

No. SC93168

IN THE
Supreme Court of Missouri

BRIAN J. DORSEY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Boone County Circuit Court
Thirteenth Judicial Circuit
The Honorable Christine Carpenter, Judge

RESPONDENT'S AMENDED BRIEF

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STATEMENT OF FACTS

Mr. Dorsey appeals the denial of his Rule 24.035 motion. He raises seven points on appeal:

(1) the State failed to disclose, or alternatively that trial counsel was ineffective for failing to discover, DNA evidence (a “peak” or another allele in the electronic data generated while analyzing a vaginal swab) that allegedly showed another possible perpetrator;

(2) the State failed to disclose information about additional “hits” in a Y-chromosome database that suggested the possibility of other perpetrators, and that trial counsel were ineffective for failing to discover information about one of the hits (a match to John Sim) that was disclosed by the State and use that information to rebut the State’s incorrect suggestion that Mr. Sim was incarcerated at the time of the crime;

(3) trial counsel were ineffective for failing to investigate evidence of Mr. Dorsey’s alleged inability to deliberate;

(4) trial counsel were ineffective for failing to present mitigation evidence about Mr. Dorsey’s depression, substance dependency, and suicide attempts;

(5) trial counsel were ineffective for failing to object to, or counter, evidence suggesting that Mr. Dorsey poured bleach on the rape victim to cover up the rape;

(6) trial counsel were ineffective for failing to request that Juror Reddick be replaced after he disclosed that he knew one of the victims from work; and

(7) trial counsel were ineffective because counsel had a conflict of interest engendered by the flat fee paid to counsel by the public defender system.

* * *

In March, 2008, Mr. Dorsey pleaded guilty to two counts of murder in the first degree. *State v. Dorsey*, 318 S.W.3d 648, 651 (Mo. 2010). On direct appeal, this Court summarized the facts of Mr. Dorsey's crimes as follows.

On December 23, 2006, Brian Dorsey called his cousin, [S.B.], to borrow money to pay two drug dealers who were in his apartment. [S.B.'s] husband [B.B.] called his friend, Darin Carel, and told him that he needed help getting the people to leave Dorsey's apartment. [S.B.] and [B.B.] drove to Dorsey's apartment. After the two drug dealers left the apartment, Dorsey went with [S.B.] and [B.B.] to their home, where they were joined by Carel and several others. [S.B.], [B.B.], Dorsey and [S.B.'s] four-year old niece, Jade, stayed at [S.B.] and [B.B.'s] home.

At some point after [S.B.] and [B.B.] went to bed, Dorsey took a single-shot shotgun from the garage and fatally shot [S.B.]

in the jaw from a distance of approximately 12 inches. Dorsey emptied the chamber, re-loaded the gun, pressed it against [B.B.'s] right ear and shot. [B.B.] died. Dorsey then engaged in sexual intercourse with [S.B.'s] body.

After killing [S.B.] and [B.B.], Dorsey took [S.B.'s] social security card from a wallet and scattered the contents of the wallet next to her body. He stole various items of personal property from the home and poured bleach on [S.B.'s] torso, genitals and thighs. Dorsey left the home in [S.B.'s] vehicle, drove to Jefferson City and met with a woman from whom he had borrowed money to buy drugs. Dorsey tried to pay the woman with items later determined to belong to [S.B.] and [B.B.].

On the afternoon of December 24, [S.B.'s] parents went to check on [S.B.] and [B.B.] because they did not show up for a family gathering. They went inside and found four-year-old Jade sitting on the couch watching television. Jade told her grandparents that she had tried to awaken [S.B.] all morning but "she won't wake up." [S.B.'s] parents called for [S.B.] and knocked on the bedroom door. There was no response. The door was locked, so [S.B.'s] father forced the door open. He saw [S.B.] and [B.B.] on the bed. After [S.B.'s] father confirmed that [S.B.] and

[B.B.] were dead, he left the home with Jade and [S.B.'s] mother and contacted the police.

The ensuing investigation confirmed that [S.B.] and [B.B.] both died from single gunshot wounds to the head. Police discovered the “pour marks” over [S.B.'s] torso and genitals where Dorsey had poured what appeared to be bleach. Additionally, testing revealed that sperm cells recovered from [S.B.'s] body contained DNA consistent with Dorsey and men from a common paternal lineage. This eliminated [B.B.] as a source of the sperm. Statistical analysis revealed that the DNA profile would not be expected to occur in more than .23 percent of the Caucasian population.

On December 26, Dorsey surrendered to police and admitted that he was “the right guy concerning the deaths of [S.B.] and [B.B].”

State v Dorsey, 318 S.W.3d at 651.

After Mr. Dorsey pleaded guilty, the court held a penalty phase with a jury. *Id.* In addition to evidence about the murders, the State also presented victim-impact testimony. S.B.'s mother testified about the effects of the murder on her life (Tr. 552-553). She stated that she and her husband were raising Jade, and she testified that she had been forced to retire from work

(Tr. 552-553). She recounted how Jade required counseling and suffered from nightmares (Tr. 553). She also testified on cross-examination that she was aware of Mr. Dorsey's drug problems, that she knew that he would call family members and ask for money, and that he had been depressed and attempted suicide (Tr. 555-556). S.B.'s sister, Krista Shikles, offered testimony about the effect of S.B.'s murder, and Traci Sheley also testified about the destruction the murders had caused in the family (Tr. 560-561, 590). B.B.'s brother testified about the loss he felt (Tr. 799-800). B.B.'s father testified about the great loss he felt, and B.B.'s mother testified about the harm she suffered and the destruction of the family (Tr. 806-807, 813).

In addition, evidence of Mr. Dorsey's prior crimes was presented through the testimony of Sharon Newlin and the testimony of three Jefferson City police officers (Tr. 704, 770, 775, 781). Ms. Newlin testified about a hit-and-run accident that Mr. Dorsey had been involved in on Highway 54 on April 23, 2006 (Tr. 704-709). She testified that when she told Mr. Dorsey that she had called the police, Mr. Dorsey got into his car and drove away (Tr. 708). A copy of Mr. Dorsey's felony conviction for leaving the scene of an accident was admitted into evidence (Tr. 710).

Officer Chris Gosche testified that he came into contact with Mr. Dorsey on January 30, 2005, and seized a rock of crack cocaine that fell from Mr. Dorsey's jacket (Tr. 782). A copy of Mr. Dorsey's felony conviction for

possession of a controlled substance was admitted into evidence (Tr. 783).

Officer Charles Duncan testified that he had contact with Mr. Dorsey on November 29, 2004, when Mr. Dorsey appeared to be under the influence of narcotics (Tr. 770-771). He then described how Mr. Dorsey had, within an hour, “almost hit our patrol vehicle head on” (Tr. 770). Mr. Dorsey failed field sobriety tests, and Officer Duncan arrested him for driving while intoxicated (Tr. 773-774, 777). At the time of that arrest, Officer Gary Campbell found a plastic bag of crack cocaine in Mr. Dorsey’s jacket (Tr. 777-778). A copy of Mr. Dorsey’s conviction for felony possession of a controlled substance was admitted into evidence (Tr. 778).

A probation and parole officer also testified that Mr. Dorsey had not succeeded in drug court (Tr. 786). She testified that Mr. Dorsey was on probation at the time he murdered B.B. and S.B. (Tr. 788).

Mr. Dorsey presented the testimony of five family members, three friends or acquaintances, and a psychologist (Tr. 857, 902, 907, 915, 920, 927, 933, 970, 974, 982, 989). In part, the psychologist, Dr. Robert Smith, testified that Mr. Dorsey suffered from “major depressive disorder, recurrent” and “alcohol dependence and cocaine dependence” (Tr. 944-945).

Mr. Dorsey also testified in the penalty phase (Tr. 883). He admitted that he was responsible for the murders, and he admitted that he had “really destroyed” his family (Tr. 885). He claimed not to remember everything about

the murders, but he told the jury, “I know that I had the gun, and I know that I was in the bedroom” (Tr. 891). He stated, “I do know that I’m responsible for this,” and “I do know I was there and I did this” (Tr. 890, 894). He also recalled thinking about suicide (Tr. 891). He said he did not remember taking the victims’ property, but he did admit some recollection of trying to get rid of the property (Tr. 891-892). He said he did not remember engaging in sexual intercourse with S.B. (Tr. 899).

Dr. Smith’s testimony revealed that Mr. Dorsey had told him about seeing the shotgun and shells in a corner (Tr. 961). Mr. Dorsey also told Dr. Smith that he recalled “standing over their bed,” and that he recalled “shooting [S.B.] and then [B.B.]” (Tr. 961).

The jury assessed a sentence of death for each murder, and the trial court sentenced Mr. Dorsey accordingly. *State v Dorsey*, 318 S.W.3d at 651.

On July 16, 2010, this Court affirmed Mr. Dorsey’s convictions and sentences. *Id.* The Court issued its mandate on August 31, 2010.

On November 24, 2010, Mr. Dorsey filed a *pro se* post-conviction motion (PCR L.F. 6). Thereafter, with the assistance of counsel, Mr. Dorsey filed an amended motion (PCR L.F. 32). Among the claims asserted in the amended motion were the following claims:

1. Claim 8(A): “Ineffective assistance of counsel—Failure to investigate and adduce evidence from a DNA expert in penalty phase to challenge the

statutory aggravators and to investigate the Y-STR DNA analysis and results prior to movant's pleas of guilty" (PCR L.F. 34).¹ Specifically, this claim alleged that "[t]he testimony of Dr. Stetler, or a similarly qualified DNA expert, would have explained to the jury what the Y-STR DNA evidence actually meant and that because Y-STR DNA is not very discriminatory that there was a very high probability that many other males in the State of Missouri could not be excluded as contributors to the DNA evidence" (PCR L.F. 34). The claim alleged that "[c]ounsel was ineffective for failing to investigate the DNA evidence and failing to call a DNA expert, such as Dr. Dean Stetler to testify at the penalty phase trial regarding the nondiscriminatory nature of Y-STR DNA testing and to testify about the State's failure to perform a differential extraction on the DNA found on the vaginal swab in order to get a full autosomal DNA profile for both the male and female fractions of the sample" (PCR L.F. 39).

2. Claim 8(B): "Brady violation by the State—Failure to disclose all CODIS hits on the Y-STR DNA profile from the vaginal swabs" (PCR L.F. 43). Specifically, this claim alleged that "the State failed to disclose additional

¹ In contrast to a full genetic profile, a Y STR DNA profile is obtained solely from the Y chromosome. It is less discriminating, meaning that it has less ability to identify a particular person as the donor of the genetic material.

CODIS Y-STR profile hits on the sample taken from the vaginal swab of [S.B.],” namely, hits that matched the Y-STR DNA profiles of Timothy Kathkart, Brandon Brown, Jeremy Morgan, and Charles Forbes (PCR L.F. 44, 46).

3. Claim 8(C): “Junk science should have been objected to and should not have been admitted or, in the alternative, movant’s counsel should have investigated and presented evidence showing how the State’s evidence was wrong” (PCR L.F. 50). This claim alleged that trial counsel should have objected to, or countered, evidence that Mr. Dorsey may have poured bleach on the victim in an attempt to obscure the fact that he raped her (*see* PCR L.F. 51-53).

4. Claim 8(D): “Ineffective assistance of counsel for failing to investigate and/or object to the false and misleading information” that John Sim, whose Y-STR DNA registered a CODIS hit with the unknown DNA from the vaginal swab, was incarcerated at all relevant times (PCR L.F. 55). This claim alleged that the State falsely implied that Mr. Sim was “incarcerated at all relevant times,” and that trial counsel was ineffective for failing to object to the State’s suggestion, or for failing to investigate Mr. Sim’s whereabouts (PCR L.F. 56-58).

5. Claim 8(E): “Ineffective assistance of counsel—Failure to investigate and present testimony from Dr. Robert Smith, a psychologist, relating to

statutory and non-statutory mitigation” (PCR L.F. 60). This claim alleged that trial counsel “failed to investigate and present evidence to the jury that described Mr. Dorsey’s childhood and mental health history from his parents”—information that allegedly would have supported Dr. Smith’s testimony and “provided more than enough evidence to support instructing the jury on” two statutory mitigating circumstances, including that the murder “was committed while the defendant was under the influence of extreme mental or emotional disturbance” (PCR L.F. 63). This claim alleged that Mr. Dorsey was prejudiced because with Dr. Smith’s additional testimony, there was “a reasonable probability the result of the penalty phase would have been different, and Mr. Dorsey would not have been sentenced to death” (PCR L.F. 65).

6. Claim 8(F): “Ineffective assistance of counsel—Failure to investigate and present a psychiatrist (medical doctor),” specifically, Dr. A. E. Daniel (PCR L.F. 65). This claim alleged that Dr. Daniel would have testified that Mr. Dorsey suffered from “Major Depression, Recurrent” and “cocaine dependence and alcohol dependence” (PCR L.F. 65-66). The claim alleged that Dr. Daniel would have testified that Mr. Dorsey was unable to deliberate at the time of the crime, both due to the crack cocaine dependency and alcohol dependency and due to his underlying major depression” (PCR L.F. 66). The claim alleged that Dr. Daniel would have testified that, at the time of the

murder, Mr. Dorsey was “under the influence of extreme mental or emotional disturbance,” and that his capacity “to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired” (PCR L.F. 66). The claim alleged that there was a reasonable probability that “the jury would not have sentenced Mr. Dorsey to death” (PCR L.F. 66).

7. Claim 8(G): “Ineffective assistance of counsel—Failure to investigate a diminished capacity defense prior to movant’s plea of guilty or, alternatively, to present during penalty phase” (PCR L.F. 68). This claim alleged that Dr. Smith or Dr. Daniel would have testified that Mr. Dorsey suffered from a mental disease or defect at the time of the offense and “was not capable of deliberating” (PCR L.F. 71). The claim alleged that if counsel had investigated this defense, “Mr. Dorsey would not have pled guilty to two counts of murder in the first degree” (PCR L.F. 72). The claim alleged in the alternative that such testimony could have been presented in the penalty phase (PCR L.F. 73).

8. Claim 8(H): “Ineffective assistance of counsel—Failure to investigate and present witnesses,” including Dr. John Lyskowski and Dr. Girard Moline (PCR L.F. 73, 74-75). This claim alleged that Dr. Lyskowski would have testified about Mr. Dorsey’s suicide attempts and treatment that Mr. Dorsey received for his depression (PCR L.F. 75-76). The claim further alleged that

Dr. Moline would have testified about treatment Mr. Dorsey received for his depression (PCR L.F. 76-78).

9. Claim 8(I): “Failure to present records” documenting the treatment Mr. Dorsey received from Dr. Lyskowski and Dr. Moline (PCR L.F. 78-83).

10. Claim 8(J): Ineffective assistance of counsel for failing “to move for dismissal of juror #47, Ryan Reddick, when the juror informed the bailiff during a break in testimony after the evidence began that he knew and used to work with one of the victims, [B.B.], at Custom Muffler in Jefferson City, Missouri” (PCR L.F. 88).

11. Claim 8(L): “Conflict of trial counsel based on flat fee compensation” (PCR L.F. 96). This claim alleged that trial counsel “limited their investigation and preparation of [Mr. Dorsey’s] case for both guilt and penalty phase issues and ultimately advised [Mr. Dorsey] to plead guilty because of their economic self-interest created by the flat fee that they received from the MSPD” (PCR L.F. 100).

On December 7-9, 2011, the motion court held an evidentiary hearing (PCR L.F. 3-4). Mr. Dorsey presented the testimony of fourteen witnesses, and he presented multiple exhibits in attempting to prove his claims. To avoid duplication, the pertinent aspects of the evidence are discussed below.

On December 31, 2012, the motion court denied Mr. Dorsey’s post-conviction motion (PCR L.F. 194). The pertinent aspects of the motion court’s

findings and conclusions are detailed below. On February 11, 2013, Mr. Dorsey filed his notice of appeal (PCR L.F. 196).

ARGUMENT

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The Standard of Review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.*

To prevail on a claim of ineffective assistance of counsel, the movant must demonstrate “that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also prove prejudice, *i.e.*, that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Rule 29.15(i).

I.

This Court should not review Mr. Dorsey’s first claim because it was not included in his post-conviction motion.

In his first point, Mr. Dorsey asserts that the State failed to disclose, and the trial counsel failed to discover, “evidence of a peak that excluded [Mr. Dorsey] from the full DNA profile from the vaginal swab”² (App.Br. 37). He asserts that “instead the State deleted this peak from what it disclosed” (App.Br. 37). He asserts that he was prejudiced because if he had “known of the evidence before his plea and received competent advice, there is a reasonable probability he would have gone to trial in guilt phase rather than plead guilty” (App.Br. 37). He asserts that he was also prejudiced because “had this evidence been presented [in penalty phase], there is a reasonable probability the jury would not have found the aggravators involving rape, or it would have found that mitigation evidence outweighed aggravation, or it would have chosen to sentence [him] to life” (App.Br. 37).

But because this claim was not included in Mr. Dorsey’s amended motion, this Court should not review it. “In actions under Rule 29.15 [or Rule 24.035], ‘any allegations or issues that are not raised in the Rule 29.15 [or

² A “peak” refers to a peak on an electronic graph (an electropherogram) showing alleles at various loci in a genetic profile.

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) (citation omitted)). “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)). Accordingly, Mr. Dorsey’s new claim cannot be addressed. *Id.*

In denying claim 8(a) of the amended motion, the motion court observed that, “[a]t the hearing, Movant also introduced evidence which he claims proves the State ‘withheld’ evidence that another, unknown individual contributed to the vaginal swab analyzed in this case” (PCR L.F. 165). The motion court observed that Dr. Stetler testified that the evidence (contained in Exhibit NN) “showed evidence of an additional contributor, who was not Movant” (PCR L.F. 165). “In other words, it did not eliminate the Movant but showed evidence of an additional contributor” (PCR L.F. 165). The motion concluded that the claim must fail for the primary reason that “it was not alleged in the motion to vacate” (PCR L.F. 165). The motion court did not clearly err.

Contrary to Mr. Dorsey’s assertion on appeal (App.Br. 50), the amended motion—and specifically Claim 8(A) of the motion—did not assert the claim

Mr. Dorsey now asserts on appeal. The unadorned allegation that “the State did not include any electronic data from the Missouri State Highway Patrol regarding the DNA testing in Mr. Dorsey’s case” was not sufficient to raise the claim asserted on appeal. In fact, the claim asserted on appeal is plainly different from the claim alleged in the amended motion.

Claim 8(A) alleged, “Ineffective assistance of counsel—Failure to investigate and adduce evidence from a DNA expert in penalty phase to challenge the statutory aggravators and to investigate the Y-STR DNA analysis and results prior to movant’s pleas of guilty” (PCR L.F. 34). Specifically, the claim alleged that “[t]he testimony of Dr. Stetler, or a similarly qualified DNA expert, would have explained to the jury what the Y-STR DNA evidence actually meant and that because Y-STR DNA is not very discriminatory that there was a very high probability that many other males in the State of Missouri could not be excluded as contributors to the DNA evidence” (PCR L.F. 34). The claim alleged that “[c]ounsel was ineffective for failing to investigate the DNA evidence and failing to call a DNA expert, such as Dr. Dean Stetler to testify at the penalty phase trial regarding the nondiscriminatory nature of Y-STR DNA testing and to testify about the State’s failure to perform a differential extraction on the DNA found on the vaginal swab in order to get a full autosomal DNA profile for both the male and female fractions of the sample” (PCR L.F. 39).

In outlining the information trial counsel had available before trial, and after pointing out that counsel had not filed a specific “Request for DNA Discovery,” the motion pointed out that the State had disclosed “a packet of materials from the State consisting of information furnished by the Missouri State Highway Patrol regarding the DNA testing in Mr. Dorsey’s case[.]” (PCR L.F. 42). The motion further observed that “[t]his information from the State did not include any electronic data from the Missouri State Highway Patrol regarding the DNA testing in Mr. Dorsey’s case” (PCR L.F. 42). The apparent reason for including this allegation was to suggest that counsel did not request or receive all potentially relevant information related to the DNA evidence.

At no point, however, did claim 8(A) allege that the “electronic data” contained exculpatory evidence. The claim did not allege that the State committed a *Brady* violation, or that the State (or one of its agents) either failed to disclose or deleted a “peak” (or evidence of an allele) in the laboratory data (*see* PCR L.F. 34-43). The motion also did not allege that trial counsel was ineffective for failing to discover the “peak” information (*see* PCR L.F. 34-43). The claim also did not allege that any witness would offer testimony about the alleged non-disclosure of such information, or that there would even be evidence of a “peak” in the laboratory data (*see* PCR L.F. 34-43, 102-106). In short, there was no allegation that the State failed to disclose

exculpatory evidence of a deleted “peak” in the DNA evidence, or that trial counsel were ineffective for failing to discover such evidence. As such, Mr. Dorsey’s first point should be denied. *See State v. Ferguson*, 20 S.W.3d 485, 503 (Mo. banc 2000) (“However, Ferguson failed to properly plead this alleged *Brady* violation in his Rule 29.15 motion, asserting nothing more than that the “state had in its possession material exculpatory evidence that was not turned over to the defense,” without specifying what the exculpatory evidence might be. This allegation fails to cite ‘facts, not conclusions, which if true would entitle the movant to relief.’ ”).³

³ The motion court also concluded that Mr. Dorsey’s new claim did not warrant relief because Jason Wyckoff testified in his post-conviction deposition that he expressly disclosed that he had removed the “stutter” or alleged “peak” (PCR L.F. 167). The motion court also found that the allegedly undisclosed DNA evidence in question did not provide a defense (PCR L.F. 170). The motion court did not clearly err. The allegedly undisclosed evidence proved nothing definitively, and the Y STR DNA profile found on the vaginal swab was still consistent with Mr. Dorsey and not consistent with the other two men who were last in the house before the murders.

II.

The motion court did not clearly err in denying Mr. Dorsey's claim that the State failed to disclose additional CODIS hits on the Y STR DNA profile developed from the vaginal swab. The motion court also did not clearly err in denying Mr. Dorsey's claim that counsel was ineffective for failing to object to a question that implied that John Sim (whose Y STR DNA profile produced one of the CODIS hits) was incarcerated at the time of the murders.

In his second point, Mr. Dorsey raises two claims. First he asserts that the State failed to disclose additional CODIS hits for the Y STR DNA profile that was developed from the vaginal swab (App.Br. 59). He points out that there were hits for four other people that were not disclosed, namely, Timothy Kathkart, Brandon Brown, Jeremy Morgan, and Charles Forbes (App.Br. 59).

Second he asserts that trial counsel was ineffective for failing to object when the State falsely implied that John Sim, whose Y STR DNA profile produced one of the CODIS hits (but whose hit was disclosed), was incarcerated at the time of the trial (App.Br. 59).

Mr. Dorsey argues that he was prejudiced "because the information of the hits on Kathkart and Sim, and a correction of the prosecutor's false claim [about Sim], would have demonstrated more clearly the limits on Y-

chromosome DNA ‘matches,’ such that there is a reasonable probability the jury would not have found the aggravators involving rape, or it would have found that mitigation evidence outweighed aggravation, or it would have chosen to sentence [Mr. Dorsey] to life” (App.Br. 59).

A. The motion court’s findings and conclusions

In denying claim 8(B), which alleged the nondisclosure of the four additional hits, the motion court found that the State did not commit a *Brady* violation because (1) the State disclosed one of the CODIS hits and made reasonable efforts to disclose the information by advising the defense that there would be additional hits in the CODIS database over time, and (2) the additional hits were not material (PCR L.F. 172-177).

In denying claim 8(D), which alleged that counsel were ineffective for failing to object to the prosecutor’s question about Mr. Sim’s incarceration, the motion court found that the jury was not told that Mr. Sim was in prison at the time of the crimes; rather, “[w]hat the jury actually heard was that Mr. Wyckoff did not know where Mr. Sim was at the time of the murder” (PCR L.F. 179). The motion court further found that no evidence connected Mr. Sim to the murders, and that his whereabouts were “entirely irrelevant” (PCR L.F. 180). The motion court concluded that Mr. Dorsey was not prejudiced by counsel’s lack of objection (PCR L.F. 180).

The motion court did not err in denying these claims.

B. The State did not violate *Brady*

Brian Hoey, a laboratory manager at the highway patrol, testified that he sent a letter to the prosecutor on May 5, 2008, identifying a DNA “hit” in the CODIS database for the Y STR DNA profile of John Henry Sim (PCR Tr. 415, 418). The letter stated that the hit had been verified, and that 2.3 Caucasian males out of every one thousand could potentially share this Y STR DNA profile (PCR Tr. 421).

The prosecutor sent a letter to defense counsel disclosing that there had been a hit to someone other than Mr. Dorsey and explaining that “[w]ith the frequency of 2.3 out of 1,000, it is not unexpected that there would be other males in the world with this same DNA characteristic” (Wyckoff depo., Ex. 1). The prosecutor’s letter stated: “Given the frequency, there will be more. Particularly in light of the fact that approximately 1700 new individuals are added to the database per month” (Wyckoff depo., Ex. 1). In his pre-trial deposition, Jason Wyckoff, the DNA analyst, testified that “more hits would be expected” (Wyckoff depo., p. 56).

The timing of the hits—*i.e.*, when the evidence came into existence—was testified to by Mr. Hoey, as follows (other events in brackets are included to provide reference points):

- January 29, 2008, a hit matching Mr. Dorsey (PCR Tr. 425).
- **[March 10, 2008, Mr. Dorsey’s guilty plea.]**

- April 22, 2008, a hit matching John Sim (PCR Tr. 426).
- **[May 5, 2008, a letter to prosecutor about the hit on Mr. Sim's profile, followed by the letter from the prosecutor to defense counsel.]**
- May 22, 2008, a second hit matching Mr. Dorsey (PCR Tr. 425).
- August 20, 2008, a hit matching Timothy Kathcart (PCR Tr. 427).
- **[August 26-28, 2008, penalty phase trial.]**
- October 29, 2008, a hit matching Brandon Brown (PCR Tr. 427).
- **[November 10, 2008, formal sentencing.]**
- June 11, 2009, a hit matching Jeremy Morgan (PCR Tr. 427).
- August 12, 2009, a hit matching Charles Forbes (PCR Tr. 427).⁴

As is evident, the last three hits occurred after the penalty phase had been completed; thus, those hits could not have affected counsels' trial strategy or the jury's deliberations. Mr. Dorsey implicitly recognizes as much when he asserts that he was prejudiced by a lack of "information of the hits

⁴ Although Mr. Hoey initially suggested on cross-examination that the information about other matches was "probably available" to him in August 2008, he later referred back to his letter detailing when each match was made; thus, it appears that his more detailed testimony accurately reveals when each match was made (*see* PCR Tr. 431-432, 434).

on Kathcart and Sim” (App.Br. 59).

“In *Brady*, the United States Supreme Court held that the State violates due process if it suppresses evidence that is favorable to the accused and material to either the guilt phase or the penalty phase.” *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2009). “The State violates due process regardless of whether it withheld the evidence in good faith or in bad faith.” *Id.*

“Such evidence is material ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Strickler v. Greene*, 527 U.S. 263, 280 (1999). “Moreover, the rule encompasses evidence ‘known only to police investigators and not to the prosecutor.’” *Id.* at 280-281. “In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.’”

Here, the State satisfied its duty to disclose under *Brady*. The State disclosed the first hit that matched someone other than Mr. Dorsey (the match to John Sim), and at that time, there were no other matches to disclose (see PCR Tr. 425, 427). The State did not have in its possession any additional *Brady* material to disclose relative to the Y STR DNA profile, and while a computer later found and stored hits at certain times in a database, none of the State’s agents actually possessed any potential *Brady* material

until they responded to Mr. Dorsey's request in February, 2011, and retrieved the data from the database (PCR Tr. 434-435). "It is well settled that there is no 'affirmative duty upon the government to take action to discover information which it does not possess.'" *United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991); see *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009) ("If a government agent diligently searches and does not locate the relevant information, then the state is not viewed as having 'possessed' the information.").

Although the State's agents stopped extracting hits from the database, the State anticipated that there would be additional matches in the future, and the State put the defense on notice that those matches would be in the database. The State was explicit and stated, "Given the frequency, there will be more" (Wyckoff depo., Ex. 1).

Thus, the defense was advised that there would be additional evidence of other people with the same Y STR DNA profile in the State's database over time. And the defense could have requested and received information about any additional hits that were found, as Mr. Dorsey's attorneys did in the post-conviction proceeding (see PCR Tr. 461-462). When a defendant knows that evidence exists or potentially exists, and "[w]hen information is readily available to the defendant, it is not *Brady* material, and the prosecution does not violate *Brady* by not discovering and disclosing the information." See

United States v. Jones, 34 F.3d 596, 600 (8th Cir. 1994); *see generally Gill v. State*, 300 S.W.3d at 231 (“If the defense knew about the evidence at the time of trial, no *Brady* violation occurred.”).

But even if the State is deemed to have possessed the hits generated by the computer, only one additional hit (Timothy Kathcart) was extant at a time when it could have been disclosed for the defense to use during the penalty phase. But there is no reasonable probability that evidence of a hit on Mr. Kathcart’s Y STR DNA profile would have affected the outcome of the penalty phase.

At trial, Jason Wyckoff testified that an initial screening test revealed the possible presence of semen on the vaginal swabs, but additional testing could not confirm the presence of semen (Tr. 839). Further examination of the vaginal swabs revealed the presence of intact sperm cells on both vaginal swabs (Tr. 841). DNA testing of the vaginal swabs revealed only S.B.’s DNA (Tr. 842). However, Y chromosome DNA testing revealed the presence of Y chromosome DNA on the vaginal swabs (Tr. 847). It was not certain that the Y chromosome DNA came from the sperm cells, but Mr. Wyckoff assumed that it did “since sperm were detected” (Tr. 845). The Y chromosome DNA from both swabs was consistent, and Mr. Dorsey (along with males from a common paternal lineage) could not be eliminated as the source of the Y chromosome DNA (Tr. 847).

Statistically, the Y chromosome DNA profile would not be expected more than 2.3 times out of a thousand individuals in the Caucasian population (.23 percent) (Tr. 849). Both Darin Carel and B.B.—the two other men who were last in the house with S.B.—were eliminated as the source of the Y chromosome DNA profile (Tr. 845-847). Mr. Wyckoff testified that the Y chromosome DNA profile also matched another person in the database, John Henry Sim (Tr. 849).

In light of this evidence, additional evidence about another hit in the database on Timothy Kathcart's profile would have been merely cumulative. The jury already knew that the Y DNA profile would be consistent with all of Mr. Dorsey's male paternal relatives, and the jury knew that it had also been specifically matched to Mr. Sim. Moreover, the jury knew that the profile would potentially be found in 2.3 of every 1,000 Caucasian males. Thus, it would have been readily apparent to the jury that multiple men would have the same Y DNA profile.

Mr. Dorsey argues that the evidence would have weakened the State's theory that he raped S.B.; he points out that the State's "theory was built largely on the strength of the Y-profile evidence that was consistent with Brian's Y-profile but inconsistent with [B.B.] and Darin Carel, the only other males in the home at the end of the evening" (App.Br. 67). But evidence that another person had the same Y DNA profile would not have undermined the

State's theory. As discussed above, the jury already knew that other people had the same genetic profile. Moreover, the strength of the State's theory lay primarily in the fact that Mr. Dorsey was *present* in the house by his own admission, and that he killed the victims. There was no evidence that Mr. Kathcart (or any other male with the same Y DNA profile) was one of the last men in the house before the murders. Rather, the evidence showed that of the last three men who were present in the house before the murders, according to Mr. Dorsey's own testimony, only Mr. Dorsey had the Y DNA profile found on the vaginal swabs. The other two men were excluded as contributors.

Mr. Dorsey points out that there were multiple other matches in addition to Mr. Kathcart that were not disclosed, namely, Brandon Brown, Jeremy Morgan, and Charles Forbes (App.Br. 68). But none of those matches existed at the time of the penalty phase, so they could not have been presented to the jury. In any event, there is no reasonable probability that giving additional examples of the .23 percent of the population with the same Y DNA profile would have affected the outcome of the penalty phase. There was no evidence that Mr. Sim, Mr. Kathcart, Mr. Brown, Mr. Morgan, or Mr. Forbes were anywhere near the scene of the murders, let alone connected to the murders by some direct evidence. Thus, there is no reason to believe that the trial court would have allowed the defense to attempt to suggest that one of those men committed the rape. *See State v. Nash*, 339 S.W.3d 500, 513

(Mo. banc 2011) (“To be admissible, evidence that another person had an opportunity or motive for committing the crime for which a defendant is being tried must tend to prove that the other person committed some act directly connecting him with the crime. . . . evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.”). The Y DNA evidence alone was not discriminating enough to directly connect any of those other men to the crimes.

It was also highly implausible, as the motion court found, to suggest that Mr. Dorsey killed the victims but that someone else raped S.B. (PCR L.F. 174). Trial counsel Scott McBride testified that they knew about the CODIS hit on another person and they decided they were not going to try to blame it on the other person (PCR Tr. 730). He saw no benefit in trying to assert that the other person did it (PCR Tr. 730). He testified that additional CODIS hits would have altered his thought process, but “not to the extent that [he] would have wanted to try to take the jury’s focus off of what we were trying to do” (PCR Tr. 731). He testified that he wanted to spend as little time as possible talking about the rape in front of the jury (PCR Tr. 731).

Mr. Dorsey argues that in finding this approach “implausible,” the motion court “failed to take into account that Dr. Daniel testified that [Mr. Dorsey] did not remember shooting them, and that his pleas and his

statement to Dr. Smith were probably based on his having accepted responsibility and the extreme remorse that [Mr. Dorsey] was feeling” (App.Br. 69). But Dr. Daniel did not testify at trial; thus, the jury would not have had his testimony to consider. Moreover, Mr. Dorsey pleaded guilty, and he told the jury, “I know that I had the gun, and I know that I was in the bedroom” (Tr. 891). He also expressly stated, “I do know that I’m responsible for this,” and “I do know I was there and I did this” (Tr. 890, 894). In light of Mr. Dorsey’s testimony, and in light of the other overwhelming evidence of his guilt, there is no reasonable probability that the jury would have concluded that some other person committed the rape.

Mr. Dorsey next points out that Mr. Sim and Mr. Kathcart owned pickup trucks, and that neighbors heard trucks driving to the victims’ house on the night of the murders (App.Br. 69). But the neighbors did not see or identify the trucks; they admitted that a lot of people have trucks in the country; and there was no evidence that the trucks matched either Mr. Sim’s truck (a 1991 Chevrolet pickup) or Mr. Kathcart’s truck (a 1995 Ford pickup) (*see* PCR Tr. 476, 480, 484-485, 489-490, 495, 501). The truck evidence did not connect either man to the murders.

C. Trial counsel were not ineffective for failing to object to the prosecutor’s question about Mr. Sim’s being incarcerated

Mr. Dorsey also asserts that the prosecutor falsely implied that Mr.

Sim was incarcerated at the time of the murders (App.Br. 70). He points out that Mr. Sim was not incarcerated in December, 2006 (*see* PCR TR. 465), and he asserts that trial counsel should have objected to the prosecutor's question (App.Br. 70).

At trial, after eliciting evidence that the Y DNA profile produced a match with John Sim, the prosecutor asked the following questions:

Q. And Mr. Sim[] was, at that time and at the relevant times in this case, in prison, was he not?

A. I don't have that information.

Q. But that's where that was developed from in Mr. Sim[] was – the Sim[] sample was coded when he entered the Department of Corrections; correct? Isn't that the database it came from?

A. Yes.

(Tr. 849).

Trial counsel McBride testified that he did not think it was necessary to object to this testimony (PCR Tr. 737-738). And he was correct. The only evidence elicited by the prosecutor's question was that Mr. Wyckoff did not have information about Mr. Sim being in prison "at the relevant times." There was no need to object.

Additionally, Mr. Dorsey was not prejudiced. The jurors were instructed that they "must not assume as true any fact solely because it is

included in or suggested by a question asked a witness” (L.F. 172). The jury was further instructed that “[a] question is not evidence, and may be considered only as it supplies meaning to the answer” (L.F. 172). It is presumed that the jury followed these instructions. *State v. Hardy*, 197 S.W.3d 250, 253 (Mo.App. S.D. 2006).

Moreover, the defense was not relying on any suggestion that Mr. Sim might have committed the rape and there was no evidence connecting him to the crimes in any fashion, so his whereabouts at the time of the murders were entirely irrelevant. In short, there is no reasonable probability that correcting any potential misimpression about Mr. Sim’s whereabouts would have affected the outcome of the penalty phase. This point should be denied.

III.

The motion court did not clearly err in denying Mr. Dorsey's claim that trial counsel were ineffective for failing to investigate a diminished capacity defense and for failing to present additional mitigating evidence through the testimony of Dr. Robert Smith and Dr. A. E. Daniel.

In his third point, Mr. Dorsey raises three claims from his amended motion (App.Br. 72). First, he asserts that counsel were ineffective for “failing to investigate [Mr. Dorsey's] mental health and present evidence from Drs. Smith and Daniel that at the time of the murders, the combination of [Mr. Dorsey's] major depression and polysubstance dependence rendered him unable to deliberate” (App.Br. 72). He asserts that if counsel had discovered this evidence, “there is a reasonable probability he would have gone to trial in guilt phase rather than plead guilty” (App.Br. 72). This claim was raised in claim 8(G) of the amended motion (PCR L.F. 68-73).

He also asserts that trial counsel were ineffective for failing to present the two doctors' testimony in penalty phase to support the statutory mitigating circumstances that he acted “under the influence of extreme mental or emotional disturbance,” and that he was “unable to appreciate the criminality of his conduct or conform his conduct to the law” (App.Br. 72). He asserts that if the doctors' testimony had been offered in penalty phase, “the

jury would have found that the mitigating evidence outweighed the State's aggravating evidence, and . . . returned a verdict of life" (App.Br. 72). The penalty phase claim was raised in claims 8(E) and 8(F) of the amended motion (PCR L.F. 60-68).

A. The motion court did not clearly err in denying Mr. Dorsey's claim that trial counsel were ineffective prior to the guilt phase

1. The motion court's findings and conclusions

In denying claim 8(G), related to guilt phase, the motion court found that a review of the transcript revealed that Mr. Dorsey's plea was voluntary, knowing, and intelligent (PCR L.F. 184). The motion court also found that trial counsel were convinced that Mr. Dorsey would be found guilty of murder in the first degree, and that, accordingly, "the focus was on how to avoid a death sentence" (PCR L.F. 184). The motion court found that a diminished capacity defense had "no realistic prospect of success" because the evidence showed that Mr. Dorsey waited until everyone else had left, retrieved the shotgun from the barn, loaded and then reloaded the shotgun, locked the bedroom door to keep Jade out of the bedroom, stole property to pay his drug debt, tried to cover up his crime by pouring bleach on S.B., and turned himself in to the police and confessed that he was responsible for what happened (PCR L.F. 184). Thus, the motion court concluded that "trial counsel were not unreasonable in concluding that there was little chance of

arguing diminished capacity during a guilt phase” (PCR L.F. 184).

The motion court also found that neither Dr. Smith nor Dr. Daniel offered “any significant additional evidence to support” a defense of diminished capacity (PCR L.F. 184). The motion court observed that “Dr. Smith and Dr. Daniel reported inconsistent statements from [Mr. Dorsey] about his recollection of the crime,” and the court concluded that “any juror would have found this discrepancy significant” PCR L.F. 184-185). The court found that “[t]heir assertions that [Mr. Dorsey’s] depression triggered this criminal activity were unpersuasive,” and the court concluded that “[t]hey would not have been effect[ive] in convincing a jury that [Mr. Dorsey’s] actions were based on an inability to ‘coolly reflect’ on what he was doing” (PCR L.F. 185). The motion court also concluded that even if diminished capacity were a possible defense, “trial counsel cannot be faulted for concluding such a result was very unlikely and that accepting responsibility was the best course of conduct” (PCR L.F. 185). The motion court did not clearly err.

2. Trial counsels’ investigation and evaluation of the probable success of a diminished capacity defense

Before trial, trial counsel Chris Slusher investigated Mr. Dorsey’s mental health. Mr. Slusher testified that he had some testing done on Mr. Dorsey by a neuropsychologist, Dr. Leonberger (PCR Tr. 575). He testified

that when he received the case file from the public defender, some mitigation records had already been collected, including medical records (PCR Tr. 576). He testified that they received “general discovery,” including police reports and photographs, and that they received “mitigation work that had been done by the Public Defender System, including notebooks with records of Mr. Dorsey’s past contained in them” (PCR Tr. 575-577). He testified that the mitigation information included “timelines and chronologies” and “a substantial amount of documentary material” (PCR Tr. 576).

Mr. Slusher testified that he felt the guilt phase was “going to be difficult” (PCR Tr. 579). He believed the evidence of guilt was overwhelming (PCR Tr. 580). He pointed out that there was a confession, and that Mr. Dorsey had had property in his possession that belonged to the murdered victims (PCR Tr. 580). He thought there was a substantial chance that Mr. Dorsey would be found guilty, and that he would receive the death penalty (PCR Tr. 580). He testified that, accordingly, he thought they needed to “take some chances in order to get life without parole” (PCR Tr. 580). The goal was to obtain a life sentence (PCR Tr. 580).

Mr. Slusher hoped to get “some credit [from the jury] for acceptance of responsibility” (PCR Tr. 581). He thought Mr. Dorsey might have to testify (PCR Tr. 581). He had represented Mr. Dorsey previously, and he thought Mr. Dorsey “could have the ability to get on the stand and convey to the jury

that . . . he had some humanity in him” (PCR Tr. 581). He testified that “that’s what’s important to be able to potentially get the verdict we wanted” (PCR Tr. 581).

Mr. Slusher testified that they also retained Dr. Smith (a psychologist) to evaluate Mr. Dorsey’s mental health (PCR Tr. 591). He did not recall whether he asked Dr. Smith to evaluate Mr. Dorsey for diminished capacity, but he stated that it was “fair to say that [he] did not . . . remember really seriously considering doing the guilt-phase diminished capacity defense” (PCR Tr. 591). He stated that the neuropsychological exam was “fairly consistent . . . with what we saw in his medical history, and that was some depression” (PCR Tr. 592). He said that “the doctor indicated those things, but he also indicated . . . that there [were no] . . . organic issues and no evidence of . . . a serious mental disease or defect of an organic defect” (PCR Tr. 592). He testified that he also talked to Dr. Bruce Harry, but that he ultimately did not think he needed a psychiatrist (PCR TR. 592).

Mr. Slusher testified that he assumed Dr. Smith considered whether Mr. Dorsey had diminished capacity (PCR Tr. 594). He testified that “Dr. Smith’s role was to give us an idea . . . about how the drug use and things affected [Mr. Dorsey’s] overall mental condition” (PCR Tr. 594). He testified that his process is to ask for a “psychological workup” and then to discuss with the expert “how that fits with potential legal theories” (PCR Tr. 596).

On cross-examination, Mr. Slusher testified that Mr. Dorsey's decision to plead guilty was "a fairly long process" (PCR Tr. 640). He testified that he explored the decision and "talked to different attorneys, [and] considered some of the things we would lose if we plea" (PCR Tr. 640). He testified that he "felt that the guilt phase evidence was overwhelming and [he] . . . didn't have much question that we were going to reach a penalty phase" (PCR Tr. 640). He testified that he discussed the decision with Mr. Dorsey, and that he told Mr. Dorsey "essentially that [he] thought that the case was very difficult and we have to take some chances" (PCR Tr. 641). He testified that the decision was ultimately Mr. Dorsey's decision, and he respected that decision (PCR Tr. 641). He stated that Mr. Dorsey ultimately decided to plead guilty based on counsel's advice (PCR Tr. 641).

Mr. Slusher reiterated that he had Mr. Dorsey evaluated by Dr. Leonberger (PCR Tr. 642). He testified that he did not want to have Mr. Dorsey evaluated by a court-appointed mental health expert (PCR Tr. 642-643). He stated that Mr. Dorsey's background did not present "a severe mental disease or defect, such as schizophrenia or something like that" (PCR Tr. 643). He testified that he was not required to disclose Dr. Leonberger's findings, but that he might have had to disclose information if he chose to pursue certain mental health issues (PCR Tr. 643-644).

Mr. Slusher testified that their trial strategy was for Mr. Dorsey to

accept responsibility for what he had done (PCR Tr. 646). He said that part of the strategy was for “Mr. Dorsey to tell the jury that he took responsibility for that” (PCR Tr. 646). He testified that he evaluated the evidence of guilt and felt that it was overwhelming (PCR Tr. 654). He testified that he thought they had considered diminished capacity, but that he did not feel the facts in this case were favorable to making that argument (PCR Tr. 654). He agreed that the fact that Mr. Dorsey had to load the gun and reload it was a fact that affected his evaluation of the case (PCR Tr. 655). He also stated that “the mental health history that had been worked up was a factor” (PCR TR. 655). He said that he thought the guilty plea and accepting responsibility would be beneficial to the defense in obtaining a life sentence (PCR Tr. 655).

Mr. Slusher testified that he did not doubt that depression could qualify as a mental disease or defect (PCR Tr. 665). But because of the voluntary intoxication, he did not think they had a diminished capacity defense (PCR Tr. 665). He testified that they also had to consider whether depression was the sort of mental disease or defect “that’s going to be a guilt-phase type of defense that’s going to work for you” (PCR Tr. 666). He testified that, “as a practical matter,” he did not “think that would work” in this case (PCR Tr. 666).

Mr. Dorsey’s other trial attorney, Scott McBride, testified that he is familiar with the diminished capacity defense (PCR Tr. 708). He testified

that major depression is a mental disease or defect (PCR Tr. 708). He testified that he did not investigate diminished capacity as a defense before Mr. Dorsey pleaded guilty (PCR Tr. 708-709).

On cross-examination, Mr. McBride testified that he has used the diminished capacity or mental disease or defect defense in other cases (PCR Tr. 725). He testified that in Mr. Dorsey's case "positioning the case in that manner would have been very difficult with the jury on these facts" (PCR Tr. 726). He stated that that fact influenced the selection of trial strategy (PCR Tr. 726; *see* PCR Tr. 734-735).

In light of the foregoing, the investigation conducted by Mr. Slusher did not fall below an objective standard of reasonableness. The record shows that trial counsel had Mr. Dorsey's medical records, that counsel was aware of his depression diagnosis, that counsel had an evaluation completed by a neuropsychologist, and that counsel talked to another doctor and determined that he did not need to retain a psychiatrist. This was a sufficient investigation to determine whether Mr. Dorsey's mental disease or defect was the sort of mental disease or defect that might reasonably support a claim of diminished capacity. *See generally* *McLaughlin v. State*, 378 S.W.3d 328, 341 (Mo. banc 2012) ("counsel is 'not obligated to shop for an expert witness who might provide more favorable testimony'").

Moreover, even if counsel could have done more investigation before the

guilty plea (Mr. Dorsey pleaded guilty before Dr. Smith finished his evaluation⁵), that does not mean that counsels' determination that diminished capacity was not a viable defense fell below an objective standard of reasonableness. To the contrary, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984).

"In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate [or investigate further] must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

Here, counsel had a sufficient understanding of the facts to adequately advise Mr. Dorsey about pleading guilty or going to trial. Counsel knew (at least in the abstract) that major depression could support a diminished capacity defense, but counsel also had a good understanding of Mr. Dorsey's

⁵ It appears that Dr. Smith's evaluation was delayed by a winter storm in Northern Ohio, and that otherwise, he would have evaluated Mr. Dorsey sooner (*see* Tr. 101-102).

mental health and the facts of his case. And in counsel's view, in light of the overwhelming evidence of guilt (and deliberation), diminished capacity based on depression was not going to convince the jury. It was, therefore, reasonable for counsel to advise Mr. Dorsey along those lines; indeed, it was counsels' duty to do so. Moreover, because counsel was convinced that a penalty phase was a virtual inevitability, it made sense to advise Mr. Dorsey that he might want to consider taking some chances in an attempt to obtain favor with the jury (*e.g.*, accept responsibility by pleading guilty).

The reasonableness of counsel's advice is also borne out by a review of the testimony offered by Dr. Smith and Dr. Daniel.

Dr. Daniel testified that Mr. Dorsey told him that he had used crack cocaine for the two days preceding the murders (PCR Tr. 290). Mr. Dorsey also drank "a significant portion of the 12-pack [of] beer" purchased by the victim on the evening of the murders (PCR Tr. 292-293). Mr. Dorsey told Dr. Daniel that he drank "maybe seven to ten beers out of that 12-pack" (PCR Tr. 294). Mr. Dorsey also told Dr. Daniel that, after the victims went to bed, he found and drank "a considerable portion" of a fifth of vodka (PCR Tr. 296). Dr. Daniel stated that Mr. Dorsey was feeling suicidal, and that he found a shotgun in the barn (PCR Tr. 296). Mr. Dorsey also found ammunition in the barn (PCR Tr. 297). Mr. Dorsey then told Dr. Daniel that he remembered being in the victims' bedroom, but that he did not remember firing the gun

(PCR Tr. 297). Mr. Dorsey told Dr. Daniel that the victims' daughter "woke up crying, wanting to go to her mother's room (PCR Tr. 297). Mr. Dorsey told the victims' daughter that "she cannot go into that room at that time," and that he "encouraged her to go back to sleep" (PCR Tr. 297). Mr. Dorsey told Dr. Daniel that he had "absolutely no recollection of any physical contact with [S.B.]" (PCR Tr. 298). He also told Dr. Daniel that he did not recall taking the victims' property, but that he later remembered having their property in his possession (PCR Tr. 298).

Dr. Daniel diagnosed Mr. Dorsey with "major depressive disorder, recurrent type, chronic, severe" and "polysubstance dependence, particularly cocaine dependence and alcohol dependence" (PCR Tr. 308-309). Dr. Daniel opined that "at the time of the offense . . . due to the combined impact of major depressive disorder and cocaine and alcohol dependence, he was severely psychiatrically impaired, and as a result of which he was unable to coolly reflect upon the actions that he was involved in" (PCR Tr. 309).

The problem with this testimony is that "voluntary intoxication may not negate a defendant's mental state or provide an insanity defense absent a separate mental disease that results in diminished capacity without the voluntarily ingested drugs." *State v. Rhodes*, 988 S.W.2d 521, 526 (Mo. banc 1999). The evidence showed that Mr. Dorsey ingested crack cocaine in the days leading up to the murders, and that he drank a substantial amount of

alcohol on the night of the murders. However, Dr. Daniel never testified that Mr. Dorsey's depression alone supported a finding of diminished capacity. Thus, Dr. Daniel's testimony would not have provided a viable defense.

Dr. Smith's testimony was similar, but it did provide somewhat better support for a diminished capacity defense. He testified that he diagnosed Mr. Dorsey with "[m]ajor depression, recurrent, severe," and "alcohol dependence and cocaine dependence" (PCR Tr. 31). Dr. Smith opined that Mr. Dorsey's depression qualified him "for a diminished capacity defense at the time of the offense" (PCR Tr. 42-43). He testified that the symptoms of "major depressive disorder recurrent, severe" include "an impairment in cognitive functioning, [and] difficulties with attention, concentration, [and] decision-making" (PCR Tr. 43). He opined that "[t]hat would then result in [Mr. Dorsey] not being able to coolly reflect or deliberate prior to the offense" (PCR Tr. 43). He then testified that Mr. Dorsey's drug use would have had a "synergistic effect" and caused further impairment (PCR Tr. 43-44).

Because Mr. Dorsey voluntarily ingested crack cocaine in the days before the murders and drank a substantial amount of alcohol on the night of the murders (*see* Tr. 949-950), it is questionable whether Dr. Smith's testimony would have supported a diminished capacity defense relative to the night of the murder. But even taking his testimony about depression alone qualifying Mr. Dorsey for diminished capacity, it still would have been

reasonable for counsel to advise Mr. Dorsey not to proceed on that defense. The jury would have been instructed that voluntary intoxication cannot be used to negate a culpable mental state, and, thus, the jury would have had to believe that Mr. Dorsey's depression alone was so severe that he was incapable of coolly reflecting. But in light of all of the steps that Mr. Dorsey took before (and after) killing the victims—the viability of a diminished capacity defense was highly questionable, as trial counsel concluded.

The evidence showed that Mr. Dorsey obtained a shotgun and shells from the barn, that he thought about killing himself, that he then decided to shoot the victims instead, that he stood over the victims, that he shot one victim, that he took out the expended shotgun shell, that he loaded a second shotgun shell, that he shot the second victim, that he engaged in sexual intercourse with S.B., that he apparently poured bleach on S.B. in an attempt to hide the rape, that he then stole various items that he thought he could sell to repay his drug debt, that he told Jade not to go into the room, that he locked the bedroom door, and that he then went and tried to sell the victim's property (*see* Tr. 550-552, 558-560, 577-578, 587-589, 600-601, 717, 719, 792-799, 805, 826-827, 847-848, 961). It was reasonable for counsel to conclude that this evidence of deliberation was overwhelming, notwithstanding the possibility of an expert suggesting that Mr. Dorsey's depression might qualify him for a diminished capacity defense. As counsel stated, "as a practical

matter,” diminished capacity was not going to work at Mr. Dorsey’s trial.

3. Mr. Dorsey failed to prove prejudice

After a guilty plea, “to satisfy the ‘prejudice’ requirement [for a claim of ineffective assistance of counsel], the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). “[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.” *Strickland*, 466 U.S. at 693.

Here, Mr. Dorsey utterly failed to prove that he would have changed his decision about pleading guilty if counsel had retained Dr. Daniel and waited for Dr. Smith to finish his evaluation. Mr. Dorsey did not testify at the hearing; thus, the record is devoid of any evidence of what Mr. Dorsey would have done. To the extent that the record shows that Mr. Dorsey would have relied on trial counsel’s advice, there was no evidence that trial counsel would have changed their advice given the facts of this case. In short, there is no evidence proving that Mr. Dorsey would have altered his decision to plead guilty if counsel had dug up evidence supporting a dubious defense of diminished capacity.

B. The motion court did not clearly err in denying Mr. Dorsey's claim that trial counsel were ineffective in penalty phase

1. The motion court's findings and conclusions

In denying claim 8(E)—failing to present additional testimony from Dr. Smith in the penalty phase—the motion court acknowledged that Dr. Smith found three new facts when he interviewed Mr. Dorsey's family members, namely, that Mr. Dorsey's mother also suffered from depression, that some members of Mr. Dorsey's family had a history of substance abuse problems, and that Mr. Dorsey showed signs of depression before he started using drugs (PCR L.F. 180). The motion court found, however, that these new facts did not change Dr. Smith's opinions, and that they did not have any mitigating value beyond the testimony that Dr. Smith offered in the penalty phase (PCR Tr. 180). The motion court did not clearly err.

In denying claim 8(F)—failing to present Dr. Daniel's testimony in the penalty phase—the motion court found that Dr. Daniel's testimony contained a "significant inconsistency in [Mr. Dorsey's] version of events and his ability to remember the crimes," namely that Mr. Dorsey told Dr. Daniel that he did not recall the shootings, but that he told Dr. Smith that he did remember standing over the bed and shooting each victim (PCR L.F. 181). The motion court found that trial counsel made a decision to call Dr. Smith, and the court concluded that trial counsel was not obligated to shop for a different expert

(PCR L.F. 181). The motion court also found that Dr. Daniel did not offer significant additional mitigation evidence, and the motion court concluded that trial counsels' trial strategy was reasonable (PCR L.F. 181). The motion court did not clearly err.

2. Trial counsel's mitigation strategy was reasonable

Trial counsel retained a neuropsychologist and a psychologist, and both experts evaluated Mr. Dorsey; trial counsel talked to a psychiatrist; trial counsel reviewed mitigation records that had been gathered by the public defender previously assigned to the case; trial counsel (or an investigator) interviewed and deposed witnesses; and trial counsel ultimately presented the testimony of five family members, three friends or acquaintances, a psychologist, and Mr. Dorsey at the penalty phase (*see* Tr. 857, 883, 902, 907, 915, 920, 927, 933, 970, 974, 982, 989; PCR Tr. 22-27, 558-566, 574-577, 591-592, 647).

Counsel testified that the mitigation strategy was "to find a way to make the jury believe that Mr. Dorsey – that there was some kind of connection the jury could find with him that he was – this was an aberration for him; that he had a history of being a good person, and that he had some things in him that a jury could connect to" (PCR Tr. 587). Counsel also stated that one of the mitigating circumstances they relied on was Mr. Dorsey's poor mental health (PCR Tr. 588). This was a reasonable strategy.

In furtherance of that strategy, and with regard to Mr. Dorsey's mental health, counsel presented substantial evidence in mitigation. At trial, Dr. Smith testified that he evaluated Mr. Dorsey to determine "whether or not [he] evidenced any mental illness or whether or not he abused alcohol or drugs" (Tr. 936). He testified that, based on his review of various records, Mr. Dorsey "has suffered from alcohol and drug addiction and depression all of his adult life" (Tr. 941). He testified that Mr. Dorsey used a minimal amount of drugs as an adolescent, and that he was "very, very involved in sports, particularly football" (Tr. 940). He testified that Mr. Dorsey realized as a senior that he was "not quite good enough to make a college team" (Tr. 940). He testified that "when it became clear to him that his football career was going to end, that was probably one of the most significant turning points in his life" (Tr. 940). He stated that "[a]t that point, [Mr. Dorsey] began to use more alcohol, experiment with marijuana" (Tr. 940). He said that Mr. Dorsey experimented with cocaine when he was nineteen, and that "at that point his addiction began" (Tr. 940).

Dr. Smith testified that Mr. Dorsey's alcohol consumption escalated, and that "[t]he cocaine progressed to be binges, going two, three, four days nonstop, without sleep, spending all the money that he could acquire to use the cocaine" (Tr. 940). He testified that medical records showed "at least three prior treatments for alcohol and drug addiction," and that Mr. Dorsey

was “diagnosed as both alcohol dependent . . . and cocaine dependent” (Tr. 941). He testified that Mr. Dorsey also tried a large number of other drugs (Tr. 941).

Dr. Smith testified that Mr. Dorsey had a “lifelong history of depression,” and that it was “clearly documented beginning at age 22” (Tr. 942). He testified that Mr. Dorsey “was diagnosed with depression, was suicidal, [and] was admitted to the hospital for a suicide attempt” (Tr. 942). He stated that there were attempts to treat the depression with “six different antidepressants at different points with minimal benefit” (Tr. 942). He testified that “major depression, which is what [Mr. Dorsey] was diagnosed with, oftentimes, when it begins at a young age, it is resistant to various medications” (Tr. 942). He testified that Mr. Dorsey was treated for his mental health problems at least three times, that he was admitted to a psychiatric facility, and that he received outpatient treatment (Tr. 943).

Dr. Smith testified that he diagnosed Mr. Dorsey with “major depressive disorder, recurrent, meaning that [he] suffered from symptoms consistent with major depression that occurred over and over again, not just one time, but over time” (Tr. 944-945). He stated that he also diagnosed “alcohol dependence and cocaine dependence, which means that he was addicted to both alcohol and cocaine” (Tr. 945). He testified that Mr. Dorsey had been diagnosed by others with major depressive disorder, drug

dependence, and alcohol dependence (Tr. 945). He testified that Mr. Dorsey had “at least three psychiatric hospitalizations where he was admitted to the hospital with that suicidal ideation,” and that he had twice attempted suicide, “one where he had overdosed and another where he cut his wrists” (Tr. 945).

Dr. Smith testified that none of Mr. Dorsey’s diagnoses “provide him the defense of insanity” (Tr. 946). He testified that with a dual diagnosis like Mr. Dorsey’s, “the treatment is much more difficult and the individual’s dysfunction in their life is much greater” (Tr. 946). He testified that drug use causes a person to forget to take medications, and that drugs also interfere with the effectiveness of the medications (Tr. 946). He testified that the drugs are sometimes used as “a temporary escape” or “a way to artificially escape the pain and suffering caused by the depression” (Tr. 947).

Dr. Smith testified that Mr. Dorsey’s diagnoses did not cause him to commit the murders, but that they “contributed” (Tr. 948). He testified that Mr. Dorsey had been using crack cocaine for two days before the murders, and that he got into debt (Tr. 949). He testified that Mr. Dorsey drank “about ten beers” at the victims’ residence (Tr. 950). He testified that after the victims went to bed, Mr. Dorsey was “very depressed, thinking about suicide, and also wanting more cocaine and wanting to drink some more” (Tr. 951). He said that Mr. Dorsey “went into the house, went into the kitchen and

found a bottle of vodka and drank straight out of the bottle” (Tr. 951). He testified that Mr. Dorsey then went out to the barn, saw the shotgun, and contemplated suicide (Tr. 951-952). He testified that Mr. Dorsey’s “next memory [was] he is standing over the bed in the bedroom and he is shooting both [S.B.] and [B.B.]” (Tr. 952). He stated that Mr. Dorsey had “some memory of talking with Jade . . . and calming her” (Tr. 952). He testified that it was reasonable to conclude that Mr. Dorsey suffered a blackout (Tr. 956-957). He testified that Mr. Dorsey suffered “impairment in reasoning, logic, being able to problem-solve, [and] reaction times” (Tr. 957). He stated that Mr. Dorsey’s alcohol consumption and sleep deprivation impaired his “ability to think, consider what [he was] doing, problem-solve, and weigh the consequences” (Tr. 957).

On cross-examination, Dr. Smith testified that Mr. Dorsey understood the difference between right and wrong, and that he was “not insane” (Tr. 970). He testified that “his capacity, under the influence of alcohol and drugs, is diminished” (Tr. 970). He testified that Mr. Dorsey’s ability to conform his conduct to the requirements of the law is “diminished” when he is under the influence of alcohol and drugs—“he has diminished capacity” (Tr. 970). He agreed that he was saying that Mr. Dorsey’s ability to reason was impaired (Tr. 971). He then testified: “I’m not saying that he would meet the criteria for insanity. I am saying that he was significantly impaired, both because of

his depression and because of his consumption of alcohol and drugs at the time of the offense” (Tr. 973).

Dr. Smith’s testimony was, of course, joined by the testimony of five family members, three other friends or acquaintances, and Mr. Dorsey. The jury was then instructed in Instruction No. 7 to consider all of the evidence in mitigation, including “[w]hether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired” (L.F. 177).

As is readily apparent, counsel spent considerable time investigating, preparing, and presenting the evidence in mitigation. Thus, Mr. Dorsey’s case is not analogous to cases like *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004), which are cited in Mr. Dorsey’s brief (App.Br. 83-85).

In *Williams v. Taylor*, for example, the defense did not begin preparing for penalty phase until a week before trial. 529 U.S. at 395. The attorneys failed to conduct an investigation that would have uncovered the defendant’s “nightmarish childhood,” including the fact that the defendant’s parents had been imprisoned for the criminal neglect of the defendant and his siblings, that the defendant had been severely and repeatedly beaten by his father, that the defendant had been committed to the custody of social services for

two years, that the defendant had been placed in an abusive foster home, that the defendant was “borderline mentally retarded” and did not advance beyond sixth grade, and that the defendant had aided the police in breaking up a drug ring in prison. *Id.* at 395-396.

Moreover, at trial, the only mitigating argument that was advanced by counsel was that the defendant “turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that.” *Id.* at 398. There were also a few other bits of purportedly mitigating evidence presented in *Williams*, including evidence from the defendant’s mother, two neighbors, and a psychiatrist, but this evidence was extremely limited. The defendant’s mother and two neighbors (one of which was pulled from the court audience without ever being interviewed beforehand) testified that the defendant was a “nice boy” and not violent. *Id.* at 369. The “psychiatric” evidence consisted of a tape-recorded excerpt of a psychiatrist relating how the defendant had told him that “in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.” *Id.* These poor efforts stand in stark contrast to counsels’ extensive efforts in Mr. Dorsey’s case.

In *Wiggins v. Smith*, similarly, counsel failed to engage in a thorough investigation. Counsel’s investigation was limited to three sources: a psychologist who tested the defendant, but who provided no background

history; a PSI report; and records kept by the Baltimore City Department of Social Services. 539 U.S. at 523-524. Counsel did not expand their investigation based on information seen in the reports, and, at trial, it was apparent that counsel had not prepared adequately for penalty phase. *Id.* at 524-527 (“counsel put on a halfhearted mitigation case, taking precisely the type of ‘‘shotgun’’ approach the Maryland Court of Appeals concluded counsel sought to avoid.”). Mr. Dorsey’s attorneys, by contrast, conducted an extensive investigation, and they presented a cohesive mitigation case.

In *Rompilla v. Beard*, while counsel interviewed the defendant, some of his family members, and three mental health experts, “None of the[se] sources proved particularly helpful,” in producing any mitigation evidence. 545 U.S. at 381. The defendant was uninterested in providing information, and he said that his childhood was “normal, save for quitting school in the ninth grade.” *Id.* (citations omitted). The defendant’s family members stated that they did not know Rompilla very well because Rompilla had spent most of his adult years and some of his childhood years in custody. *Id.* at 381-382. The experts’ reports provided “nothing useful,” and counsel “did not go to any other historical source that might have cast light on Rompilla’s mental condition.” *Id.* at 382. Having consulted these sources, counsel apparently went no further, for counsel did not review school records or any records of the defendant’s adult or juvenile incarcerations.

And, having failed to find any substantial mitigating evidence, counsel also failed to investigate the basis for the state's aggravating circumstance, namely, the defendant's prior conviction for rape and assault. *Id.* at 383. Counsel failed to even review the prior conviction until the day before the penalty phase. *Id.* at 383-385. And even after counsel reviewed the prior conviction, counsel failed to review the other material in the file. *Id.* at 385.

Under such circumstances, where the investigation had not turned up much mitigating evidence, the Court stated that "it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation." *Id.* at 385. In other words, because counsel's efforts in finding mitigating evidence had not produced much fruit, counsel was obligated to attempt to undermine the state's evidence in aggravation. For, "[w]ithout making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim." *Id.* at 386.

In *Hutchison*, the record showed that "Hutchison's counsel were overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase." 150 S.W.3d at 302. "They spent most of the available time preparing for the guilt phase of the trial, and as a result, the jury did not

hear compelling evidence for mitigation in the penalty phase.” *Id.* “Counsel knew that they needed to prepare for the penalty phase, but they left no time to prepare adequately and to present such evidence.” *Id.* As a result, counsel completely failed to obtain and investigate “[r]eadily available records” that “documented Hutchison’s troubled childhood, mental health problems, drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems.” *Id.* at 304. Here, by contrast, counsel investigated Mr. Dorsey’s history, and they presented evidence about his childhood, family life, employment, schooling, and mental health issues.

In short, counsel reasonably selected Dr. Smith as their mental health expert, and counsel was not obligated to shop for another expert to provide additional or different opinions. *McLaughlin v. State*, 378 S.W.3d 328, 341 (Mo. banc 2012) (“counsel is ‘not obligated to shop for an expert witness who might provide more favorable testimony’”). Additionally, the fact that trial counsel did not facilitate interviews between Dr. Smith and Mr. Dorsey’s parents was of little or no consequence. The few additional facts that turned up confirmed Dr. Smith’s diagnoses, but Mr. Dorsey’s major depression and addictions were already well documented and before the jury. “Counsel is not ineffective for not presenting cumulative evidence.” *Deck v. State*, 381 S.W.3d 339, 351 (Mo. banc 2012).

3. Mr. Dorsey was not prejudiced

Mr. Dorsey also was not prejudiced by the lack of additional mitigating evidence from Dr. Smith. The additions to Dr. Smith's testimony were minimal. The jury had already heard that Dr. Smith diagnosed Mr. Dorsey with "major depressive disorder, recurrent, meaning that [he] suffered from symptoms consistent with major depression that occurred over and over again, not just one time, but over time" (Tr. 944-945). The jury had also heard that he diagnosed "alcohol dependence and cocaine dependence, which means that he was addicted to both alcohol and cocaine" (Tr. 945).

Dr. Smith also testified that Mr. Dorsey's diagnoses did not cause him to commit the murders, but that they "contributed" (Tr. 948). He testified that it was reasonable to conclude that Mr. Dorsey suffered a blackout (Tr. 956-957). He testified that Mr. Dorsey suffered "impairment in reasoning, logic, being able to problem-solve, [and] reaction times" (Tr. 957). He stated that Mr. Dorsey's alcohol consumption and sleep deprivation impaired his "ability to think, consider what [he was] doing, problem-solve, and weigh the consequences" (Tr. 957).

On cross-examination, Dr. Smith testified that "his capacity, under the influence of alcohol and drugs, is diminished" (Tr. 970). He testified that Mr. Dorsey's ability to conform his conduct to the requirements of the law is "diminished" when he is under the influence of alcohol and drugs—"he has

diminished capacity” (Tr. 970). He agreed that he was saying that Mr. Dorsey’s ability to reason was impaired (Tr. 971). He then testified: “I’m not saying that he would meet the criteria for insanity. I am saying that he was significantly impaired, both because of his depression and because of his consumption of alcohol and drugs at the time of the offense” (Tr. 973).

There is no reasonable probability that adding in an observation that Mr. Dorsey was also under extreme emotional disturbance would have affected the outcome of trial. Indeed, in light of the circumstances preceding the murders (his drug binge and inability to pay his debts), and in light of the fact that he was contemplating suicide, it would have been apparent to the jurors that he was emotionally distraught. In the end, the reason the jury assessed sentences of death was because of the overwhelming evidence in aggravation.

There is also no reasonable probability that presenting Dr. Daniel’s testimony would have favorably affected the outcome of the trial. Contrary to Mr. Dorsey’s argument on appeal that it was “significantly favorable,” the fact that he told Dr. Daniel that he did not remember shooting the victims was potentially very damaging evidence. Mr. Dorsey had told Dr. Smith that he remembered the shooting, and jurors could have readily concluded that Mr. Dorsey was not being truthful with Dr. Daniel. The jury would not have had to accept Dr. Daniel’s laborious logic that Mr. Dorsey might have simply

said that to Dr. Smith because Mr. Dorsey “felt extremely guilty for having done it” (App.Br. 92).

Dr. Daniel also expressed other opinions that could have reflected poorly on the defense or undermined any attempt to suggest that Mr. Dorsey’s judgment was impaired. For instance, Dr. Daniel opined that Mr. Dorsey “probably” did not know that firing the shotgun into the heads of the victims would kill them “because he was severely impaired” (PCR Tr. 325). But Dr. Daniel then admitted that Mr. Dorsey had to obtain the shogun and the ammunition, take it into the house, and load the shotgun before shooting the victims (PCR Tr. 325-326). Dr. Daniel pointed out that Mr. Dorsey’s “initial intent was to kill himself,” but he then admitted that Mr. Dorsey had decided not to kill himself (PCR Tr. 326). Dr. Daniel stated, however, that he was “not sure he chose to” kill the victims (PCR Tr. 326-327). Dr. Daniel said, “I’m not sure he intentionally chose to kill them,” even though he had to reload the shotgun to kill the second victim (PCR TR. 327).

To the extent that Dr. Daniel’s testimony was favorable, it was largely cumulative to Dr. Smith’s trial testimony. Mr. Dorsey points out that “[b]ecause trial counsel did not have a psychiatrist—a medical doctor—evaluate [him], the jury did not hear that his major depression was a psychiatric diagnosis” (App.Br. 93-94). But there is no reasonable probability that jurors would have drawn any distinction between a psychologist’s

diagnosis and a psychiatrist's diagnosis.

Finally, to the extent that diminished capacity could have been presented in the penalty phase, trial counsel McBride testified that he did not consider presenting diminished capacity as a mitigating circumstance because "after we kind of opened up the whole case to remorse and trying to make a case for acceptance of responsibility, [he] wouldn't have felt real strong about a diminished capacity mitigator" (PCR Tr. 710). That was reasonable, and in light of Mr. Dorsey's admissions and the other evidence, Mr. Dorsey was not prejudiced. This point should be denied.

IV.

The motion court did not clearly err in denying Mr. Dorsey’s claim that trial counsel was ineffective for “failing to present in mitigation testimony and records from Drs. Moline and Lyskowski concerning [Mr. Dorsey’s] treatment for depression, substance dependency, and suicide attempts.”

In his fourth point, Mr. Dorsey asserts two related claims from his amended motion—claim 8(H) (testimony from the doctors) and claim 8(I) (reports about the treatment provided) (App.Br. 97). Mr. Dorsey asserts that the doctors “would have testified that [he] suffered from major depression and substance dependency long before the time of the murders” (App.Br. 97). He asserts that if counsel had presented this evidence, “there is a reasonable probability the jury would have returned a verdict of life” (App.Br. 97).

In denying these claims, the motion court found that trial counsel introduced such evidence through Dr. Smith (PCR L.F. 185). The motion court found that the information was presented to the jury, and that there was no reasonable probability that presenting it through the doctors and records would have affected the jury’s verdicts (PCR L.F. 185-186). The motion court did not clearly err.

Dr. Girard Moline testified at the post-conviction evidentiary hearing that in 2003, Mr. Dorsey complained of depression and insomnia, and that he

prescribed Mr. Dorsey medications for depression (Zoloft) and sleep (Ambien) (PCR Tr. 121, 123). He later prescribed Effexor when Mr. Dorsey reported that he did not think the Zoloft was working (PCR Tr. 124). Dr. Moline also prescribed Klonopin for anxiety (PCR Tr. 125). Dr. Moline later increased the Effexor prescription to a middle-sized dose (PCR Tr. 126). He treated Mr. Dorsey for a little over a year, from the end of 2003 to early 2005 (PCR Tr. 127). He testified that Mr. Dorsey's condition "was probably more major depression, long-term" (PCR Tr. 128).

Dr. John Lyskowski, a psychiatrist, testified that Mr. Dorsey was admitted at St. Mary's Health Center in Jefferson City on December 12, 2005 (PCR Tr. 138). He testified that Mr. Dorsey had come to the emergency room with "complaints of depression and thoughts of harming himself" (PCR Tr. 139). At that time, Mr. Dorsey was taking anti-depressant medication (Lexapro and Wellbutrin) and sleep medication (Desyrel) (PCR Tr. 140). Dr. Lyskowski testified that Mr. Dorsey reported that he was an only child, and that his father and maternal aunt both had "some issues with alcohol" (PCR Tr. 142). Dr. Lyskowski testified that Mr. Dorsey had decreased motor activity, that his mood was depressed, and that he had "a sad face" (PCR Tr. 144). He testified that Mr. Dorsey admitted to having suicidal thoughts, specifically that he thought of hanging himself or cutting himself (PCR Tr. 144). Dr. Lyskowski did not think that Mr. Dorsey was psychotic (PCR Tr.

144). He diagnosed Mr. Dorsey with “major depressive disorder, . . . single episode,” he placed Mr. Dorsey on suicide watch, he increased Mr. Dorsey’s Wellbutrin prescription, he prescribed Remeron in place of the Lexapro, and he prescribed Klonopin (PCR Tr. 147-148). He testified that Mr. Dorsey left the hospital six days later, but that he was readmitted four days after leaving (PCR Tr. 149). He testified that Mr. Dorsey had cut himself on his wrist (PCR Tr. 149). Dr. Lyskowski characterized Mr. Dorsey’s actions as a suicide attempt (PCR Tr. 150).

With the exception of a few details (*e.g.*, the types and amounts of prescription medications), virtually all of this information was presented to the jury through other witnesses.

At trial, Dr. Smith testified that based on his review of various records, Mr. Dorsey “has suffered from alcohol and drug addiction and depression all of his adult life” (Tr. 941). He testified that Mr. Dorsey used a minimal amount of drugs as an adolescent (Tr. 940). He testified that, as a senior, Mr. Dorsey “began to use more alcohol, experiment with marijuana” (Tr. 940). He said that Mr. Dorsey experimented with cocaine when he was nineteen, and that “at that point his addiction began” (Tr. 940).

Dr. Smith testified that Mr. Dorsey’s alcohol consumption escalated, and that “[t]he cocaine progressed to be binges, going two, three, four days nonstop, without sleep, spending all the money that he could acquire to use

the cocaine” (Tr. 940). He testified that medical records showed “at least three treatments for alcohol and drug addiction,” and that Mr. Dorsey was “diagnosed as both alcohol dependent . . . and cocaine dependent” (Tr. 941). He testified that Mr. Dorsey tried a large number of other drugs (Tr. 941).

Dr. Smith testified that Mr. Dorsey had a “lifelong history of depression,” and that it was “clearly documented beginning at age 22” (Tr. 942). He testified that Mr. Dorsey “was diagnosed with depression, was suicidal, [and] was admitted to the hospital for a suicide attempt” (Tr. 942). He stated that there were attempts to treat the depression with “six different antidepressants at different points with minimal benefit” (Tr. 942). He testified that “major depression, which is what [Mr. Dorsey] was diagnosed with, oftentimes, when it begins at a young age, it is resistant to various medications” (Tr. 942). He testified that Mr. Dorsey was treated for his mental health problems at least three times, that he was admitted to a psychiatric facility, and that he received outpatient treatment (Tr. 943).

Dr. Smith testified that he diagnosed Mr. Dorsey with “major depressive disorder, recurrent, meaning that [he] suffered from symptoms consistent with major depression that occurred over and over again, not just one time, but over time” (Tr. 944-945). He stated that he also diagnosed “alcohol dependence and cocaine dependence, which means that he was addicted to both alcohol and cocaine” (Tr. 945). He testified that Mr. Dorsey

had been diagnosed with major depressive disorder, drug dependence, and alcohol dependence by others (Tr. 945). He testified that Mr. Dorsey had “at least three psychiatric hospitalizations where he was admitted to the hospital with that suicidal ideation,” and that he had twice attempted suicide, “one where he had overdosed and another where he cut his wrists” (Tr. 945).

Mr. Dorsey’s mother offered testimony demonstrating that Mr. Dorsey used illegal drugs (*see* Tr. 862). She testified that Mr. Dorsey had attempted suicide on two prior occasions (Tr. 864). She stated that the first attempt was in 1993 or 1995 when he “took a bunch of pills”—“aspirins and just general things that you have in your medicine cabinet” (Tr. 865-866). She testified that Mr. Dorsey spent a couple of days in intensive care at St. Mary’s Hospital in Jefferson City, that they pumped his stomach, and that he remained in intensive care because “they were afraid of the aspirin, all of the aspirin, that it might cause his kidneys to stop” (Tr. 866). She testified that after he was treated for his medical issues, he was transferred to the psychiatric ward, where he stayed for about four days (Tr. 866).

Mr. Dorsey’s mother testified that he attempted suicide again in 2005 by slitting his wrists (Tr. 867). She testified that Mr. Dorsey was very depressed and disoriented at St. Mary’s Hospital when she arrived (Tr. 867). She said that he stayed in the hospital for about four days and again went to the psychiatric unit (Tr. 868). She testified that Mr. Dorsey had “a lot of other

problems”—that he had “been in trouble with alcohol” and “wrecking his car and things like that” (Tr. 868). She stated that his alcohol use “a lot of the times” led to drugs in “a vicious cycle” (Tr. 868). She testified that sometimes he would leave the house for a couple of days and use crack cocaine (Tr. 868-869). She stated that Mr. Dorsey went to “Valley Hope” for drug rehabilitation, and that “[he] would do well for a period of time, maybe even a year or more” (Tr. 869). She stated that he worked at several different security jobs, and that he was an excellent barber (Tr. 869). She said that he worked as a barber in Jefferson City and Springfield (Tr. 870).

Mr. Dorsey’s mother testified that he eventually started using drugs again (Tr. 870). She stated that he received some treatment at Two Rivers Hospital in Kansas City, a psychiatric facility (Tr. 870). She testified that Mr. Dorsey became depressed, and that he remained in her basement for nearly a year (Tr. 871). She stated that when he came out of his depression he got a job at Dollar General (Tr. 871).

Mr. Dorsey’s mother also testified that Mr. Dorsey had been “a very happy child,” that he was “very loving” toward her, that Mr. Dorsey was an only child, and that he had “a good relationship” with his father (Tr. 872). She testified that he loved spending time with his extended family, that he loved baseball, that he played church ball, and that football was “the love of his life” (Tr. 872). She testified that he played football for four years at JC in

Jefferson City (Tr. 872). She stated that he was not “a fighter,” that he was never violent toward her or his father, that he did not fight with his cousins, and that he was “always very loving and very caring and sharing” (Tr. 872-873). She gave an example of how Mr. Dorsey used his barber skills to provide service to his grandmother and great-aunt (Tr. 881-881). She said that their hair was falling out due to chemo therapy, and that he shaved their heads so that they could keep their hair out of their food “and things” (Tr. 882). She stated that it made them feel better (Tr. 882).

Mr. Dorsey’s mother testified that, after the murders, she talked to Mr. Dorsey on the telephone and was afraid that he was going to commit suicide (Tr. 874). She said that he wanted to know “[i]f that place up there is really what they say it is: peace and beautiful and calm” (Tr. 874). She said that he said “he’d been trying so hard to kill himself, but he was just too scared” (Tr. 874-875). She said that he told her “he was going to hang up the phone and he would think about it some more, and he might call me back” (Tr. 875). She said that when he called back, he asked her to come and get him, “[t]o take him to the sheriff’s department” (Tr. 875).

On cross-examination, she testified that Mr. Dorsey had “a close relationship” with his father, that they “did things together,” that they were “[n]ot distant with each other,” and that he had [a] close, loving relationship with his dad” (Tr. 877-878). As examples, she stated that Mr. Dorsey’s father

coached him “all through Little League,” and that they went fishing together (Tr. 878). She reiterated that he had played football in high school (nose guard), and that he was a good barber (Tr. 879). She testified that he had gone to barber school (Tr. 879). She testified that after his bout with depression, he was able to get a job (Tr. 879-880). She stated that it became apparent in his twenties that drug and alcohol abuse was going to be an issue in his life (Tr. 880).

A family member, Pam Brauner, testified that she knew about Mr. Dorsey’s suicide attempts, his “desperation,” and his failing Drug Court (Tr. 977). Another family member, Jennifer Smith, testified that she knew about Mr. Dorsey’s suicide attempts, including his hospitalization for the overdose of pills and the hospitalization for slitting his wrists (Tr. 988). Ms. Smith also mentioned that Mr. Dorsey “would go in and out of rehab,” and that “[i]t was painfully obvious that Brian had struggles” (Tr. 988).

In short, counsel presented a comprehensive social and medical history of Mr. Dorsey’s life. Testimony from Dr. Moline and Dr. Lyskowski and supporting records would have been merely cumulative, and there is no reasonable probability that their testimony or the records would have affected the outcome of trial. “Counsel is not ineffective for not presenting cumulative evidence.” *Deck v. State*, 381 S.W.3d 339, 351 (Mo. banc 2012). This point should be denied.

V.

The motion court did not clearly err in denying Mr. Dorsey’s claim that trial counsel were ineffective for failing to object to, or counter, evidence suggesting that Mr. Dorsey poured bleach on S.B. to cover up the rape.

In his fifth point, Mr. Dorsey asserts that the motion court clearly erred in denying his claim that trial counsel were ineffective for “failing to object to the State’s evidence in support of its theory that [Mr. Dorsey] poured bleach on [S.B.] to cover up his alleged rape of her, or in investigating and presenting evidence to refute the State’s evidence” (App.Br. 105). He asserts that “reasonably competent counsel would have: 1) objected and requested a *Frye* hearing, because there was no foundation for Det. Nichols’s testimony that an ‘alternative light source’ revealed the presence of a ‘pour pattern’ of bleach on [S.B.], or for Wyckoff’s testimony that the lab had conducted studies about ‘chemical insults’ to prevent detection of the protein present in semen; or 2) would have presented evidence that other substances—such as beer, which was present at the scene in large amounts—also fluoresce under a similar light source” (App.Br. 105).

A. The motion court’s findings and conclusions

In denying this claim, the motion court stated that Mr. Dorsey “offered no evidence whatsoever to suggest that Det. Nichols’ determination that a

pour pattern appeared on the torso of [S.B.] was inaccurate” (PCR L.F. 177). The motion court found that Mr. Dorsey’s evidence “consisted entirely of an argument that the pour pattern was not from bleach, but could have been beer” (PCR L.F. 177). The motion court found that Mr. Dorsey’s evidence merely proved that “beer will also leave a pour pattern” (PCR L.F. 177).

The motion court further observed that Detective Nichols did not testify that bleach created the pour marks; rather, he merely testified that he smelled the odor of bleach (PCR L.F. 177). The motion court observed that bleach is a common household product, and that no expert testimony is needed to identify the odor of bleach (PCR L.F. 177-178). The motion court also observed that Detective Nichols merely testified about circumstances that suggested that bleach may have been used, namely, the presence of a bleach bottle in the bathroom sink adjacent to the bedroom, and possible bleached spots on the carpet below the victim (PCR L.F. 178).

The motion court found that Mr. Dorsey’s evidence “merely confirmed what Det. Nichols did was reliable and accurate” (PCR L.F. 178). The motion court also found that Mr. Dorsey’s evidence was not helpful because “[w]hether [he] poured beer as opposed to bleach on the torso of [S.B.] after raping her does not seem to be significant, and [Mr. Dorsey] certainly did not prove that it would have been significant” (PCR L.F. 178). The motion court pointed out that “[i]n either case, the State could argue that it was an

attempt to hide his actions and negated a claim that [he] did not understand the wrongfulness of his conduct” (PCR L.F. 178). The motion court also found that Mr. Dorsey failed to present any “evidence about the effects beer would have on DNA or whether its effect would be different from that of bleach” (PCR L.F. 178).

Finally, the motion court found that trial counsel “wanted to spend as little time as possible discussing the rape before the jury” (PCR L.F. 178). The motion court concluded that the beer theory would not have been persuasive, and that it would have undermined the defense theme that Mr. Dorsey was remorseful and took full responsibility for his crimes (PCR L.F. 179). “Litigating whether it was beer or bleach that he poured on his victim’s torso would not have endeared the defense to the jury or supported the defense fundamental theory of the case” (PCR L.F. 179). The motion court did not clearly err.

B. Mr. Dorsey failed to prove that a *Frye* hearing would have rendered any of the State’s evidence inadmissible

At trial, Detective Nichols testified that his “attention” was drawn to bleach because there was an “odor” of bleach “in the master bedroom” (Tr. 672). He said the odor was “very strong” in “the area next to the bathroom door and the east side of the master bed” (Tr. 672). He testified that S.B. was on the east side of the master bedroom (Tr. 672). He testified that “next to the

bed, on the east side, on the floor, the carpeting had been discolored or bleached out” (Tr. 673). He testified that “[a] bleach bottle was located . . . in the bathroom adjacent to the master bedroom, . . . in the sink” (Tr. 675). He also testified that he saw “some dried blood on [S.B.’s] side,” and that it “appeared to be some pour marks going actually through that dried blood area” (Tr. 679).

None of this testimony required any specialized scientific knowledge or expertise. Bleach is a common household item, its odor is recognizable, and it is commonly known that bleach will discolor or “bleach out” colors in fabrics or carpet. “Pour marks” are also readily recognizable to a person of ordinary intelligence and experience. Thus, a *Frye* hearing would not have affected the admissibility of these parts of Detective Nichols’s testimony, and his testimony would have supported a reasonable inference that bleach had been poured on S.B.’s body. *See generally State v Breedlove*, 348 S.W.3d 810, 816 (Mo.App. S.D. 2011) (“[A] witness who personally observed events may testify to ‘his ‘matter of fact’ comprehension of what he has seen in a descriptive manner which is actually a conclusion, opinion or inference, if the inference is common and accords with the ordinary experiences of everyday life.’ ”).

Detective Nichols also testified that using an “alternative light source in order to enhance or actually to look for fluids or trace evidence,” he saw “what appeared to be a pour pattern” on S.B.’s midsection (Tr. 676). He

testified that with the alternative light source, he was “able to see where the liquid had been poured on her groin area” (Tr. 686). He testified that he swabbed the area of the pour mark and sent the sample to the laboratory, but that he had not heard anything back from the laboratory (Tr. 687). Detective Nichols was asked these questions about his “bleach investigation,” but he never testified that the liquid poured on S.B. was bleach, or that bleach will fluoresce under an alternative light source (Tr. 676, 686-687).

Although a lay person might not have had the knowledge or expertise to decide to employ an alternative light source, no *Frye* hearing was required to permit Detective Nichols to testify about what he observed in the photographs under different lighting. His testimony was limited to his observation that there appeared to be a pour mark from a liquid. No scientific knowledge was required to make that observation, as a pour mark would be recognizable to a person of ordinary intelligence and experience. In short, his testimony about a pour mark visible under the alternative light source was merely an additional circumstance that, when considered together with the other circumstances, supported the inference that bleach was poured on S.B.

If Detective Nichols had testified that the substance fluorescing in the photographs was, in fact, bleach, additional foundation may have been necessary. But that was not his testimony. His testimony was that “a liquid” had been poured there, as evidenced by the pour mark. The inference that the

liquid was bleach was suggested by other circumstantial evidence, namely, the odor of bleach, the presence of possible bleach marks on the carpet, and the presence of a bleach bottle in the adjacent bathroom.

Moreover, to the extent that Detective Nichols's testimony implied that bleach would fluoresce under an alternative light source, Mr. Dorsey's evidence at the evidentiary hearing showed not that a *Frye* hearing would have rendered Detective Nichols's testimony inadmissible, but, rather, that bleach does, in fact, fluoresce under the exact type of alternative light source that Detective Nichols used.

At the evidentiary hearing, Mr. Dorsey presented the testimony of Joseph Johnson, a professor of photography, who agreed that the photographs Detective Nichols took appeared to have been made with an alternative light source (PCR Tr. 169-170, 173-175). He testified that bleach will fluoresce under an alternative light source, and that "[o]ver a period of time, the areas treated by bleach would continue to show up" under the alternative light source (PCR Tr. 181). Mr. Johnson testified that he conducted a test over several hours, using the same alternative light source that Detective Nichols used, and that his test revealed that beer and bleach "fluoresce very similarly" when photographed at intervals under an alternative light source (PCR Tr. 171-173, 183-196). In short, a *Frye* hearing would have confirmed that some liquids, including bleach, fluoresce under

the type of alternative light source used by Detective Nichols, and Mr. Dorsey utterly failed to prove otherwise.

Mr. Dorsey also points out that Jason Wyckoff, the highway patrol DNA analyst testified that the detection of acid phosphatase, a protein found in semen, can be prevented by “some chemical insults,” such “soap, detergent, cleansers and so forth” (Tr. 840-841). But he also failed to prove that a *Frye* hearing would have rendered this testimony inadmissible. In fact, he presented no evidence to suggest that Mr. Wyckoff’s testimony was incorrect, and his own DNA expert, Dr. Stetler, agreed that bleach does inhibit the ability to detect proteins (PCR Tr. 403).

C. Evidence that beer also fluoresces would not have produced a reasonable probability of a different result

Mr. Dorsey also argues that counsel should have presented evidence that the liquid could have been beer because that would have been useful “to counter the evidence of rape” (App.Br. 114). He asserts that if it was beer, S.B. could have “*spilled* [the beer] on herself” (App.Br. 113). But Detective Nichols testified that a pour mark went through the dried blood on S.B.’s side (Tr. 679). Thus, S.B. could not have spilled beer on herself. As trial counsel McBride ultimately admitted, “[I]t couldn’t have happened . . . that way” (PCR Tr. 753). Accordingly, even if counsel had been able to convince the jury that the liquid poured on S.B. was beer, the State still would have been able

to argue that Mr. Dorsey attempted to cover the rape by rinsing off S.B.'s midsection and groin.

Additionally, suggesting that Mr. Dorsey used something other than bleach to rinse the victim would have done little to rebut the evidence of rape. There was still evidence of sperm cells on the vaginal swab from S.B., and there was a Y DNA profile developed from the vaginal swab that was consistent with Mr. Dorsey but not consistent with B.B. or Mr. Carel. The reasonable inference was that the Y DNA profile came from the sperm cells, and that the sperm cells came from Mr. Dorsey, the man who admittedly killed both victims. Mr. Dorsey admitted that he killed the victims, and he was the only other adult present in the house at the time of the murders. At trial, he testified, "I do know that I'm responsible for this," and "I do know I was there and I did this" (Tr. 890, 894).

Finally, while trial counsel may have devoted little time and effort to countering the bleach evidence, their decision to focus on a different trial strategy did not fall below an objective standard of reasonableness. First, for the reasons discussed above, there was no persuasive or meritorious way to counteract the evidence.

Second, the defense strategy in this penalty phase was for Mr. Dorsey to accept responsibility but to avoid focusing on the heinous fact that he raped his cousin contemporaneously with the murder (*see* PCR Tr. 586-587,

611, 646, 657-657, 662, 699, 723-724, 731, 735-736). It was reasonable not to focus the jury's attention on one of the most heinous aspects of the case by quibbling over the question of whether Mr. Dorsey poured bleach or beer on S.B.'s midsection and groin after raping her in an attempt to cover up what he had done.⁶ This point should be denied.

⁶ At one point in his argument, Mr. Dorsey observes that the bleach evidence was "also offered in support of the State's theory that [Mr. Dorsey] poured bleach to cover up the rape, thus showing his planning and ability to deliberate" (App.Br. 113). But Mr. Dorsey pleaded guilty and admitted that he deliberated.

VI.

The motion court did not clearly err in denying Mr. Dorsey’s claim that trial counsel were ineffective for failing “to move to replace juror Reddick after he disclosed that he knew [B.B.]” and had “worked with [B.B.] and supervised him, and had a favorable opinion of him.”⁷

In his sixth point, Mr. Dorsey asserts that the motion court clearly erred in denying his claim that trial counsel should have sought to replace Juror Reddick after the juror disclosed that he knew B.B., had supervised him at work, and had a favorable opinion of him (App.Br. 115). He asserts that if counsel had replaced Juror Reddick, “there is a reasonable probability

⁷ In his Point Relied On, Mr. Dorsey inserts a new claim that was not included in his amended motion, namely, that reasonably competent counsel “would have re-questioned Reddick about his feelings after he saw graphic crime-scene and autopsy photographs” (App.Br. 115). The amended motion did not allege that trial counsel erred in this fashion; thus, this aspect of Mr. Dorsey’s claim 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).

the jury would not have imposed death” (App.B. 115).

In denying this claim, the motion court concluded that, while trial counsel did not “remember the specific reasons for their decision, they are sure there were reasons” (PCR L.F. 189). The motion court concluded that the decision to replace an alternate “remains a matter of sound trial strategy” (PCR L.F. 189). The motion court did not clearly err.

At trial, Juror Reddick informed the trial court that he might have worked with B.B. at a muffler shop in Jefferson City (Tr. 572-573). He said that he worked with B.B. for about six months (Tr. 573). He apologized for missing that, and said he “did not have any clue about that” (Tr. 573). Mr. Reddick stated that it would not “make any difference to [him],” and he assured the court that it would not influence his decision (Tr. 573).

Trial counsel questioned Mr. Reddick, and Mr. Reddick testified that he had worked closely with B.B. “in a small shop of six” (Tr. 574). He said that they did not do jobs together, that Mr. Reddick assigned work and managed the facility (Tr. 574). He testified that he was B.B.’s boss (Tr. 574). Mr. Reddick told the court that he thought B.B. “did really good work” (Tr. 574). He assured the court that everything he had said was the truth (Tr. 574).

Defense counsel conferred, and when they had finished, Mr. Slusher announced that they were “not requesting any action” (Tr. 574).

At the post-conviction evidentiary hearing, Mr. Slusher testified that

when Juror Reddick disclosed his working relationship with B.B., he thought they would have had “a discussion about what feeling we had about this particular juror through the jury selection and his answers and responses that he gave when this issue came up during the trial” (PCR Tr. 629). He suspected that “we felt like we still wanted him” (PCR Tr. 629). He testified that another factor to consider is whether the first alternate is “somebody that you really didn’t want to be on the jury” (PCR Tr. 629).

Mr. McBride testified that he recalled Juror Reddick’s disclosure (PCR Tr. 714-715). He testified that they did not seek to remove Juror Reddick because he thought they “liked what Mr. Reddick had said earlier on voir dire” (PCR Tr. 715). He stated that he did not recall exactly what they talked about, but he said he thought they probably talked about the photographs of B.B. that would be admitted into evidence (PCR Tr. 715-716).

“Trial counsel’s removal of a juror is a matter of reasonable trial strategy.” *Tripp v. State*, 958 S.W.2d 108, 111 (Mo.App. S.D. 1998). “[T]here is a strong presumption that the challenged action constitutes sound trial strategy, thereby rendering it reasonably skillful and diligent.” *Id.* “Tactical errors do not establish ineffective assistance of counsel.” *Id.* Here, counsel consulted after Juror Reddick disclosed his relationship, and they apparently concluded that they preferred to keep him on the jury. This was a matter of trial strategy, and it should not be second guessed—even if counsel cannot

remember precisely why they opted to follow that route. *See Bullock v. State*, 238 S.W.3d 710, 715 (Mo.App. S.D. 2007) (“Where, as here, trial counsel does not remember the reason for making a strategic decision, there is a failure to overcome the strong presumption that the decision was made as a part of a reasonable trial strategy.”).⁸

Additionally, the record does not demonstrate any disqualifying bias on the part of Juror Reddick. Juror Reddick was questioned on the record, and he stated unequivocally that his six-month working relationship with B.B. would not “make any difference” and would not “influence” his decision. *See generally Middleton v. State*, 103 S.W.3d 726, 734 (Mo. banc 2003) (“A prospective juror may be excluded for cause only if the juror’s views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instructions and oath. The qualifications of a

⁸ This case differs markedly from cases like *Anderson v. State*, 196 S.W.3d 28, 40 (Mo. banc 2006), which is cited in Mr. Dorsey’s brief (App.Br. 117-118). There, a juror who professed an inability to follow the law was not struck, and both defense attorneys admitted that it was due to an oversight caused by note-taking error. *Id.* at 40-41. Here, the juror expressed the ability to be fair and impartial, and counsel consulted off the record and decided they were not going to ask for his removal.

prospective juror are not determined conclusively by focusing on a single response, but are considered in the context of the entire examination.”). Mr. Dorsey cannot demonstrate any prejudice from Juror Reddick remaining on the jury. This point should be denied.

VII.

The motion court did not clearly err in denying Mr. Dorsey's claim that trial counsel curtailed their efforts on his behalf due to a conflict of interest engendered by the flat fee paid to them by the public defender system.

In his seventh point, Mr. Dorsey asserts that the motion court clearly erred in denying his claim that trial counsel had “a conflict of interest caused by their being limited to a flat fee to represent [Mr. Dorsey]” (App.Br. 121). He points out that counsel were each paid \$12,000 “for a death penalty defense, regardless of whether the case resulted in a plea, a full trial of guilt and sentence, or a plea with a sentence-only trial such as occurred” (App.Br. 121). He asserts that the fee “provided an incentive for counsel to do as little work as possible, creating a ‘divergence of interest’ between [Mr. Dorsey] and counsel that impacted everything from [Mr. Dorsey’s] decision to plead guilty to how the case was investigated, to what evidence was presented on [Mr. Dorsey’s] behalf” (App.Br. 121). He asserts that but for the conflict of interest, he “would not have pleaded guilty and the jury would not have imposed death” (App.Br. 121).

In denying this claim, the motion court found that both of Mr. Dorsey’s attorney’s testified that “there was no decision made based on their compensation and expenses” (PCR L.F. 194). The motion court found that

both attorneys were “very credible,” and the court concluded that no “decision made by Movant’s trial counsel was motivated by a desire to minimize their investment of time or expense” (PCR L.F. 194). The motion court found that Mr. Dorsey had failed to prove his allegations, and the motion court stated, “based on the credible testimony of [trial counsel], the fee arrangement did not impact on the effective representation of Movant and did not influence the decisions of trial counsel” (PCR L.F. 194). The motion court further concluded that “both attorneys knew that additional funds were available for experts and other issues if they felt those resources were necessary,” that “counsel sought and received funds for a DNA expert,” and that counsel “simply made a strategic decision to not pursue a challenge to that evidence” (PCR L.F. 194). The motion court did not clearly err.

“To prevail on a claim of ineffective assistance of counsel based on counsel’s conflict of interest, the movant must show an actual conflict of interest adversely affected counsel’s performance.” *Conger v. State*, 398 S.W.3d 915, 919 (Mo.App. E.D. 2013). “‘In order to prove a conflict of interest, “something must have been done by counsel, or something must have been forgone by counsel and lost to defendant, which was detrimental to the interests of defendant and advantageous to another.”’” *Id.* “Moreover, ‘the mere existence of a possible conflict of interest does not automatically preclude effective representation.’” *Id.*

Here, there was no conflict of interest. Mr. Slusher testified that he received a flat fee for representing Mr. Dorsey, but that he could have made expense requests for an outside investigator or experts (PCR Tr. 570-571). He testified that his investigator, Mr. Thompson, was not paid out of the flat fee; rather, Mr. Thompson was an employee of his firm (PCR Tr. 571). Although Mr. Thompson was not paid directly by the flat fee, Mr. Slusher testified that he did not intend for Mr. Thompson to do a lot of work in the case because he “couldn’t afford to pay him to be working on the case for this fee” (PCR Tr. 574). He testified that he and Mr. McBride discussed hiring an outside investigator, but that they ultimately decided not to (PCR Tr. 574). He testified that he later relied on Mr. Thompson to do some work because they “needed to get things done, and he was close” (PCR Tr. 574). He testified that the flat fee did not affect his decision-making about the investigation or preparation of the case (PCR Tr. 639-640).

Mr. McBride testified that he received a \$12,000 flat fee from the public defender’s office (PCR Tr. 670). He testified that they could request additional funds for hiring experts or conducting investigation (PCR Tr. 671). He testified that none of the decisions he made regarding “how to defend the case, how to investigate the case, [or] who to talk to,” were made based on his “concern about how much [he was] being paid” (PCR Tr. 724). He stated that he knew that he could request additional funds from the public defender

system (PCR Tr. 724).

Barbara Hoppe, a former employee of the public defender system, testified that the public defender system agreed to pay trial counsel \$24,000, or \$12,000 each (PCR Tr. 548). She testified that if they needed additional funds for “investigation, experts, [or] testing,” that they could request it (PCR Tr. 548-549). She testified that, on January 8, 2008, additional funds (\$1,500) were authorized for a DNA expert (PCR Tr. 549-550; *see* PCR Tr. 675). She testified that additional funds can be approved for “other services, testing, handwriting analysis, witness identification issues, whatever” (PCR Tr. 554).

As is evident, there was no conflict of interest that arose as a result of counsel “being limited to a flat fee” (App.Br. 121). Counsel were not limited to a flat fee to litigate the case; additional funds were available for other expenses as necessary. Counsel knew they could obtain additional funds, and counsel testified that they considered whether to request funds and even once requested additional funds. Both attorneys also testified that they did not make any investigative decisions based on finances, and “it is up to the motion court to judge credibility[.]” *Taylor v. State*, 262 S.W.3d 231, 242 n. 5 (Mo. banc 2008).

Mr. Dorsey points out that Mr. Slusher’s investigator was “limited” to using the telephone to interview four witnesses instead of going to see them in person (App.Br. 121-122; *see* PCR Tr. 560-561). But even if counsel was

trying to conserve resources, prudent use of resources does not show a conflict of interest. In fact, most clients would probably welcome prudence over extravagance; and, importantly, counsel did not forgo the investigation of those witnesses. In any event, counsel knew that he could request funds to hire an outside investigator.

Mr. Dorsey asserts that the flat fee affected “whether they spent hours investigating the State’s allegation of rape or not, whether they consulted with a psychiatrist, or [Mr. Dorsey’s] treating physician, or simply relied on Dr. Smith to recite what he had read in [Mr. Dorsey’s] records” (App.Br. 124-125). But there is no proof of any of these insinuations, and the record shows that counsel handled each of these areas of the case in a professional manner.

Counsel requested and obtained additional funding for DNA analysis, but counsel ultimately decided on a different trial strategy. That decision was plainly not prompted by a lack of money (because there was money available), but by a decision to follow a different strategy that appeared to have a greater chance of success.

Counsel also conducted a thorough investigation into Mr. Dorsey’s mental health and social history. Two experts evaluated Mr. Dorsey—a neuropsychologist and a psychologist; counsel reviewed numerous records and interviewed and deposed a number of witnesses; and counsel developed a coherent mitigation strategy for trial.

Mr. Dorsey points out that counsel did not investigate other “hits” on other men with the same Y DNA profile, “or the issue whether [he] poured bleach on [S.B.]” (App.Br. 125). But these were fruitless pursuits that would not have provided any sort of defense for Mr. Dorsey.

In short, there was no convincing proof that counsel had a conflict of interest, or that they curtailed any investigative effort due to a lack of funds or a desire to minimize their hours on the case. In fact, there was no evidence at all about how many hours counsel actually worked on the case, and whether that amount of hours was typical for a case of this sort. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Dorsey's post-conviction motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 21,213 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 22nd day of November, 2013, to:

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