Court finds the testimony of defense counsel to be credible. They met with Mr. Renner and provided him information.

Defense counsel was concerned that Movant actually had three different types of bloodstains on his clothing and learned that these could not easily be explained. They were concerned that hiring, and using, their own expert would bring this problem to light and thus, create an even more effective means of attacking Movant's defense at trial.

Thus, the defense team made a sound, strategic decision to not hire and use their own expert. As a result, this problem with Movant having three different types of bloodstains was not made an issue at the trial.

(PCRL.F. 1024-1025).

The motion court concluded:

Thus, the Court finds that the decision to not hire a blood spatter expert was a matter of sound trial strategy and trial counsel was not ineffective for failing to hire one. They did, in fact, succeed in keeping any discussion of the fact that there were three distinct types of transfers of

blood on Movant's clothing from being discussed and it was a reasonable decision by the defense attorneys to do so.

(PCRL.F. 999).

The motion court found that defense counsel Kim Freter and David Bruns attended a seminar in 2005, and that Ms. Freter credibly described a "more detailed discussion" with Mr. Renner "over the course of the week-long conference." (PCRL.F. 998). "She and Mr. Bruns had the case file and showed Mr. Renner some of the material. The discussions were with the possibility of hiring him as a witness." (PCRL.F. 998). Freter testified that she learned from this encounter that "a potential problem for the defense was that Movant had three different types of stains that could not be easily explained. By hiring an expert, Ms. Freter feared that this 'problem' would come to light and it would be more advantageous to not hire an expert." (PCRL.F. 998-999).

The motion court further found, "Ms. Freter's testimony was confirmed by the later testimony of Mr. Kessler, who also indicated the decision to not call an independent blood spatter expert was based on a concern that such an expert would cause more harm to the defense than good." (PCRL.F. 999). The motion court found that Kessler "remembered that Ms. Freter came back from the conference believing that hiring their own expert may be detrimental and may have strengthened some of the State's case. Mr. Kessler also believed that the State's witness was not the best witness and did not want to make him a better

witness by having their expert confirm some of the expert's conclusions.” (PCRL.F. 1000). Furthermore, “Mr. Kessler testified that the defense goal was to not do the same things that had been done in previous trials that had been unsuccessful.” (PCRL.F. 1000).

The motion court concluded that the defense “made a conscious decision” to not hire a blood spatter expert as “a matter of sound trial strategy” and that “trial counsel was not ineffective for failing to hire one.” (PCRL.F. 999). The defense correctly believed that the State's witness would not address these problems. The defense also made a conscious decision not to challenge the “conclusions of the experts that it was blood on [Defendant's] clothing” and that “the blood on the [Defendant's] clothing was that of the victim.” (PCRL.F. 999).

This did not mean that the defense was conceding the point about blood spatter. “Instead, trial counsel attacked the testimony of the State's blood [spatter] expert as ‘junk science’ (2006 Trial Tr. 892-919), and challenged Mr. Newhouse's training (2006 Trial Tr. 869, 871-872). The decision to proceed in this manner was made after sufficient investigation and based on legitimate concerns.” (PCRL.F. 1025).

While Defendant now contends that rather than hiring the expert they spoke to, they should have hired a different expert whom he procured for the postconviction hearing, Stuart James, the motion court concluded “that Mr. James . . . was not particularly persuasive or credible. As noted, he did not

actually do any testing of the clothing or blood stains and does not present himself well.” (PCRL.F. 1025).

James did not do any independent examination of the blood spatter observed by Mr. Newhouse, and did no testing in this case to determine if the testing done by Newhouse was accurate or not. (PCRL.F. 991). James admitted he saw small spots on the lower area of the shirt from photos he took in 2008 (PCRL.F. 991). “Mr. James’ testimony was not very persuasive or credible; he became very defensive at times and this Court does not believe he would be persuasive with a jury.” (PCRL.F. 992).

In particular:

. . . Mr. James testified that in deciding whether he had a blood spatter pattern, the number of spatters is a factor to consider. In this case, Mr. James could not even tell the Court how many spots were visible; he never counted them. This appeared to be, based on Mr. James’ direct testimony, the type of information he should have recorded.

(PCRL.F. 992).

Mr. James “is a full-time professional expert since 1981, and since then 75% of his work has been for criminal defendants.” (PCRL.F. 990).

“Mr. James also confirmed and agreed with much of what Mr. Newhouse testified to.” (PCRL.F. 992). Defendant “presented no evidence that Mr.

Newhouse’s conclusions are incorrect.” (PCRL.F. 991).⁸ Therefore, the motion court found that Defendant failed to meet his burden to establish that he was prejudiced by the failure to call James at trial (PCRL.F. 991).

The motion court concluded that:

Trial counsel extensively cross-examined Mr. Newhouse and exposed the limitations on his opinions, including that his opinions were not conclusive. Trial counsel was not ineffective in failing to call Mr. James on behalf of the Movant. Trial counsel made a reasonable strategic decision to attack the sufficiency of Mr. Newhouse’s findings and opinions and chose to not submit their own expert, whose own limitations on his conclusions would also be exposed.

(PCRL.F. 992-993).

C. Motion court’s findings not clearly erroneous

Because defense counsel did investigate a blood spatter expert and made an informed trial strategy decision not to call him because he would have strengthened the State’s case, this strategic choice is “virtually unchallengeable.” *Strickland*, 466 U.S. at 690-691. The defense had no duty to “scour the globe” in search of a different, more favorable expert. *Johnson v.*

⁸ The motion court found that James’s “formal education is a Bachelor’s degree, as was Mr. Newhouse[‘s].” (PCRL.F. 990).

State, 388 S.W.3d 159, 166 (Mo. banc 2012). “[D]efense counsel is not obligated to shop for an expert witness who might provide more favorable testimony.” *Johnson v. State*, 333 S.W.3d 459, 464 (Mo. banc 2011).

Moreover, this decision was part of a reasonable trial strategy, which, according to defense counsel, was “to focus on the lack of blood on Movant’s clothes given the violence of the crime scene.” (PCRL.F. 1004).

Freter testified that she thought it would be a bad idea to hire a blood spatter expert after consulting the expert:

It was my understanding based upon the lab report and the testimony that there were three distinctive types of bloodstains on Mr. Barton’s clothes and that that was inconsistent with his statement regarding how he happened upon the scene and that we were unaware because we had new prosecutors whether or not their blood spatter expert was going to stick to the same testimony that he had before or whether he was going to delve into the issue about the three different types of stains.

I spoke with an expert about that. It was my opinion that a good expert would be required either—if we didn’t bring it up on direct, it could have been brought up on cross. If we didn’t bring it up on direct, then we looked like we were hiding something, so we would have to bring it out on direct because we didn’t know if he would [be] crossed . . . Once we endorsed somebody, the odds that they did a deposition or talked more to

their expert about it increased. We were happy with just them talking about this high velocity spatter because it didn't talk about the three different kinds of stains.

In addition to that, our defense throughout the whole case was what we thought was the most logical one which was that if he had done the crime in the way that the State said, he would be covered in blood and no blood spatter expert would be able to testify to that or not.

(PCR Tr. 408-409).

Brad Kessler testified:

I think the problem was that he had blood in more than one spot that may have been - - do you want me to go into all of this? I mean, it seems to me that the blood, itself, and the evidence of the blood, itself, was inconsistent with [Defendant's] version of just merely touching the body when he saw her laying in the bed. That was a concern for not bringing in our own person who might then have said, well, that doesn't really account for these other bloodstains. So, no, I wouldn't - - I mean there was something on the shoe. There was something on his arm. What you are calling high velocity, I just remember it being like some sort of spray or something . . .

(PCR Tr. 455-456).

Kessler went on to testify, "I would say by getting our own expert that that expert very well may have confirmed what the State was saying, and not only

that, but my recollection was Kim coming back from that conference was this isn't going to help us. In fact, we may be in more hot water if we get this guy because he may verify more of what the State's person is going to say. That I think was the fear." (PCR Tr. 456-457).

Kessler believed that cross-examination would be more effective based on his prior experience with the State's expert:

You have got to remember that I have had these guys for years. I mean, these are guys that I knew from other cases at other times. I would say, in my humble opinion, [the State's expert is] not the best testifier, and so I thought that, maybe, our cross-examination would be good enough to show that he was not that much of an expert, and I didn't think, you know, now in hindsight, you know, I can tell you a really good reason not to bring in your own blood expert is he makes their expert look a lot better by confirming his findings, so I don't know if we conceded it . . . it was my recollection that he was cross-examined fairly hard, but that's just because I knew him.

(PCR Tr. 457-458).

The alternative expert (James) who testified for Defendant at the evidentiary hearing was found not credible and would not have presented himself well to the jury (PCRL.F. 992). Therefore, Defendant could not have been prejudiced by the failure to call him.

Nor was there prejudice in light of the overwhelming evidence of guilt, including the fact that the bloodstain evidence was even worse than the State proved at trial, according to the expert consulted by the defense.

As Kessler concluded: “It was our trial strategy not to prove the State’s case by calling our own expert who may very well have proven the State’s case.” (PCR Tr. 458).

Defendant’s sixth point should be rejected.

VII.

The motion court did not clearly err by denying Defendant's claim, after an evidentiary hearing, that counsel was ineffective for failing to cross-examine Carol Horton with prior statements about how long Defendant washed his hands, her knowledge of Defendant's alleged car problems, and whether Defendant's demeanor had changed from earlier because defense counsel did impeach Horton with her prior testimony about Defendant's demeanor and made the jury aware of Defendant's alleged car problems. Moreover, counsel's decision not to further emphasize the lengthy period in which Defendant was washing his hands by highlighting the issue with minor discrepancies was reasonable trial strategy and Defendant was not prejudiced in light of the overwhelming evidence of guilt.

Defendant contends that trial counsel was ineffective for failing to impeach Carol Horton with prior testimony about how long Defendant washed his hands in her bathroom and his change in demeanor when he returned from Victim's trailer the second time, and her knowledge of Defendant's alleged car problems. But counsel did impeach Horton with prior testimony about Defendant's change in demeanor or lack thereof. Horton also testified that Defendant claimed he had been working on his car and asked for a ride to pick it

up at Fast Track.⁹ Even the impeachment version of how long Defendant was washing his hands in Horton's bathroom after returning from Victim's trailer during the period after she was last seen alive was sufficiently lengthy not to make, in trial counsel's estimation, any minor impeachment worth it. The motion court correctly found that no additional impeachment would have changed the outcome of the trial.

A. Standard of review

The standard of review for an ineffective assistance of counsel claim and a challenge to trial strategy is as outlined under Point I.

Generally, the mere failure to impeach a witness does not entitle the movant to postconviction relief. *State v. Phillips*, 940 S.W.2d 512, 524 (Mo. banc 1997); *McClendon v. State*, 247 S.W.3d 549, 556-557 (Mo. App. E.D. 2007); *Borst v. State*, 337 S.W.3d 95, 106 (Mo. App. W.D. 2011); *Reynolds v. State*, 87 S.W.3d 381, 385 (Mo. App. S.D. 2002); *see also*, *State v. Mahoney*, 165 S.W.3d 563, 568 (Mo. App. S.D. 2005) ("Subjects covered during cross-examination are generally matters of trial strategy and left to the judgment of counsel").

⁹ The fact that the car was off-site perhaps undermines Defendant's claim that he had just finished working on it and that was why he was washing his hands so thoroughly after returning from Victim's trailer.

“Where . . . the issue is impeachment, movant must show that had the witness been impeached, it would have provided a viable defense or otherwise met the *Strickland* standard.” *Black v. State*, 151 S.W.3d 49, 55 (Mo. banc 2004); *Borst*, 337 S.W.3d at 106. To prevail, defendant must show that counsel’s “failure to present the impeachment evidence was unreasonable and outside the realm of trial strategy.” *Fry v. State*, 244 S.W.3d 284, 288 (Mo. App. S.D. 2008). Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006) (quoting *Strickland*, 466 U.S. at 690); *McLaughlin v. State*, 378 S.W.3d 328, 377 (Mo. banc 2012).

B. Horton’s trial testimony

Carol Horton testified on direct examination that when Defendant returned from Victim’s trailer about 4:00 p.m., he asked to use her bathroom and said nothing else; she gave him permission (Tr. 459). After a while, “[i]t seemed like he had been in there such a long time. I was, you know, somebody in my home, I was curious what he was doing because I never heard the toilet flush or anything like that. So I went down to see what he was doing.” (Tr. 459).

Horton further testified:

I walked down the hallway in my trailer. I had double sinks, and he was standing there at the first sink by the door, and he looked up in the

mirror. He seen me standing there and just said that he had been working on a car and he was washing his hands.

(Tr. 459-460).

Horton estimated, “he was probably in there close to ten minutes or so.”

(Tr. 460).

Horton further testified that Defendant’s mood had changed when he went to her bathroom in that he was no longer jovial and “seemed to be in a hurry.”

(Tr. 460). Horton testified Defendant “was kind of distant. Like I said, like he was in a hurry.” (Tr. 460-461).

Horton further testified that after Defendant finished washing his hands, he asked Horton if she would take him “to Fast Track and get his car, and I told him I couldn’t.” (Tr. 461).

Horton testified that Defendant “was a great deal different than what he was when he first came to my trailer.” (Tr. 462). He had gone from someone “wanting to have the radio on, dancing, sitting around and talking, and it wasn’t like that the second time.” (Tr. 462).

When Horton told Defendant she was going up to Victim’s trailer, he said in a very definite way, using “a very strong voice” that she should not go and “Ms. Gladys is lying down taking a nap.” (Tr. 463).

On cross-examination, defense counsel impeached Horton’s testimony on Defendant’s change of demeanor with her 1993 testimony:

Question: How was the Defendant acting at this time?

* * *

Answer: Really, no difference that I could tell.

(Tr. 499-500). In response, Horton claimed that she said Defendant acted differently when he came back the second time, that's the statement she had given, and she was not changing it. (Tr. 500). When asked if she would agree that the above quotation was what the transcript from 1993 said, Horton replied, "If that's the way you want to take it." (Tr. 500).

Defense counsel further cross-examined Horton on the absence of pets in Victim's trailer to explain the hair evidence found on Victim's body, the timeline of prior statements she had given to the highway patrol concerning Defendant's first visit to her trailer, and the lack of visible blood on Defendant or in the bathroom (Tr. 495-498).

C. Trial counsel's evidentiary hearing testimony

Trial counsel testified he did not know the importance of whether Defendant was washing his hands for 10 minutes or 4 minutes (PCR Tr. 528-529). He did not know whether Defendant was trying to wash off blood or what he was trying to do (PCR Tr. 528). Defense counsel testified, "No, I do not at this point understand the importance. . . . if that extra 5 minutes was vitally important, I might impeach. If not, I would not." (PCR Tr. 529). In order to be

able to discuss his strategy, counsel would need to see all of Carol Horton's transcripts and his files (PCR Tr. 530).

D. Motion court findings

The motion court found that defense counsel impeached Horton with her prior testimony dealing with Defendant's behavior after he came back from the Victim's trailer and concluded, "That impeachment of Ms. Horton did not appear to have succeeded in affecting the jury's assessment of Ms. Horton's credibility." (PCRL.F. 1014).

The motion court further observed that, at the evidentiary hearing, Defendant failed to carry his burden to prove that trial counsel did not have a strategic reason for not addressing these potential points at trial. (PCRL.F. 1019). "As a result, the court must presume that trial counsel did have a legitimate strategic reason for not making certain inquires during cross-examination. *Jackson v. State*, 205 S.W.3d 282, 285, 290 (Mo. App. E.D. 2006)." (PCRL.F. 1019).

The motion court held:

Trial counsel in this case were both well experienced and well prepared. They had reviewed the previous testimony of the witnesses, including their testimony in post-conviction proceedings. They expressed a desire to get certain witnesses off the stand as expeditiously as possible, and to focus on the issues they deemed crucial to the defense. Thus, the

legal presumption that trial counsel had specific reasons for not raising certain issues, or not engaging in specific areas of cross-examination is particularly appropriate in assessing the conduct of Movant's trial attorneys. . . .

(PCRL.F. 1019).

The motion court went on to state:

Movant presented almost no evidence at the hearing that would refute the legal presumption that trial counsel made sound, strategic decisions about the scope of the cross-examination regarding Ms. Horton. Trial counsel had reviewed all previous transcripts and was familiar with the file and the record.

A review of the record and the evidence leaves this Court firmly convinced that Movant was not prejudiced by the alleged failure of defense counsel to establish these inconsistencies. Because of the passage of time, it is reasonable to expect that minor details of the events of that day will be forgotten or remembered slightly different.

Trial counsel states their strategy was to focus on the important details and not on every single discrepancy that was not significant to their defense. Such a strategy was sound and trial counsel were effective in their representation of the Movant.

(PCRL.F. 1021-1022).

E. Motion court's findings not clearly erroneous

These findings are not clearly erroneous. Trial counsel impeached Horton on the change of demeanor and the jury was aware that Defendant claimed to have been washing a car, and that he asked Horton to drive him to his car, which was then located at "Fast Track." The decision not to impeach on whether Defendant spent 4 minutes in the bathroom washing his hands or 10 was based on trial strategy and would not have provided a viable defense.

Trial counsel's testimony dove-tailed with defense strategy and such strategy decisions, made after a full review of past transcripts are "virtually unchallengeable." *Strickland*, 466 U.S. at 690-691. "Trial counsel's decision as to the extent of the impeachment of a witness is a matter of trial strategy." *Davidson v. State*, 308 S.W.3d 311, 317 (Mo. App. E.D. 2010), citing *White v. State*, 939 S.W.2d 887, 897 (Mo. banc 1997). "In virtually every case, the extent of cross-examination must be left to the judgment of counsel." *White*, 939 S.W.2d at 897; *Davidson*, 308 S.W.3d at 317. To establish ineffective assistance for counsel's failure to impeach a witness, the movant must show that the impeachment of the witness would have provided the defendant a viable defense or otherwise changed the outcome of the trial. *Black v. State*, 151 S.W.3d 49, 55 (Mo. banc 2004); *Davidson*, 308 S.W.3d at 317.

Here, there was neither deficient performance nor prejudice where counsel chose not to impeach on small matters of minutes where the handwashing was

unquestionably more lengthy than normal. The impeachment would not have provided a viable defense or otherwise changed the outcome of the trial.

Defendant was not prejudiced in light of the other evidence of guilt. The evidence established that Defendant had unexplainable medium or high-velocity blood spatter of the Victim's blood on his shirt, as well as medium or high-velocity blood spatter on his jeans, each explainable by the attack but not by any of Defendant's three shifting explanations. Defendant had Victim's blood on his boot. A check made out to Defendant dated that day by the Victim but uncharacteristically never recorded in her checkbook was found just blocks from the murder scene, a check which Defendant had gone to the scene to receive. Defendant was the last person known to be inside the trailer between the time Victim was last seen alive and the discovery of her body, he answered her phone but did not put Victim on as requested by the caller during the window of the attack, and he washed his hands for a suspicious length of time and had a marked change of demeanor after returning from her trailer. Defendant, in a "very strong" voice tried to dissuade Carol Horton from going to Victim's trailer after the murder. Defendant walked around the location and banged on the portion of the trailer where the body was located when purporting to try to rouse Victim. Once inside, Defendant knew to warn Victim's granddaughter multiple times not to go down the hallway where Victim's body was discovered. Defendant initially lied to police about having returned a second time to the

trailer during the time frame of the murder. Once in jail, Defendant threatened a female inmate by asking whether she knew what he was in for, and threatened to “kill [her] like he killed that old lady.”¹⁰

Point VII should be rejected.

¹⁰ The trial can also be relied upon as having produced a just result because the evidence at the evidentiary hearing established that even an expert consulted by the defense at a forum designed to save people from the death penalty found there were three kinds of bloodstains on Defendant’s clothing and boot, which were not consistent with Defendant’s account of how he acquired them.

VIII.

The motion court did not clearly err by denying, after an evidentiary hearing, Defendant's claim that trial counsel was ineffective for failing to object to a portion of the State's rebuttal argument during the guilt phase explaining why Debbie Selvidge did not corroborate Defendant's claim that Victim's blood was transferred from her when he ostensibly pulled her away from the body because declining to object is presumptively trial strategy. Defendant's theory at closing argument was not that the blood was transferred from Selvidge, but rather that Defendant got blood spatter on him by slipping and contacting the bloody bed sheet. Moreover, there was no prejudice because there was no blood on Selvidge to transfer, no evidence that anyone made contact with the body or blood when the body was discovered, and uncontroverted testimony from a blood spatter expert established that merely making contact with the bloody bedspread could not have caused the high to medium-velocity blood spatter on Defendant's clothing.

Defendant contends that the motion court clearly erred by denying his claim that trial counsel was ineffective for failing to object to the prosecutor's rebuttal argument concerning witness Debbie Selvidge's statement to Officer Isringhausen about Defendant pulling her out of the room when the body was

discovered because he contends a representation about the statement was erroneous and his “defense was built around establishing the small amount of blood on his clothing was transfer from pulling Selvidge away and Bradley’s argument repudiated [sic] that explanation.” Brief for Appellant at 121.

Defendant confuses his theory at previous trials with his theory at this trial, which was that Defendant acquired the blood spatter by slipping and making contact with the bloody bed spread, not transfer from alleged contact with Selvidge (Tr. 1034). Defendant failed to overcome the presumption that the failure to object was strategic because the argument did not address Defendant’s theory at this trial. Moreover, there was no prejudice where there was no testimony that Selvidge had any blood on her to transfer, and the expert testimony ruled out all three of Defendant’s explanations for how the medium to high-velocity blood spatter got on his clothing (i.e., the one to his counsel, the one at previous trials, and the one at this trial).

A. The disputed rebuttal argument

The disputed portion of the State’s rebuttal argument, in context, was as follows:

Walter Barton claimed originally to Hodges that he slipped, and remember this, he never talked about having blood on him until he went to the law enforcement facility and the trained law enforcement people noticed the blood. You saw the jeans. You saw the boots. You saw the

shirt. The shirt looks dirty, quite frankly, and time has faded some of it, but none of the witnesses before they went to law enforcement ever saw blood. Not the lady he went over to have dinner with. None of them did, but the trained law enforcement saw it, and after they saw it, they asked him about it, and he had to come up with a story. He thought quick on his feet. I slipped in the blood. I was pulling the lady back. The witnesses all testified he never went in the room.

Now, the one witness, Debbie - - Carol Selvidge {sic} got confused. She did tell Hodges the night of the murder when she's upset that her grandmother had just been murdered that, yeah, that's probably what happened. The next day, she told Cpl. Isringhausen at the time, no, he never pulled me back. He got blood on himself and didn't know he had, and then he is trying to cover for it.

(Tr. 1049-1050).¹¹

Defendant contends that Selvidge did tell Isringhausen that Defendant pulled her back. The motion court found that the prosecutor was correct in arguing that Selvidge's statement to Officer Isringhausen was different from her

¹¹ Defendant made no claim on direct appeal that this argument constituted error. (PCR Tr. 150). Debbie Selvidge testified twice that her original statement to Officer Hodges was made "under duress" (Tr. 523, 526).

statement to Officer Hodges the night before, that there was no intention to mislead the jury, that trial counsel was not ineffective for failing to object because it was based on sound trial strategy, and that Defendant was not prejudiced in light of the fact that the cited statement to Officer Isringhausen did not relate to whether Defendant pulled Selvidge away from the body, but merely to whether he pulled her out of the room.

In any case, Defendant was not prejudiced in light of the overwhelming evidence of guilt, including that Defendant could not have acquired the Victim's blood spatter on his clothing in that manner, and uncontroverted trial testimony that Defendant was neither in proximity to Debbie Selvidge, nor near the blood in the room when Victim's body was discovered.

B. Standard of review

The standard of review for claims of ineffective assistance of counsel is as outlined under Point I.

Ineffective assistance of counsel is rarely found in cases where trial counsel has failed to object. *Johnson v. State*, 330 S.W.3d 132, 139 (Mo. App. W.D. 2010). To establish a claim of ineffective assistance of counsel for failure to object, a movant must show: (1) that the objection would have been meritorious and (2) that the failure to object substantially deprived the movant of his right to a fair trial. *Jackson v. State*, 205 S.W.3d 282, 288 (Mo. App. E.D. 2006).

Counsel is not ineffective for failing to make non-meritorious objections. *Storey v. State*, 175 S.W.3d 116, 132 (Mo. banc 2005); *Strickland*, 466 U.S. at 687.

Seasoned trial counsel often decline to object for strategic purposes. *Jackson v. State*, 205 S.W.3d at 288. They fear that frequent objections irritate the jury and highlight the evidence complained of, resulting in more harm than good. *Id.* There is a presumption that the failure to object was a strategic choice made by competent counsel. *Id.* An omission is presumed to be trial strategy. *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009).

C. Motion court findings

The motion court found:

Movant also claims that trial counsel. . . should have objected to the State's closing argument that Ms. Debbie Selvidge stated only once that she had been pulled away from the victim's body. (2006 Trial Tr. 1050). Movant makes a strained argument that Prosecutor Bradley intentionally misstated the evidence. Ms. Selvidge told Office Hodges the night of the murder that Movant pulled her away from the victim's body (Tr. 542). She later told Cpl. Isringhausen that Movant merely pulled her back "from the room" (Tr. 747). The distinction is significant and clear. Just as clear is the fact that the Prosecutor was arguing this distinction to the jury, and was not misleading the jury. It is for this reason that Movant's trial counsel did not object. While present in the courtroom and hearing the

argument, defense counsel did not see it as objectionable because the argument could not be reasonably interpreted in the manner Movant asserts in his amended motion.

(PCRL.F. 989-990).

The motion court further observed:

Mr. Kessler testified that although he does not remember much about this case, he did have a strategic reason for the decisions he made, including whether or not to make objections. He has been a criminal defense attorney for 30 years and has litigated approximately 20 capital murder cases.

(PCRL.F. 1001).

The motion court found:

The real issue was whether Movant may have gotten the victim's blood on his clothing when he reached down and pulled Ms. Selvidge from the victim's body, as he told the police when interviewed. (Tr. 672).

The issue was not whether Movant pulled Ms. Selvidge from the room, but rather he pulled her back from the victim's body. What Isringhausen testified to was that Ms. Selvidge told him "that she did not get past Gladys Kuehler's feet but kind of bent over, and, at that time, she was pulled back from the room by Walter Barton." (Tr. 747).

The Court does not believe that the State intentionally misstated the evidence and does not believe the argument was improper. It was obviously not perceived as a misstatement of the evidence by Movant's trial counsel, since no objection was made. As Mr. Kessler stated, the usual remedy to an objection would have been an instruction to the jury that they will be guided by the evidence. This Court believes that in the context of the argument and the facts, the jury understood that the State was arguing that Ms. Selvidge had told Officer Isringhausen that Movant had not moved her back from the Victim's body.

(PCRL.F. 1007-1008).

D. Motion court's findings not clearly erroneous

The cited portion of Office Isringhausen's testimony alleged to be inconsistent with the rebuttal argument, in context, was as follows:

A. [Selvidge] told me that she went down the hallway first followed by Carol Horton who was followed in turn by Walter Barton. She told me that she did not get past Gladys Kuehler's feet but kind of bent over, and at that time, she was pulled back from the room by Walter Barton.

Q. Did she get any blood on her clothing?

A. She told me she did not.

Q. Okay. Did she mention whether anybody had fallen in that room?

A. She said nobody had fallen. The rest had remained behind her.

(Tr. 747).¹²

Trial counsel Brad Kessler testified at the motion hearing that if he had objected to the prosecutor misstating the evidence, the judge would then say “the jury will recall what the evidence is.” (PCR Tr. 448). Kessler further testified that Prosecutor Mike Bradley “was somebody who I don’t think could even foster the intent to try to mislead or do something, so probably he would get more slack from us.” (PCR Tr. 499).

Kessler further testified at the evidentiary hearing that he listens for things during closing argument that are objectionable, but doesn’t always object (Tr. 494-495). He factors in whether it is significant and makes conscious decisions to object or not object (Tr. 495-496). “You are on hyper-alert, and so if

¹² Officer Isringhausen did volunteer on cross-examination that he was aware of the statement made the night before that Selvidge said she had been pulled away from the body while being bent over and volunteered, “She told me that she had been pulled away from the body.” (Tr. 748). However, the testimony as to the manner in which she was pulled away from the body establishes the Defendant was never in a position to acquire blood either by falling (he did not), or by transfer from Selvidge, who had no blood on her. Nor would such a transfer stain produce the tiny spots of medium- to high-velocity blood spatter observed on Defendant’s clothes, according to the expert testimony.

you hear something that's objectionable and you didn't object, you had a reason at the time for not objecting." (Tr. 498). Kessler factored in whether it would hurt him, whether or not it was significant, and things like that (Tr. 499). Kessler also pointed out, in the context of discussing an issue concerning a potential objection relating to the opening statement, that when you object and ask for relief, "you run the risk of highlighting it. I mean, it's just like asking somebody to strike something from the record. You know it's not really stricken, and then the Court says I want you to strike the last statement in which the witness just said whatever and then they hear it a second time, so I guess it's a matter of trial strategy if someone wants to highlight it for the jury." (PCR Tr. 444).

Moreover, Defendant was not prejudiced and the outcome of the trial can be relied upon as just where Defendant has changed his story multiple times about how he acquired the blood. Kessler testified that Defendant's story to his counsel was as follows:

I mean, you have to go on what he tells you, so his theory of the case was I didn't kill her, and if there's blood on me, which by that time he knew from other trials and proceedings that there was testimony and there was going to be testimony that there was blood on him, that this is how I got it. I went in. I went to this side of the bed. I touched her. She was cold or whatever. I ran out and I didn't do it.

(PCR Tr. 487-488). Defendant's version of events to his attorneys, therefore, was not that he acquired the blood by contact with Selvidge while pulling her out of the room.

Nor was the argument that Defendant acquired the blood by contact with Selvidge the theory that the defense argued in closing to the jury. By then, Defendant contended that he acquired the blood by slipping, as he told Officer Hodges, and Defendant added during closing argument the contention that the evidence was consistent with Defendant making contact with the bloody bedspread after slipping (presumably to account for the medium to high-velocity spatter). (Tr. 1034).

However, even this theory, which at least attempted to address the spatter problem, was not supported by the evidence at trial. Blood spatter expert William Newhouse's uncontroverted testimony was that:

The small grouping of bloodstains on that T-shirt would not have been created by contact. . . . Something had to break the blood up into these tiny little drops to create these tiny little stains and that requires the energy be applied to the source of the blood. In other words, a blow had to have been struck to the Victim or to something that was bloody, something that was already bloody, and created that blood spatter pattern.

(Tr. 891-892).

Expert Newhouse further testified that hitting a hand on a blood-drenched bed spread would not create the size of stains that were found here (Tr. 892). The same amount of force applied to something that has blood on it would not recreate blood from the stabbing (Tr. 893). Newhouse had taken the opportunity to perform just exactly these kinds of experiments, including performing blows onto a bloody quilt or a blood pool on a carpet and created blood spatter and blood stains in exactly that way (Tr. 893-894). There is no way Defendant could create that with his fist, foot, knee, or in any way applying energy to those two kinds of sources of blood and create as bloodstains as tiny as were found on his clothing, particularly without creating much larger stains because it takes more energy than that and more focused energy (Tr. 894-896).

Because the failure to object was reasonable trial strategy in the context of the argument (which did not go to the defense theory at the time of closing argument that Defendant slipped and hit the bloody bed spread with his hand, propelling spatter onto his T-shirt), because the jury was properly instructed that argument is not evidence, and because the evidence supported only a conclusion that Defendant had medium to high-velocity blood spatter on him which could not have been obtained during the period in which the body was discovered, Defendant's claim lacks merit.

Moreover, Defendant was not prejudiced in light of the overwhelming evidence of guilt. The evidence established that Defendant had medium or high-

velocity blood spatter of the Victim's blood on his shirt, as well as medium or high-velocity blood spatter on his jeans, each explainable by the attack but not by any of Defendant's three shifting explanations. Defendant had Victim's blood on his boot. A check made out to Defendant dated that day by the Victim but uncharacteristically never recorded in her checkbook was found just blocks from the murder scene, a check which Defendant had gone to the scene to receive. Defendant was the last person known to be inside the trailer between the time Victim was last seen alive and the discovery of her body, he answered her phone but did not put Victim on as requested by the caller during the window of the attack, and he washed his hands for a suspicious length of time and had a marked change of demeanor after returning from her trailer. Defendant, in a "very strong" voice tried to dissuade Carol Horton from going to Victim's trailer after the murder. Defendant walked around the location and banged on the portion of the trailer where the body was located when purporting to try to rouse Victim. Once inside, Defendant knew to warn Victim's granddaughter multiple times not to go down the hallway where Victim's body was discovered. Defendant initially lied to police about having returned a second time to the trailer during the time frame of the murder. Once in jail, Defendant threatened

a female inmate by asking whether she knew what he was in for, and threatened to “kill [her] like he killed that old lady.”¹³

Defendant’s eighth point should be rejected.

¹³ The trial can also be relied upon as having produced a just result because the evidence at the evidentiary hearing established that even an expert consulted by the defense at a forum designed to save people from the death penalty found there were three kinds of bloodstains on Defendant’s clothing and boot, which were not consistent with Defendant’s account of how he acquired them.

IX.

The motion court did not clearly err by denying Defendant's claim, after an evidentiary hearing, that trial counsel was ineffective for failing to call Dr. Merikangas to testify that Defendant has brain damage that predisposes him to violent impulsive acts because counsel testified that the decision not to call this witness was trial strategy in that they did not want the jury to think Defendant was violent and capable of committing the murder and Defendant did not want the witness called. Furthermore, the trial strategy was reasonable where the witness's testimony was found not to be persuasive by the motion court and had failed to save Defendant from the death penalty on multiple prior occasions.

Defendant contends that trial counsel was ineffective for failing to call Dr. Merikangas during penalty phase to testify that Defendant has brain damage that adversely impacts his intellectual abilities and predisposes him to violent impulsive acts. Dr. Merikangas had testified at multiple previous proceedings in which Defendant had been given the death penalty despite his testimony.

The standard of review for an ineffective assistance of counsel claim is as outlined under Point I. Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006) (quoting *Strickland*, 466

U.S. at 690); *McLaughlin v. State*, 378 S.W.3d 328, 377 (Mo. banc 2012). Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. *Deck v. State*, 381 S.W.3d 339, 346 (Mo. banc 2012).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense. *Id.* Because Defendant is challenging counsel's failure to call certain witnesses during the penalty phase, a "viable defense" is one in which there is a reasonable probability that the additional mitigating evidence that witness would have provided would have outweighed the aggravating evidence presented by the prosecutor, resulting in the jury voting against the death penalty. *Id.*

The motion court was free to believe or disbelieve any evidence, whether contradicted or undisputed. *Mendez v. State*, 180 S.W.3d 75, 80 (Mo. App. S.D. 2005).

The motion court found that trial counsel was not ineffective for failing to call this witness at trial and that the witness would not have been credible to a jury (PCRL.F. 995, 1026). The court found Brad Kessler's testimony--that he did

not want to do things that had been done before and failed--to be credible and that it reflected a sound trial strategy (PCRL.F. 1002). The motion court found:

Trial counsel had access to Dr. Merikangas' previous testimony, including his deposition in the post-conviction proceeding. The decision not to use Dr. Merikangas was a deliberate, strategic decision based on a number of factors. First, Movant did not want his defense attorneys to call Dr. Merikangas. Second, Movant did not want to assert an insanity defense. Third, Dr. Merikangas had not been persuasive in the previous trials. This Court has already noted some of the shortcomings in Dr. Merikangas' testimony . . . It is worth repeating . . . that his claim that Movant was unable to understand the wrongfulness of his conduct, but only while committing the murder, was particularly unbelievable and unpersuasive, and seemed to defy common sense and logic. A jury would not be persuaded.

(PCRL.F. 1026).

Defense counsel David Bruns testified that Dr. Merikangas had not been persuasive previously and that he did not want to have the jury hear about Defendant having an "irresistible impulse" to commit violent acts in the penalty phase (PCRL.F. 1024). Bruns testified that the primary focus of the defense in the penalty phase was to emphasize any "residual doubt" the jury might have had about Defendant's guilt considering the strength of the State's case. The

defense was also concerned about opening certain doors in the penalty phase as well (PCRL.F. 1003).

It appears that Dr. Merikangas' opinion that some unknown event or trigger caused an "extreme mental disturbance" at the time of the murder is pure speculation on his part. Dr. Merikangas was not persuasive when he testified in 1998, and there is no reason he would have been persuasive in 2006. In addition to the factual errors of the witness, any discussion about Movant adjusting well in a prison environment opens the door to testimony that Movant escaped while in prison.

(PCRL.F. 995).

The motion court found that Dr. Merikangas had made significant factual errors, including the following:

Dr. Merikangas' report from 1995 was admitted into evidence. (Exhibit 231). There are some errors in the report. Dr. Merikangas reported as a result of the altercation in 1974, Movant "was in a coma with perhaps three or four weeks hospitalization." The hospital records (Exhibit 232) indicate a "concussion" but no coma, and that Movant was in the hospital for observation for four (4) days.

(PCRL.F. 993-994).

The motion court also noted:

Surprisingly, Dr. Merikangas “predicts” that Movant’s impulsiveness causes him to have a violent temper and lose control. This testimony is inconsistent with the testimony from Patricia Barton and Leslie Julius that Movant was always peaceful and never lost his temper, even when a family conflict resulted.

(PCRL.F. 994).

Dr. Merikangas purported to believe based on MRI results that Defendant had both congenital brain damage and acquired brain injury from a fight he initiated in 1994, and that this might affect a person’s ability to plan and make decisions. However, the motion court found:

. . . at the 1998 trial, Dr. Merikangas gave the following testimony:

Q. Doctor, we’ve talked an awful lot here about could have or maybe or consistent with. The fact is you don’t know with certainty what impact this damage had on this man, do you?

A. I don’t.

(1998 Trial Tr. 1074-1075).

(PCRL.F. 994).

The motion court further noted that at the 1998 trial, defense counsel made a record by calling Defendant to testify that they did not ask Dr. Merikangas questions about Defendant’s responsibility for the crime because Defendant expressly instructed them not to do so (1998 Trial Tr. 1077-1079);

(PCRL.F. 994-995). In fact, Defendant had claimed to Dr. Merikangas that he did not commit the crime and Dr. Merikangas had no information about the crime or the actions of Defendant, and while he testified this does not impact his ability to determine whether Defendant was acting impulsively, this assertion “simply is not credible.” (PCRL.F. 994-995).

The motion court concluded:

. . . Movant failed to present any evidence that he suffered from “brain damage” to the extent that he was not qualified for the death penalty. Indeed, trial counsel testified that the decision not to call Dr. Merikangas was a strategic decision, based in part upon Movant’s express desire to not have Dr. Merikangas testify. Coupled with the fact that Dr. Merikangas’s previous trial testimony did not avoid a sentence of death, the strategic decision by trial counsel was not ineffective representation. (PCRL.F. 1018).

The motion court observed that “trial counsel in this case were experienced in defending capital cases and well-qualified to assess the case and whom to contact as potential witnesses.” (PCRL.F. 1026). The conscious trial strategy decision of experienced capital defense lawyers in this case is “virtually unchallengeable.” *Strickland*, 466 U.S. at 690-691.

Moreover, it was reasonable. The motion court held that Dr. Merikangas would not have been credible to a jury. Counsel had learned from previous trials

that Dr. Merikangas's testimony would not save Defendant from the death penalty. *See, Middleton v. State*, 80 S.W.3d 799, 809 (Mo. banc 2002) (additional testimony of mother in previous trial had not saved defendant from the death penalty, thus trial strategy was reasonable). Defendant himself did not want Dr. Merikangas called,¹⁴ and Brad Kessler testified that Defendant had informed Merikangas that he could not have committed an earlier crime of which he had been convicted because, if he had, he would have killed the victim. The decision not to open the door to such testimony was hardly deficient performance. *McLaughlin v. State*, 378 S.W.3d 328, 343 (Mo. banc 2012) (counsel not ineffective for failing to present the testimony of psychiatrist due to existence of impeaching evidence that may have harmed the defense's case).

This crime was so gruesome that no defendant who committed such a crime was likely to escape the death penalty unless there was residual doubt on the part of the jurors. The last thing experienced capital defense counsel wanted was for the jury to believe that Defendant was prone to violent impulsive acts, which would strengthen its conviction that Defendant was guilty of the crime

¹⁴ Defendant cannot invite error and then complain of it on appeal. "It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Mayes*, 63 S.W.3d 615, 632 n. 6 (Mo. banc 2001), *quoted in State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012).

and that future such acts could only be avoided by sentencing him to death. *See, id.*

Point IX should be rejected.

X.

The motion court did not clearly err in denying Defendant's claim, after an evidentiary hearing, that counsel was ineffective for failing to present additional mitigating evidence from multiple family members to describe his home environment growing up and his impulsive behavior following his skull fracture because this was a reasonable trial strategy endorsed by the Defendant. Many of the family members were no longer close to Defendant and some thought he had already been executed. Moreover, Defendant's trial strategy at penalty phase was not to remove any residual doubt or lend credence to a view of Defendant as prone to violence as the result of his past. Instead, counsel put on multiple witnesses who were still close to Defendant, who cared about him, and who discussed the value he brought to their lives. Moreover, Defendant was not prejudiced in that the motion court found that the omitted witnesses were not compelling, and the suggested approach had been tried multiple times in the past yet Defendant had still received the death penalty due to the heinous nature of the crime and two other violent attacks upon women that preceded it.

Defendant contends that trial counsel was ineffective for failing to call multiple family members to discuss his home environment growing up and his

impulsivity following his skull fracture. Counsel testified that this was a matter of trial strategy, particularly in light of the fact that some of these witnesses had not saved Defendant from the death penalty before and Defendant did not want them called.

The motion court agreed:

. . . most of [these witnesses] had testified in previous trials, trials that resulted in a death sentence. The trial attorneys had concluded that they did not want to use witnesses who had not been persuasive in the past. This is not an unwise or unsound strategy. Movant also told his attorneys that he did not want anyone “begging for his life.”

The Court has noted the testimony of these witnesses offered at the hearing by the Movant. None of these witnesses offered any compelling evidence or information that would have altered the outcome of the trial. (PCRL.F. 1027-1028).

Specifically, the court found Brad Kessler’s testimony “to be credible and finds that he did not render ineffective assistance to Movant. Mr. Kessler was prepared for trial and his decisions were a matter of sound trial strategy.” (PCRL.F. 1001). Decisions were made after discussion among counsel about what evidence to present in the penalty phase (PCRL.F. 1004).

These findings are not clearly erroneous. Kessler testified:

We respected [Defendant's] wishes. . . . I don't know, then, why we would call the three that we called other than he would have said, okay, call them, but he didn't want anybody. You have got to remember, this guy has been on death row for thirteen years or something already. I mean, this is not a guy who didn't know what he wanted. You can say anything you want about, you know, his mom took presents or whatever, but this guy knew what he wanted. He was not someone that was mentally incompetent to tell you what he wanted . . . he did not want to have people coming in and whining and begging for his life.

(PCR Tr. 482-483).

Kessler further testified, "If we didn't call them, they weren't called because he didn't want them called." (PCR Tr. 483). "It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Mayes*, 63 S.W.3d 615, 632 n.6 (Mo. banc 2001), *quoted in State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012).

Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. *Deck v. State*, 381 S.W.3d 339, 346 (Mo. banc 2012).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) counsel knew or should have known of

the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense. *Id.* Because Defendant is challenging counsel's failure to call certain witnesses during the penalty phase, a "viable defense" is one in which there is a reasonable probability that the additional mitigating evidence that witness would have provided would have outweighed the aggravating evidence presented by the prosecutor, resulting in the jury voting against the death penalty. *Id.*

The motion court was free to believe or disbelieve any evidence, whether contradicted or undisputed. *Mendez v. State*, 180 S.W.3d 75, 80 (Mo. App. S.D. 2005). The determination of a witness' credibility is for the trial court and appellate courts must defer to it. *Kalter v. State*, 617 S.W.2d 93, 94 (Mo. App. E.D. 1981).

These witnesses would have negatively impacted Defendant's trial strategy, which was to raise no suggestion that Defendant was capable of the crime or eliminate "residual doubt."

Juanita Branan (an aunt) testified that after Defendant was beaten up at school, "he was like Dr. Jekyll and Mr. Hyde. It took very little to make him mad, and I mean really mad, to the point he would hurt you. . . .something would snap in him. It was just like, like I said, Dr. Jekyll and Mr. Hyde. A calm person here and a monster over here. And it didn't take just a matter of seconds

to change. Just (witness snapping fingers) like that.” (Ex. 216, Branan Depo. at 13). Branan further testified “that you could be talking to him and he will get really - - it’s just like a Dr. Jekyll and Mr. Hyde. He’ll change. But it may, not necessarily something that you’ve said, it’s just something that maybe has happened before.” *Id.* at 24. Branan testified that after he got his head injury, “then he just did a flip flop. Dr. Jekyll and Mr. Hyde. Which scared because, I mean, like I say I was close to Walter, and it scared me to death.” *Id.* at 29.

Moreover, Branan testified that despite being out of prison, Defendant failed to attend his own mother’s funeral despite having told family members he would be there. *Id.* at 15.

Branan admitted that had she been called at trial, she would have testified that his personality changed suddenly from time to time. *Id.* at 23. While she initially claimed that Defendant had never hurt anybody else that she knew of, she admitted under cross-examination that she was aware that he had been in prison for assault before. *Id.* at 23. She had told a previous attorney that Defendant had a real bad temper. *Id.*

Branan’s knowledge of Defendant’s home life was limited. She lived most of the time in Kennett, Missouri growing up, whereas Defendant’s family lived in Arkansas, so most of her knowledge was based on visits and what other people had told her. *Id.* at 27. Finally, she testified that most of the abuse she was aware of was mental or verbal rather than physical. *Id.* at 25.

The failure to call such a witness, whose testimony not only did not unqualifiedly support Defendant, but affirmatively undermined any claim that Defendant was not capable of the crime or would not repeat the crime did not constitute ineffective assistance of counsel. *Wilson v. State*, 226 S.W.3d 257, 261-262 (Mo. App. S.D. 2007), quoting *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002) (“When defense counsel believes a witness’ testimony would not unequivocally support [the] client’s position, it is a matter of trial strategy not to call him, and the failure to call such witness does not constitute ineffective assistance of counsel”).

Marie Johnson, Defendant’s aunt, admitted that her claim that Defendant’s grandmother was bipolar “was never diagnosed.” (Depo. of Marie Johnson at 7). Johnson had no information whatsoever about Defendant’s head injury in high school. *Id.* at 22. She had had no contact with Defendant since the first time he went to prison until recently. *Id.* She thought Defendant was dead. *Id.* at 23. Defendant had only recently begun initiating telephone conversations the previous year, and they took place about once a week. *Id.* at 31-32. “But recently, he hasn’t called very much.” *Id.* at 32. Johnson was living in Michigan and usually stayed with her brother rather than with Defendant’s mother on visits. *Id.* at 29-30. The last time she had seen Defendant was when he was a teenager. *Id.* at 31. The last summer Johnson had spent with Defendant’s family, Defendant was a pre-schooler. *Id.* at 29.

Moreover, Johnson's testimony would have contradicted that of other witnesses that Defendant purports to now believe should have been called, as will be set forth below. While Johnson testified that Defendant's mother either ignored the children or was ranting and raving and yelling at them and hit them with whatever was nearby, she testified that Defendant's father was "very quiet." *Id.* at 14, 16.

Johnson also testified that Defendant never exhibited any anger toward anything or anyone as a child, and that when she talks to him, "he's a complete innocent still. . . .And I don't see any anger in him even now. I mean, when I talk to him, the things that happened to him, he doesn't blame anyone, you know." *Id.* at 21, 24.

Joyce Rogers is Defendant's maternal aunt by marriage (Ex. 213 at 1). Her affidavit admitted that she had been contacted by two sets of attorneys and an investigator previously, and that the latter set had taped her statement and asked her to go to court, but she had said that she would not be able to help them because her husband was sick at the time. *Id.* at 7. Apparently in an attempt to explain why there were additional allegations in her present affidavit versus her previous statement, Rogers claimed that she did not talk as openly with those people as she did with Defendant's current social worker because they did not take the time to sit down and talk with her at length and ask the same questions. *Id.*

Most of Rogers' affidavit is hearsay. *See, id.* at 1-7. Rogers stated that Defendant's mother "rarely whipped them around me because she knew that I did not approve of that form of discipline." *Id.* at 3-4. Rogers did not know anything about the head injury that Defendant had which required him to be hospitalized. *Id.* at 5. She did profess to know about another head injury suffered when he was beat up at school in the high school parking lot. *Id.* at 5-6. Rogers had not seen Defendant in years until he came to visit her about six or seven years ago just before he was arrested for the offense of which he is now convicted. *Id.* at 6.

Barton's younger brother, Robert, admits in his affidavit that he did not tell a previous investigator about their mother's alleged behavior. (Ex. 218 at 2). As with Branan, his testimony would have undermined the trial strategy to avoid suggesting the Defendant was capable of violence. Robert Barton's affidavit states, "Walter stayed mad after his head injury. After his head injury, it seemed like he was always getting into scrapes and fights. It seemed to me that Walter got angry faster and lost his cool faster than he had before his head injury." *Id.* at 3.

In contrast to the claims of some other suggested witnesses that only their mother hit them, Robert Barton's affidavit claims that both parents whipped them with a variety of things. *Id.* at 4.

Robert Barton admits that he testified at Defendant's previous trial and that he spoke with an investigator two or three different times, but contends that he provided more information to the present investigator because she took the time to listen to him and explain things to him. *Id.* at 5.

In contrast to other witnesses, Mary Reese, Defendant's aunt, testified that Defendant's father was stricter than his mother and disciplined him with a belt. (Ex. 217 at 9). She admitted that she wasn't around too much after Defendant got hurt with a bat at school when he was about eighteen. *Id.* at 15. She didn't know or didn't remember too much about his head injury, she just knew he got in trouble in school. *Id.* at 16-17. She had not seen Defendant in person since the first time he went to prison. *Id.* at 17. Her contact with him had been through letters, but she hadn't heard from him in a while, probably a year or more. *Id.* at 17-18. She had previously done an affidavit but had never been physically present at any of his hearings. *Id.* at 18-19. She had been contacted by and had talked to Defendant's prior attorneys. *Id.* at 19-20.

Ralph Barton, Jr., Defendant's older brother who is closest in age to him among the siblings, testified by phone deposition. In stark contrast to the other proposed witnesses, Ralph, Jr. testified that their dad was strict but their mother "tried to be strict but she was more on the liberal side than she was strict." (Ex. 219 at 7). Ralph testified, "She tried to be strict but we'd call her bluff when we were kids and pretty well got away with what we wanted to. I

mean, honestly that's it." *Id.* at 7. Such testimony would have significantly undermined any suggestion sought to be created through other witnesses that Defendant's series of brutal, misogynistic attacks were the result of issues with females created by his mother's harshness during childhood.

Ralph was overseas in the military when Defendant got his head injury. *Id.* at 7-8. Ralph had left home when Defendant was 16. *Id.* at 8. When Ralph returned home, Defendant had already left and gone into the military. *Id.* at 8. Ralph testified that Defendant came to see him after he got out of prison "and he came to my house and then he went back to Missouri and got hisself in trouble again, I guess." *Id.* at 9. He came to Ralph's house for about a week and then left and went back to Missouri and he didn't see him again before he went back to prison and had not had much contact with him since. *Id.* at 10-11. He had not seen Defendant in 10 to 12 years. *Id.* at 11. In fact, Ralph had believed that Defendant had already been executed. *Id.* at 11-12.

Defense counsel's decision not to call family witnesses who would have given conflicting versions of alleged discipline problems in the household growing up, and who either had little or no knowledge of Defendant's head injury or contended that it turned him into a person with a violent temper who could erupt at any moment was reasonable trial strategy. Clearly, Defendant was not close with these family members, some of whom believed he was already dead.

Instead, counsel chose to call the three people Defendant had remained close to, who had the most current knowledge of his character, to testify to the positive characteristics they had more recently observed and to the value he brought to their lives.

As in *Deck v. State*, 381 S.W.3d 339 (Mo. banc 2012), the defendant's claims that his mother "neglected the children because she was busy pursuing sexual relationships with various men" and "would even have sex in her car in front of the children" and testimony from various relatives who clearly had no strong bond with him is insufficient proof in mitigation to demonstrate that "their testimony would have outweighed the aggravating evidence so that there was a reasonable probability the jury would have voted for life." *Id.* at 347, 349. "These witnesses' testimony was so lacking in substance that it would not have had an impact on the jury in their decision." *Id.* at 349. "The motion court did not clearly err in finding that these . . . witnesses' testimony would not have been compelling." *Id.*

Because the choice of witnesses is a matter of broad discretion for counsel in accordance with trial strategy, because the motion court properly found the choices in this case were insisted upon by the same Defendant who now wishes to benefit by claiming they were error and were sound trial strategy, and because the evidence would not have established a viable defense and Defendant was not prejudiced, Defendant's tenth point should be rejected.

XI.

The motion court did not clearly err by denying Defendant's claim, after an evidentiary hearing, that counsel's penalty phase closing argument was ineffective because counsel did not argue Defendant's "mitigating, redeeming qualities warranting life" rather than urging the jury not to lower themselves to his level by imposing death. Counsel chose a reasonable strategy informed by his extensive experience in capital defense and, in the face of the most horrific facts and Defendant's repeated acts of unprovoked, sadistic violence towards women, made an effective closing argument that emphasized Defendant's value to his witness's and their families' lives, as well as appealing for mercy to the better angels of each juror's nature. Moreover, Defendant was not prejudiced in that Defendant's suggested strategy had resulted in two previous death sentences.

Defendant's eleventh point contends that trial counsel was ineffective because his closing argument did not emphasize his alleged "mitigating, redeeming qualities" but instead urged the jurors not to lower themselves to the level of conduct of the Defendant.

The motion court held that:

Counsel gave the jury reasons why they should not impose death on Movant, asserting that they were better than that. (2006 Trial Tr. 1161).

How to advocate to spare the life of one whom the jury has already determined has committed a horrible murder is, indeed, an extremely difficult decision to make. Trial counsel was, and is, very experienced in making such arguments and his judgment as to how to advocate for Movant was reasonable. Previous arguments, more in line with the position advocated by Movant in his amended motion, were unsuccessful. Trial counsel was not ineffective.

(PCRL.F. 1029).

The standard of review for ineffective assistance of counsel claims is as outlined under Point I. As with other strategic decisions, defense attorneys have some latitude in choosing how to approach a closing argument at a capital sentencing hearing. *See, Hall v. Washington*, 106 F.3d 742, 750 (7th Cir. 1997).

In *Forrest v. State*, 290 S.W.3d 704 (Mo. banc 2009), this Court observed, “By definition, mercy allows more lenient sentences when other sentences are justified.” *Id.* at 716. A simple plea for mercy may be a valid choice, *if* that plea focuses on the particular defendant and the circumstances of the particular offense. *Hall*, 106 F.3d at 750 (italics in original). In *Middleton v. State*, 80 S.W.3d 799 (Mo. banc 2002), counsel argued that multiple death sentences would be excessive, invoked mercy, weaknesses in the State’s evidence, and the effect of drugs on the defendant and communities generally, and this Court

found the argument appropriate in the context of the particular facts of the case and not ineffective. *Id.* at 812-813.

In the case at bar, defense counsel made his appeal for mercy based on the individualized evidence presented in the penalty phase, such as in the following excerpt:

I want to talk to you about what mitigating circumstances are. Mitigating circumstances are things that aren't listed. They are simple human things. Okay? Debbie loves her husband. Debbie's son loves his stepfather. Those are mitigating circumstances. You can find those exist[.] All right? You can find that Lucy loves this man like a son. . . .to suggest that she is not right somehow because she believes this man has a value, that she is somehow inferior, that her feelings of loss are somehow inferior because she loves this man, that is a repugnant stance to take.

(Tr. 1156-1157).

Trial counsel was confronted with a situation in which three juries had found his client guilty of a horrific murder, involving more than 50 stab wounds, bludgeoning, sexual assault, the slicing of the Victim's eyeball while she was alive, and the carving of two X's, one of which was so deep in her torso that it exposed her intestines. In addition, he had to confront the fact that his client had twice attacked other females with violent assaults and threatened to kill a female inmate "like I killed that old lady." The jury was aware of all these facts.

Trial counsel adopted a reasonable mitigation strategy, which was to put on three witnesses who loved the Defendant, including his wife, to testify as to the ways in which his life had value to them, and to the extent of loss they would experience if he were executed. At the same time, he implicitly strove to find one juror who might hold out on the grounds that sentencing the Defendant to death would diminish the juror himself or herself. Counsel testified that he did not wish to repeat prior, unsuccessful strategies, which had resulted in two previous death sentences.

The motion court's finding that trial counsel's strategy was reasonable in this case is not clearly erroneous. *See, Taylor v. State*, 126 S.W.3d 755 (Mo. banc 2004) (Counsel's decision to plead for mercy not ineffective assistance where defendant had revealed damaging information to psychiatrist whom counsel chose not to call at penalty phase). *See also, Deck v. State*, 381 S.W.3d 339, 344 (Mo. banc 2012) ("the choice of one reasonable trial strategy over another is not ineffective assistance").

Defendant's eleventh point should be rejected.

XII.

The motion court did not clearly err by denying Defendant's claim, after an evidentiary hearing, that trial counsel was ineffective for failing to request a mistrial on the basis that three jailhouse witnesses referenced in the prosecutor's opening statement ultimately did not testify because the decision not to highlight the statement was reasonable trial strategy, the jury was instructed that opening statements are not evidence and is presumed to follow the instructions, the State intended to call the witnesses at the time but one invoked the Fifth Amendment and another amnesia prior to testifying, and Defendant was not prejudiced in light of the overwhelming evidence of guilt. Moreover, the motion court's finding that the prosecution was hurt more by the failure to deliver on promises than the defense is not clearly erroneous.

Defendant's twelfth point contends that trial counsel was ineffective for failing to request a mistrial on the basis that three jailhouse informants who were referenced in the prosecutor's opening statement ultimately did not testify. One invoked the Fifth Amendment between the time of opening statement and the time he was to be called after expressing pique at the amount of time he had to wait in the local jail to testify. A second claimed amnesia from a head attack (which Defendant asserts was contrived). It is unclear whether the third also

refused to cooperate or whether the State ultimately decided not to call him because his testimony that the witness who invoked the Fifth Amendment had been threatened by Defendant in response to previous testimony was no longer relevant. In any event, the motion court found that there was no intent by the prosecutor to mislead, a statement that defense counsel, Bradford Kessler, agreed with at the hearing. The court found that the decision was reasonable trial strategy and that there was no prejudice because the jury was instructed that opening statements are not evidence, and is presumed to follow the instructions. Moreover, the motion court found that the failure to call a witness referenced in opening statement is generally harmful to the prosecution rather than to the defense.

The standard of review for a claim of ineffective assistance of counsel is as referenced under Point I.

Appellate review of a trial court's ruling on an objection to remarks made in opening statement is for abuse of discretion. *State v. Thompson*, 68 S.W.3d 393, 395 (Mo. banc 2002); *State v. Hoover*, 220 S.W.3d 395, 401 (Mo. App. E.D. 2007). An appellate court will reverse only if it is probable that the improper comments had a substantial effect on the judgment. *Id.*

The motion court found, "The jury is informed that opening statements are not evidence and the law assumes the jury will follow these instructions." The defense had no way of knowing which witnesses the State would, in reality

actually call at trial.” (PCRL.F. 1027-1028). The motion court further found that Defendant never actually identified what the appropriate objection would be or what relief trial counsel should have requested (PCRL.F. 1027-1028). The motion court observed, “when the State promises the jury that they will hear certain evidence, but that evidence does not materialize, that is usually detrimental to the State.” (PCRL.F. 1027-1028).

The motion court found credible the State’s explanation that the opening statement made reference to the testimony of Mr. Arnold, Mr. Dorser, and Mr. Ellis with the expectation that their testimony would be offered at trial, and that it was only later, during the course of the trial, that the State made a decision not to call these witnesses (PCRL.F. 1027-1028). The court credited counsel Brad Kessler’s testimony that, although he did not remember much about the case, he had a strategic reason for the decisions he made, including whether or not to make objections, and emphasized that he had been a criminal defense attorney for 30 years and had litigated approximately 20 capital murder cases (PCRL.F. 1001).

The motion court found, “Prosecutor Bradley also had three of the ‘snitches’ at the trial and intended to call them as witnesses. (Bradley Depo., pp. 23-25). Eventually, he decided not to use them as witnesses. (Bradley Depo., pp. 22).” (PCRL.F. 1004-1005).

David Bruns testified that he had no specific memory of what he was thinking at the time, but requesting striking of the opening statement sometimes highlights the portion asked to be stricken (PCR Tr. 520). He did concede that asking for a mistrial would not do any harm (PCR Tr. 520).

Kessler testified in regards to a closing argument issue, “Mike Bradley was somebody who I don’t think could even foster the intent to try to mislead or do something, so probably he would get more slack from us.” (PCR Tr. 499).

Kessler testified:

...if that’s something that comes up, you certainly have the right to do it, but then you run the risk of highlighting it. I mean, it’s just like asking somebody to strike something from the record. You know it’s not really stricken, and then the Court says I want you to strike the last statement in which the witness just said whatever and then they hear it a second time, so I guess it’s a matter of trial strategy if someone wants to highlight it for the jury.

(PCR Tr. 443-444).

In light of the motion court’s finding that the prosecutor had the witnesses witted in to testify at trial, and intended to call them at the time of his opening statement, there were no grounds for a mistrial and trial counsel was not ineffective for failing to futilely request relief.

In *State v. Stillman*, 310 S.W.2d 886 (Mo. 1958), the prosecutor said in his opening statement that the state's evidence would show that a fetus delivered by a prosecuting witness was delivered, placed in a bag, and dropped in a sewer in the City of St. Louis and recovered from that sewer by the police department. *Id.* at 887. The woman who had allegedly thrown the bag containing the fetus into the sewer was endorsed as a witness on the information and, had she been adduced as a witness, her testimony to that effect would have tended to prove the crime charged, "and thus, defendant may not be charged with having erroneously failed to have objected to the part of the prosecutor's opening statement containing that proffer of evidence." *Id.* at 888.

This Court stated the same principle relied upon by the motion court:

It is objectionable for an attorney, in his opening statement, to indicate that certain evidence will be adduced if he knows that such evidence would be inadmissible upon objection or that the only witness who might be able to furnish the evidence is not available. The difficulty with defendant's present position is that there is nothing in the record to show whether at the time the prosecutor made his opening statement he did or did not believe in good faith that Marian Pope was or was not available as a witness. If, for example, the prosecutor had known at the time he made his opening statement that he could not adduce evidence except by hearsay to establish the fact in question, he should not have

made the statement. But if, for example, he, in good faith, believed at the time he made his statement that Marian Pope would be available as a witness and if, in fact, he did not find that she was not available until later, then he might have legitimately attempted to make the proof by the best evidence then available, viz., hearsay which, if unobjected to, would have constituted evidence of probative value. . . .

Consequently, upon the record before us, we cannot properly hold that the prosecutor was in bad faith in including the matter complained of in his opening statement or that he intentionally brought about an answer which he knew the court had theretofore excluded.

Id. at 888-889.

In the case at bar, the motion court found that the prosecutor thought that he had the witnesses referenced in opening statement available to testify. It is undisputed that they had testified at previous trials and that the substance of this testimony was known to coincide with the prosecutor's representations. Larry Arnold agreed to testify during his colloquy with the court if he were called the following day, but turned on a dime during the discussion and invoked his Fifth Amendment rights, expressing dissatisfaction with the length of time he would be in the local jail waiting to testify. (Tr. 717-719). One of the other witnesses (Ricky Ellis) had previously testified that after Arnold had talked to authorities, Defendant had threatened to kill Arnold. (Ex. 242 at 804-806).

Defendant was caught with a “shank” or “homemade stabbing knife” in his bedroll during this trial (Tr. 822-823).

Once Arnold refused to testify, the State had no reason or ability to call Ellis to testify to the threats made against Arnold for testifying that Defendant admitted killing an old woman and carving Xs in her.

Craig Dorser, who previously testified that Defendant admitted killing Victim, and that he licked her blood off his face and liked the taste (Ex. 242 at 815-816), contracted a case of jailhouse amnesia which he claimed, in chambers prior to being called to testify, was brought about by a blow to the head when he was jumped with baseball bats months previously (Tr. 711-713). He claimed no memory of the events or previous testimony (Tr. 715). While Defendant claims this story was made up (without citation or proof), it was clearly pointless, once the prosecutor heard this story in chambers during the trial, for him to call Dorser.

Thus, the motion court’s ruling that the prosecutor intended to call the witnesses as of the time of opening statement, but changed his mind during trial, and that there was therefore no bad faith in his references to these witnesses during opening statement, is not clearly erroneous.

Nor was the defense decision not to highlight these witnesses’ damaging prior testimony unreasonable trial strategy. “Mistrial is a drastic remedy to be exercised only in extraordinary circumstances where there is no other way to

remove the prejudice to the defendant.” *Smith v. State*, 324 S.W.3d 497, 500 (Mo. App. E.D. 2010). An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Id.* Defendant failed to meet his burden to overcome the presumption that the failure to object or seek a mistrial was reasonable trial strategy and the motion court’s finding on that issue is not clearly erroneous.¹⁵

Nor was Defendant prejudiced. In *Jones v. State*, 197 S.W.3d 227 (Mo. App. W.D. 2006), the motion court rejected a claim without an evidentiary hearing that the defendant received ineffective assistance of counsel where counsel did not object nor request a mistrial on the basis of references by the

¹⁵ *State v. Hoover*, 220 S.W.3d 395 (Mo. App. E.D. 2007), referenced by trial counsel as authority for the proposition that references during opening statement to evidence which does not come in can be objected to or the basis for a mistrial, involved a case in which there were references to statements made by the defendant which were determined to be hearsay and “outcome-determinative.” *See, id.* at 407. Moreover, the State advised the court prior to trial that they believed the witness would not testify and that his prior recorded statements would not be admissible. *Id.* at 402-403. In the case at bar, the State believed at the time of opening that the evidence would come in, as the motion court found. Nor was the absence of the evidence “outcome-determinative.”

prosecutor during opening statement and voir dire. *Id.* at 231-232. The defendant argued that the prosecutor misstated the evidence, referred to matters outside the record, and misstated the jury's role in the case. *Id.* at 232. Without reaching the question of whether the comments were improper, the Court of Appeals held that the defendant failed to allege facts showing a reasonable probability that, but for counsel's failure to request a mistrial or object, the result of the proceeding would have been different. *Id.* The evidence of guilt was overwhelming in that there was physical evidence of the defendant's presence in the victim's apartment, although he denied being there, including bloody finger and palm prints of the defendant on the wall. *Id.* The defendant also exhibited consciousness of guilt in making a false exculpatory statement. *Id.* The motion court's decision to deny relief without an evidentiary hearing was not clearly erroneous. *Id.*

Defendant was not prejudiced in the case at bar, in light of the overwhelming evidence of guilt, including the fact that medium to high-velocity blood spatter with Victim's DNA was found on his shirt and jeans explainable by the attack but not by any of Defendant's three shifting explanations. Defendant was the last person known to be inside the trailer between the time Victim was last seen alive and the discovery of her body, he washed his hands for a suspicious length of time and had a marked change of demeanor after returning from her trailer, he answered her phone but did not put Victim on as requested

by the caller during the window of the attack, he exhibited consciousness of guilt by actively discouraged others from either going to the murder scene or venturing down the hallway to the where the body was found, and by initially denying to police that he had returned to the trailer, and he knocked on the portion of the trailer where the body was found. Defendant went to the trailer to receive a check from Victim, was present to receive the check during the window of the murder, and a check in Victim's handwriting made out to Defendant, dated the day of the murder, which was uncharacteristically not recorded in the register by Victim, was later discovered abandoned just blocks away. Moreover, Defendant threatened to kill a female inmate who rejected his attention "like I killed that old lady."¹⁶

Defendant's twelfth point should be rejected.

¹⁶ The trial can also be relied upon as having produced a just result because the evidence at the evidentiary hearing established that even an expert consulted by the defense at a forum designed to save people from the death penalty found there were three kinds of bloodstains on Defendant's clothing and boot, which were not consistent with Defendant's account of how he acquired them.

XIII.

The motion court did not clearly err by denying Defendant's claim, after an evidentiary hearing, that the delay in his death sentence violates the Eighth Amendment or the due process clause because there is no authority for such a proposition.

Defendant's final point contends that he has been on death row too long and therefore has been subjected to cruel and unusual punishment and his right to due process has been violated. Defendant cites no case anywhere in the United States which has so held and the cases he does cite involve situations in which the United States Supreme Court has denied certiorari on such a claim, including in instances where the inmate has been on death row longer than Defendant has.

The standard of review for denials of postconviction relief is as outlined under Point I.

Defendant cites only three dissents from denials of certiorari holding that such a claim should be considered. In each of those cases, the United States Supreme Court let stand lower court holdings that there was no constitutional violation.

In *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459 (1999), Justice Thomas pointed out in an opinion concurring in the denial of certiorari that:

. . . I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.

Id.

Justice Thomas further emphasized the obvious:

Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. See *Coleman v. Balkcom*, 451 U.S. 949, 952, 101 S Ct. 2031, 68 L. Ed. 2d 334 (1981) (STEVENS, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.

Id., 120 S.Ct. at 460 (citations omitted).

While Defendant cites to a dissent from denial of certiorari by Justice Stevens in the early 1990's inviting state and lower courts to consider the viability of such a claim, Justice Thomas pointed out that, in the interim, every court which had considered such a claim had denied it:

Five years ago, Justice STEVENS issued an invitation to state and lower courts to serve as "laboratories" in which the viability of this claim could receive further study. *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (memorandum respecting denial of certiorari). These courts have resoundingly rejected the claim as meritless. See, e.g., *People v. Frye*, 18 Cal. 4th 894, 1030-1031, 77 Cal. Rptr. 2d 25, 959 P.2d 183, 262 (1998); *People v. Massie*, 19 Cal. 4th 550, 574, 79 Cal. Rptr. 2d 816, 831-832, 967 P.2d 29, 44-45 (1998); *Ex parte Bush*, 695 So. 2d 138, 140 (Ala. 1997); *State v. Schackart*, 190 Ariz. 238, 259, 947 P.2d 315, 336 (1997), cert. denied, 525 U.S. 862, 119 S.Ct. 149, 142 L.Ed.2d 122 (1998); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996), cert. denied, 522 U.S. 827, 118 S.Ct. 90, 139 L.Ed.2d 46 (1997); *State v. Smith*, 280 Mont. 158, 183-184 931 P.2d 1272, 1287-1288 (1996); *White v. Johnson*, 79 F.3d 432, 439-440 (C.A. 5), cert. denied, 519 U.S. 911, 117 S.Ct. 275, 136 L.Ed.2d 198 (1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (C.A.10 1995).

Id., 120 S Ct. at 461.

Justice Thomas emphasized:

Each of these cases rejected the claim on the merits. I am not aware of a single American court that has accepted such an Eighth Amendment claim. Some judges have dismissed the claim on the strongest of terms. See, e.g., *Turner v. Jabe*, 58 F.3d 924, 933 (C.A.4 1995) (Luttig J., concurring) (describing a similar claim as a “mockery of our system of justice, and an affront to lawabiding citizens”).

Id. at 461 n.4.

The U.S. Supreme Court denied certiorari in *Knight*, which involved a claim by an inmate who had been sentenced to death nearly 25 years earlier. See, *Knight*, 120 S Ct. at 461 (Breyer, J. dissenting).

Lackey v. Texas, a second case upon which Defendant relies, held on denial of habeas relief in the Fifth Circuit that, “Lackey’s claim also fails on the merits, because *White [v. Johnson]*, 79 F.3d 432 (5th Cir. 1996) holds that inordinate delay in carrying out an execution does not violate the prisoner’s Eighth Amendment rights. *Id.* at 439.” *Lackey*, 83 F.3d 116, 117 (5th Cir. 1996), *cert. denied*, 519 U.S. 911 (1996).

In the third case relied upon by Defendant, *Valle v. Florida*, 132 S.Ct. 1 (2011), the United States Supreme Court denied certiorari on the claim where the inmate was initially sentenced to death more than 33 years earlier. *Id.* at 1 (Breyer, J., dissenting from denial of stay). Statistics cited by Justice Breyer in

his dissent from the denial noted that the average period of time that an individual sentenced to death spends on death row is almost 15 years. *Id.* Justice Breyer cited Department of Justice statistical tables from 2009 purporting to show that approximately 113 prisoners have been under a sentence of death for more than 29 years out of 3,173 death row prisoners in total. *Id.*, citing Dept. of Justice, Bureau of Justice Statistics, T. Snell, [Statistical] Tables, Capital Punishment, 2009, p. 19 (Dec. 2010) (Table 18).

In short, not only do the cases cited by Defendant not stand for his claim, the law cited therein demonstrates that the claim has been held meritless by every court which has considered it. Nor does Defendant cite any authority for his claim that a trial judge mistakenly sustaining an objection to a defense closing argument resulting in reversal, or a *Brady* violation resulting in postconviction relief alters the analysis.

Defendant's final point should be rejected.

CONCLUSION

Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 27,560 words, not including the cover, the signature block, and this certificate, as calculated pursuant to the requirements of Supreme Court Rule 84.06 and counted by Microsoft Word 2007 software; and
2. That an electronic copy of this brief and certificate was sent through the eFiling system on this 14th day of January, 2014, to:

William J. Swift
Woodrail Centre, Bldg. 7, Ste. 100
1000 West Nifong
Columbia, Missouri 65203
William.Swift@mspd.mo.gov

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946
P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI