

No. SC92448

---

---

**In the  
Supreme Court of Missouri**

---

**KEVIN JOHNSON, JR.,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

---

**Appeal from St. Louis County Circuit Court  
Twenty-First Judicial Circuit  
The Honorable Gloria Clark Reno, Judge**

---

**RESPONDENT'S BRIEF**

---

**CHRIS KOSTER  
Attorney General**

**DANIEL N. McPHERSON  
Assistant Attorney General  
Missouri Bar No. 47182**

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

**ATTORNEYS FOR RESPONDENT  
STATE OF MISSOURI**

---

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....2

STATEMENT OF FACTS .....8

STANDARD OF REVIEW ..... 21

ARGUMENT ..... 23

Point I – Counsel’s strategic choices in presenting evidence of  
Appellant’s background were reasonable ..... 23

Point II – The record refutes Appellant’s claim of a *Brady* violation ... 41

Point III – Appellant is not entitled to relief on claim of failure to object  
to reenactment video ..... 52

Point IV – Appellant failed to plead facts entitling him to relief on his  
claim that counsel was ineffective for failing to object to the presence of  
uniformed police officers as spectators at trial ..... 62

Point V – Appellant is not entitled to relief on his claim that counsel  
should have impeached a State’s witness with a prior inconsistent statement  
..... 69

Point VI – Appellant is not entitled to relief on his claim that counsel  
was ineffective for failing to object to the prosecutor’s arguments on  
deliberation ..... 78

Point VII – Appellant failed to plead facts entitling him to relief on his claim that counsel should have objected to Appellant wearing a leg brace during trial ..... 83

Point VIII – Claim that Missouri’s death penalty statutes are unconstitutional is not cognizable in a motion for post-conviction relief. Even if it were cognizable, the arguments raised against the statutes have repeatedly been rejected by this Court ..... 87

Point IX – Appellant is not entitled to relief on his claim of failure to object to an allegedly sleeping juror ..... 92

Point X – Appellant failed to demonstrate ineffectiveness or prejudice from counsel’s failure to make additional *Batson* challenges ..... 98

Point XI – Counsel was not ineffective for failing to investigate and call his daughter’s grandmother as a mitigation witness ..... 111

CONCLUSION..... 119

CERTIFICATE OF COMPLIANCE..... 120

## TABLE OF AUTHORITIES

### Cases

<i>Allen v. Hardy</i> , 478 U.S. 255 (1986) .....	109 n.10
<i>Anderson v. State</i> , 196 S.W.3d 28 (Mo. banc 2006) .....	35, 36, 116
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986) .....	98 n.7, 108
<i>Boches v. State</i> , 506 So. 2d 254 (Miss. 1987) .....	65, 66
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963) .....	45
<i>Brown v. State</i> , 752 A.2d 620 (Md. Ct. Spec. App. 2000) .....	65, 66
<i>Carey v. Musladin</i> , 549 U.S. 70 (2006) .....	64, 65
<i>Carter v. Kemna</i> , 255 F.3d 589 (8th Cir. 2001) .....	110
<i>Clemmons v. State</i> , 785 S.W.2d 524 (Mo. banc 1990) .....	105
<i>Commonwealth v. Chipman</i> , 635 N.E.2d 1204 (Mass. 1994) .....	59
<i>Commonwealth v. Gibson</i> , 951 A.2d 1110 (Pa. 2008) .....	65, 67
<i>Deck v. Missouri</i> , 544 U.S. 622 (2005) .....	84, 86
<i>Deck v. State</i> , 68 S.W.3d 418 (Mo. banc 2002) .....	58, 81, 95
<i>Dickerson v. State</i> , 269 S.W.3d 889 (Mo. banc 2008) .....	84
<i>Ervin v. State</i> , 80 S.W.3d 817 (Mo. banc 2002) .....	116
<i>Estelle v. Williams</i> , 425 U.S. 501 (1976) .....	64 n.3
<i>Goodwin v. State</i> , 191 S.W.3d 20 (Mo. banc 2006) .....	21, 63, 68
<i>Henderson v. State</i> , 111 S.W.3d 537 (Mo. App. W.D. 2003) .....	36
<i>Holbrook v. Flynn</i> , 475 U.S. 560 (1986) .....	64 n.3

*Howard v. State*, 941 S.W.2d 102 (Tex. Crim. App. 1996)..... 65, 67

*Johnson v. State*, 333 S.W.3d 459 (Mo. banc 2011)..... 89, 90, 91, 98 n.8

*Kearse v. State*, 969 So. 2d 976 (Fla. 2007)..... 66

*Lopez v. State*, 651 S.W.2d 413 (Tex. Ct. App. 1983) ..... 58

*Lyons v. State*, 39 S.W.3d 32 (Mo. banc 2001)..... 37, 40

*McLaughlin v. State*, 378 S.W.3d 328 (Mo. banc 2012) ..... 88, 117

*Middleton v. State*, 103 S.W.3d 726 (Mo. banc 2003) ..... 36, 49

*Morgan v. Illinois*, 504 U.S. 719 (1992)..... 91

*Morrow v. State*, 21 S.W.3d 819 (Mo. banc 2000)..... 108

*Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990)..... 64

*People v. Anzalone*, 894 N.Y.S.2d 279 (N.Y. App. Div. 2010) ..... 59

*People v. Grady*, 838 N.Y.S.2d 207 (N.Y. App. Div. 2007) ..... 65

*People v. Rodrigues*, 885 P.2d 1 (Cal. 1994) ..... 59

*Phillips v. State*, 70 P.3d 1128 (Alaska Ct. App. 2003)..... 65

*Rompilla v. Beard*, 545 U.S. 374 (2005) ..... 40

*Shootes v. State*, 20 So. 3d 434 (Fla. 2009) ..... 66

*Smulls v. State*, 71 S.W.3d 138 (Mo. banc 2002)..... 117, 118

*State v. Anderson*, 862 S.W.2d 425 (Mo. App. E.D. 1993) ..... 58

*State v. Black*, 50 S.W.3d 778 (Mo. banc 2001) ..... 58

*State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992)..... 74, 76

*State v. Bradley*, 811 S.W.2d 379 (Mo. banc 1991) ..... 21

*State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997) ..... 50

*State v. Brown*, 337 S.W.3d 12 (Mo. banc 2011)..... 57

*State v. Carter*, 889 S.W.2d 106 (Mo. App. E.D. 1994) ..... 110

*State v. Caudill*, 789 S.W.2d 213 (Mo. App. W.D. 1990)..... 58

*State v. Clemons*, 946 S.W.2d 206 (Mo. banc 1997) ..... 81, 82

*State v. Cole*, 71 S.W.3d 163 (Mo. banc 2002) ..... 90

*State v. Cowans*, 717 N.E.2d 298 (Ohio 1998)..... 59

*State v. Elbert*, 471 S.W.2d 170 (Mo. 1971) ..... 65 n.4

*State v. Ervin*, 979 S.W.2d 149 (Mo. banc 1997) ..... 90

*State v. Finch*, 975 P.2d 967 (Wash. 1997)..... 59

*State v. Forrest*, 290 S.W.3d 704 (Mo. banc 2009)..... 91

*State v. Fritz*, 913 S.W.2d 941 (Mo. App. S.D. 1996) ..... 95

*State v. Garrison*, 276 S.W.3d 372 (Mo. App. S.D. 2009)..... 76

*State v. Gollaher*, 905 S.W.2d 542 (Mo. App. E.D. 1995)..... 64

*State v. Johns*, 34 S.W.3d 93 (Mo. banc 2000)..... 90

*State v. Johnson*, 284 S.W.3d 561 (Mo. banc 2009).....*passim*

*State v. Johnson*, 22 S.W.3d 183 (Mo. banc 2000)..... 90

*State v. Knese*, 985 S.W.2d 759 (Mo. banc 1999) ..... 90

*State v. Lacy*, 851 S.W.2d 623 (Mo. App. E.D. 1993) ..... 105

*State v. Martin*, 956 S.W.2d 364 (Mo. App. S.D. 1997)..... 94

*State v. McLaughlin*, 265 S.W.3d 257 (Mo. banc 2008) ..... 89 n.6

<i>State v. McMillin</i> , 783 S.W.2d 82 (Mo. banc 1990) .....	91
<i>State v. Middleton</i> , 998 S.W.2d 520 (Mo. banc 1999) .....	90
<i>State v. Powell</i> , 798 S.W.2d 709 (Mo. banc 1990).....	91
<i>State v. Ramsey</i> , 864 S.W.2d 320 (Mo. banc 1993).....	91
<i>State v. Reilly</i> , 674 S.W.2d 530 (Mo. banc 1984).....	74
<i>State v. Rousan</i> , 961 S.W.2d 831 (Mo. banc 1998) .....	80, 90
<i>State v. Sager</i> , 600 S.W.2d 541 (Mo. App. W.D. 1980).....	75
<i>State v. Salter</i> , 250 S.W.3d 705 (Mo. banc 2008) .....	49, 51
<i>State v. Strong</i> , 142 S.W.3d 702 (Mo. banc 2004) .....	90
<i>State v. Tabor</i> , 657 S.W.2d 317 (Mo. App. E.D. 1983) .....	95
<i>State v. Taylor</i> , 18 S.W.3d 366 (Mo. banc 2000).....	107
<i>State v. Whitfield</i> , 837 S.W.2d 503 (Mo. banc 1992) .....	91
<i>State v. Williams</i> , 97 S.W.3d 462 (Mo. banc 2003).....	90
<i>State v. Williams</i> , 34 S.W.3d 440 (Mo. App. S.D. 2001) .....	75
<i>State v. Williams</i> , 945 S.W.2d 575 (Mo. App. W.D. 1997) .....	95
<i>State v. Youngblood</i> , 648 S.W.2d 182 (Mo. App. S.D. 1983).....	94, 95, 96
<i>Storey v. State</i> , 175 S.W.3d 116 (Mo. banc 2005) .....	50, 75, 80
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	21, 107 n.9, 116
<i>Strong v. State</i> , 263 S.W.3d 636 (Mo. banc 2008) .....	98 n.8, 107, 108, 109
<i>Tisius v. State</i> , 183 S.W.3d 207 (Mo. banc 2006) .....	82, 96
<i>Vann v. State</i> , 26 S.W.3d 377 (Mo. App. S.D. 2000).....	95

*Wiggins v. Smith*, 539 U.S. 510 (2003) ..... 39

*Wilkes v. State*, 82 S.W.3d 925 (Mo. banc 2002)..... 105

*Williams v. Taylor*, 529 U.S. 362 (2000) ..... 39, 40

*Woods v. State*, 490 So. 2d 24 (Fla. 1986) ..... 66

*Worthington v. State*, 166 S.W.3d 566 (Mo. banc 2005).....*passim*

*Young v. Bowersox*, 161 F.3d 1159 (8th Cir. 1998) ..... 108

*Zink v. State*, 278 S.W.3d 170 (Mo. banc 2009).....*passim*

**Statutes and Court Rules**

Section 565.020, RSMo 2000 .....8

Supreme Court Rule 29.15 ..... 19, 21

## STATEMENT OF FACTS

Kevin Johnson, Jr. is appealing the denial of his Rule 29.15 motion which sought to vacate his conviction for murder in the first degree, section 565.020, RSMo 2000, and sentence of death.<sup>1</sup> (PCR L.F. 486-88). Appellant was tried by a jury on October 31-November 9, 2007, before Judge Melvin W. Wiesman. (L.F. 16-17).<sup>2</sup> Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant lived in the Meachem Park neighborhood of Kirkwood with his great-grandmother and with his twelve-year-old brother, Joseph “Bam Bam” Long. (Tr. 1219, 1781; 2007 Tr. 757). His grandmother lived in the

---

<sup>1</sup> The conviction was from Appellant’s second trial on the charged crime. An earlier trial ended with a hung jury. (L.F. 14).

<sup>2</sup> Respondent asks this Court to take judicial notice of its file in case number SC89168, the direct appeal from Appellant’s conviction. The record on appeal will be cited as: SC89168 Direct Appeal Legal File (L.F.); SC89168 Direct Appeal Transcript (Tr.); Partial Transcript of 2007 trial made part of the record in SC89168 (2007 Tr.); SC92488 Post-Conviction Legal File (PCR L.F.); SC92448 Supplemental Post-Conviction Legal File (Supp. PCR L.F.); SC92448 Post-Conviction Transcript (PCR Tr.).

house next door. (2007 Tr. 776). In July of 2005, Appellant was wanted for a probation violation for a misdemeanor offense. (Tr. 1220-21). Appellant had previously fled when police officers went to his house to try to arrest him. (Tr. 1222). Shortly after that, Appellant had been seen by police driving a white Ford Explorer, but had eluded the officers. (Tr. 1222).

On July 5, 2005, Officer Chris Nelson was on patrol when he saw a white Ford Explorer parked across the street from Appellant's house. (Tr. 1225). Nelson contacted an Officer Brand, who was also in the area. (Tr. 1228-29). The officers were trying to determine if the Explorer belonged to Appellant when Appellant's grandmother came out of her house and began yelling for help. (Tr. 1232). She told Officer Brand that her twelve-year-old grandson had a seizure and had fallen. (Tr. 1235). "Bam Bam" had been born with a congenital heart condition, but the officers weren't told that. (Tr. 1240-41, 1641, 1781). Officer Brand called for paramedics, and he and Officer Nelson went inside, where they found "Bam Bam" lying on the floor on his stomach. (Tr. 1236). He was not responsive and appeared to be unconscious. (Tr. 1236-37). The officers detected a faint pulse and weak breathing. (Tr. 1236-37). A small pool of blood had formed around "Bam Bam's" mouth, and the officers decided not to move him for fear that would cause more complications. (Tr. 1238). The officers had also been trained to not perform

CPR on a person who has a pulse, because that can make the situation worse. (Tr. 1239).

The paramedics arrived at 5:35 p.m., four minutes after receiving the call. (Tr. 1182). Police Sergeant William McEntee, who was the supervisor for the area, also arrived at the scene. (Tr. 1191, 1240). Several family members were also present. (Tr. 1191). The paramedics rolled “Bam Bam” over on his back, and were unable to find a pulse. (Tr. 1187). They began performing CPR and used electric pads to try and shock the heart back into beating. (Tr. 1188-89). The paramedics asked the family members what “Bam Bam” had been doing before he collapsed, and about his medical history, but no one responded. (Tr. 1194-95). The paramedics were never told about “Bam Bam’s” heart condition. (Tr. 1185-86). An EMT asked the officers to look for suicide notes, drugs, open pesticide containers, or anything else that might explain why “Bam Bam” had collapsed. (Tr. 1196, 1242). Nelson checked the kitchen area and McEntee checked the basement, but they did not find anything. (Tr. 1196, 1243-44).

Jada Tatum, “Bam Bam” and Appellant’s mother, arrived while the paramedics were working on “Bam Bam.” (Tr. 1192, 1635-36, 1639). She was very upset and tried to get to her son. (Tr. 1192, 1640-41). The paramedics asked Sergeant McEntee to take her outside and he escorted her to the front porch. (Tr. 1193). Tatum was upset, but did not resist. (Tr. 1193). The

paramedics took “Bam Bam” to the hospital, with Officer Brand following. (Tr. 1244). Sergeant McEntee asked Tatum’s boyfriend to take her to the hospital. (Tr. 1644). Sergeant McEntee and Officer Nelson stayed behind for a few minutes talking to a family member, and then left. (Tr. 1244-45). McEntee stopped by the hospital where “Bam Bam” had been taken. (Tr. 1198, 1644-45). “Bam Bam” died from an irregular heartbeat caused by his congenital heart problems. (Tr. 1781-82).

Later that evening, Appellant was driving around the neighborhood, where he ran into a cousin. (Tr. 1424-25). The cousin got into the vehicle, and they drove about a block over, where Appellant parked. (Tr. 1426). The two men then walked and talked, with Appellant saying that the police were acting like they didn’t want to save his brother. (Tr. 1426). Appellant and his cousin ended up on Alsobrook Street, where they encountered Appellant’s girlfriend. (Tr. 1428). She and Appellant’s cousin got into a truck and smoked marijuana, while Appellant walked towards Orleans Street. (Tr. 1429, 1433).

At about the same time, Sergeant McEntee was responding to a report of fireworks being shot off in Meachem Park. (Tr. 1167-68, 1433). As McEntee turned off of Orleans onto Alsobrook, he encountered three teenage boys. (Tr. 1293-95, 1316-17, 1380-81). McEntee stopped his car and asked the boys, who were standing on the driver’s side of the car, whether they had

been setting off fireworks. (Tr. 1296, 1318, 1383). As this was taking place, Appellant walked up to the passenger side of the patrol car, said something to the effect of, “you killed my brother,” put his hand through the open window and began firing a handgun. (Tr. 1299, 1320, 1347-48, 1384-85, 1442-45). Witnesses saw McEntee’s head and body jerking back from the force of the bullets, and blood running down the right side of his face. (Tr. 1321, 1385, 1447). One of the bullets went through and struck one of the teenagers in the leg. (Tr. 1301, 1323). Appellant reached inside the car and took McEntee’s gun. (Tr. 1387-90, 1448, 1450-51). Appellant ran from the scene. (Tr. 1322, 1348-49).

McEntee’s patrol car went down the street and hit a tree. (Tr. 1349, 1671). A crowd of people ran to the car. (Tr. 1349). McEntee got out of the car and fell forward onto his knees. (Tr. 1351-52, 1675). He tried to talk, but his mouth was full of blood. (Tr. 1675). Appellant approached the car and told everyone to get out of his way. (Tr. 1352-53). Appellant shot McEntee two or three more times. (State's Exs. 66, 75). At least one shot struck McEntee in the head. (2007 Tr. 804). McEntee fell to the ground. (2007 Tr. 804). Appellant then bent over McEntee and appeared to be rifling through his pockets. (Tr. 1678-79). When a bystander asked Appellant what he was doing, Appellant replied that McEntee had killed his brother. (Tr. 1680).

Appellant then walked away from the scene, a gun in each hand, yelling and cursing, saying things like, “they killed my brother, I just don’t give a fuck . . . .” (Tr. 1680, 1711). He encountered his mother and her boyfriend. (Tr. 1654). Appellant’s mother asked him what he had done, and Appellant replied, “that mother fucker let my brother die, he needs to see what it feels like to die.” (Tr. 1654). His mother told him that wasn’t true. (Tr. 1654). Appellant walked away. (Tr. 1655). He later got in his Explorer and drove out of Meachem Park. (Tr. 1451-53, 1455; 2007 Tr. 806-08).

One of the bystanders had called 911, and another got on Sergeant McEntee’s radio and reported that an officer had been shot. (Tr. 1170, 1677). Officer Nelson was among the first to arrive at the scene. (Tr. 1252). He found Sergeant McEntee lying face down. (Tr. 1254). There were holes in McEntee’s face, and the back of his head had basically been blown away. (Tr. 1255). His tongue was hanging out of his mouth, which was bleeding profusely, and his right eye was missing. (Tr. 1255). Nelson rolled McEntee over, and a large amount of brain matter or blood was dumped in his lap. (Tr. 1256). Officer Nelson fixed McEntee’s hair, put his tongue back in his mouth, and pulled out the stuff that was hanging from his right eye. (Tr. 1256). Nelson then rolled McEntee back over to the position in which he had found him. (Tr. 1257). Nelson looked for McEntee’s gun and his extra ammunition, but they were missing. (Tr. 1258, 1265).

The same paramedic who, just a couple of hours earlier, had asked McEntee to escort Appellant's mother out of the house responded to the scene and rolled McEntee over. (Tr. 1208). He was unable to recognize the sergeant. (Tr. 1208). He observed the same injuries that Officer Nelson had seen. (Tr. 1208). Large amounts of blood came out of McEntee's mouth and from the holes in his head as the paramedic rolled him over. (Tr. 1208-09). McEntee was taken to a hospital, where he was pronounced dead. (Tr. 1271).

An autopsy showed that McEntee suffered seven gunshot wounds. (Tr. 1791). One bullet went in the right forehead, destroyed the right eye, and exited through the left cheek. (Tr. 1793). Another bullet went in the right cheek and lodged in the neck. (Tr. 1793-94). It damaged some teeth and went through the tongue, resulting in a lot of bleeding. (Tr. 1794-95). A third bullet went through the right jaw and also went through the tongue, exiting from the left upper neck. (Tr. 1795-96). A fourth bullet entered behind the right ear and lodged in a sinus located deep inside the right jaw. (Tr. 1797). A fifth bullet entered the right upper back and exited through the chest. (Tr. 1798). A sixth bullet grazed the right upper chest, entered in the left upper chest, and exited through the left shoulder. (Tr. 1799-1800). The seventh bullet entered the left upper chest and exited through the left upper arm. (Tr. 1800).

The medical examiner testified that the gunshot wound behind the right ear was fatal and would have immediately incapacitated Sergeant McEntee. (Tr. 1809-10). She testified that McEntee could have survived the other gunshots, and would still have been conscious and able to function briefly after those wounds were inflicted. (Tr. 1803-09). The angle of the fatal bullet was consistent with Sergeant McEntee being on his hands and knees when he was shot. (Tr. 1817). In that case, the shot would have immediately dropped him to the ground. (Tr. 1818). The angle of the gunshot wound to the back was consistent with the shooter standing over Sergeant McEntee as he lay flat on the ground. (Tr. 1818).

Police recovered four nine-millimeter shell casings and a spent projectile from the street, and five shell casings from inside the patrol car. (Tr. 1504, 1510-13, 1522-25). Tests on the shell casings and on the bullet fragments that were recovered from Sergeant McEntee's body determined that they were all fired from the same weapon. (Tr. 1553, 1574-76).

Appellant went to his father, who made arrangements for him to stay at a cousin's apartment. (Tr. 1413-18; 2007 Tr. 808-13). St. Louis County police learned that Appellant's Explorer was parked at the apartment complex. (Tr. 1531-32). A distant cousin of Appellant was police chief in the St. Louis suburb of Beverly Hills and was asked by family members to arrange for

Appellant's surrender. (Tr. 1882-83). St. Louis County police went to the apartment and placed Appellant under arrest. (Tr. 1884-86).

Appellant's belt was seized and was sent to the crime lab for testing. (Tr. 1611, 1629). A spot found near the buckle tested presumptively positive for blood, but the sample was not large enough to confirm that it was blood. (Tr. 1630). DNA was extracted from the sample. (Tr. 1631). Neither Appellant nor Sergeant McEntee could be excluded as possible sources of the DNA. (Tr. 1631-32). The Explorer had been towed to the St. Louis County Crime Lab and processed for evidence. (Tr. 1541-42). A box of nine-millimeter bullets was found in the center console. (Tr. 1546). Very small blood spots were found inside the vehicle. (Tr. 1547). Those blood spots were tested and were found to be consistent with Sergeant McEntee's DNA. (Tr. 1625-28).

At trial, the State played a DVD of Appellant's testimony at his prior trial. (Tr. 1287). Appellant said that he was looking out the window of his great-grandmother's house when he saw Officers Brand and Nelson looking at his Explorer. (2007 Tr. 773-74). Appellant said that he was afraid the Explorer would be towed due to his outstanding warrant, so he gave the keys to "Bam Bam" and told him to give them to his grandmother so that she could say that she was driving the vehicle. (2007 Tr. 775-76). Appellant said that after "Bam Bam" collapsed and the paramedics arrived, he saw Sergeant

McEntee pushing his mother to keep her out of the house. (2007 Tr. 783-84). Appellant said that he then started to get mad. (2007 Tr. 784-85). Appellant also said that after “Bam Bam” was taken to the hospital, Sergeant McEntee came over to the house where he was staying, and asked his great-grandmother where Appellant was. (2007 Tr. 787). Appellant said that Sergeant McEntee saw Appellant standing in the window, that he tapped Officer Nelson on the shoulder, and that the two officers looked at Appellant and started smiling. (2007 Tr. 787).

Appellant said that he learned thirty minutes later that “Bam Bam” had died, and that he was shocked, mad, and upset. (2007 Tr. 788). Appellant said that he drove around for a while, then returned to his great-grandmother’s house and decided to walk his daughter home. (2007 Tr. 789). Appellant ran into his cousin, whom he told that the police did not help “Bam Bam” because they had been too busy looking for him. (2007 Tr. 791). Appellant and his cousin began walking, and Appellant said that he was, “kind of angry still but, you know, I wasn’t as mad as when I first heard the news.” (2007 Tr. 793-94). Appellant eventually left his cousin, who by that time was smoking marijuana with Appellant’s girlfriend, and began walking down Alsobrook Street. (2007 Tr. 793-97). Appellant said that he saw a police car and tried to walk by it without being noticed. (2007 Tr. 798). As he did so, Appellant said that he saw Sergeant McEntee inside, and that

McEntee saw him and started smiling. (2007 Tr. 798). Appellant said that he “flipped out,” pulled out his gun and fired seven shots. (2007 Tr. 798-99). Appellant then walked away towards Orleans Street. (2007 Tr. 799).

Appellant said that he encountered his mother, who asked what was going to happen to Appellant’s two-year-old daughter. (2007 Tr. 801). Appellant said that he started running to get his daughter. (2007 Tr. 802). As he did so, he came across the patrol car and saw Sergeant McEntee moving on the side of the car. (2007 Tr. 804). Appellant said that he “flipped out” and shot Sergeant McEntee one more time in the head. (2007 Tr. 804). McEntee fell forward, and Appellant said that he tripped over the body, causing the gun to discharge into the sidewalk. (2007 Tr. 804-05).

Appellant did not testify at the 2009 trial, but did present two witnesses in the guilt phase. (Tr. 1832, 1864-65, 1882). His grandmother testified that when “Bam Bam” collapsed at her house, the police stood around with their arms folded and did not attempt to help him. (Tr. 1845-46). She also testified that Sergeant McEntee pushed Appellant’s mother out the door when she tried to enter the house. (Tr. 1850). She further testified that she told Appellant of “Bam Bam’s” death between 6:30 and 7:00 p.m. (Tr. 1858). Joe Collins, the police chief of Beverly Hills and a distant cousin of Appellant, described his involvement in negotiating Appellant’s surrender. (Tr. 1882-89).

The jury found Appellant guilty of murder in the first degree. (L.F. 482). After hearing evidence from both the State and the defense in the sentencing phase of trial, the jury returned with a sentencing recommendation of death. (Tr. 2034-2290; L.F. 515). The jury found the following aggravating circumstances beyond a reasonable doubt: (1) that Appellant, by his act of murdering Sergeant McEntee, knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person; (2) that the murder of Sergeant McEntee involved depravity of mind, and as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhumane; and (3) that the murder of Sergeant McEntee was committed against a peace officer while engaged in the performance of his official duty. (L.F. 515). The trial court imposed the jury's sentencing recommendation on February 1, 2008. (L.F. 18; Tr. 2375, 2390-91).

The conviction and sentence were affirmed on direct appeal by this Court on May 26, 2009. *State v. Johnson*, 284 S.W.3d 561 (Mo. banc 2009). The mandate issued on June 30, 2009. (PCR L.F. 73). Appellant filed a *pro se* Motion to Vacate, Set Aside or Correct the Judgment and Sentence under Supreme Court Rule 29.15 on September 22, 2009. (PCR L.F. 1). Appointed counsel filed an amended motion on January 6, 2010, that raised fourteen claims. (PCR L.F. 3, 72-363). The motion court granted an evidentiary

hearing on five of those claims, and that hearing was held on June 22, 2011. (PCR L.F. 4, 5, 434). The motion court issued its Findings of Fact, Conclusions of Law, Order, Judgment, and Decree of Court on January 12, 2012, denying all of the claims raised in the amended Rule 29.15 motion. (PCR L.F. 5). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

## STANDARD OF REVIEW

In reviewing the overruling of a Rule 29.15 motion, the motion court's findings are presumed correct and will be overturned only when either the findings of fact or conclusions of law are clearly erroneous. *Zink v. State*, 278 S.W.3d 170, 175 (Mo.banc 2009); Supreme Court Rule 29.15(k). To be overturned, the ruling must leave the appellate court with a definite and firm impression that a mistake has been made. *Zink*, 278 S.W.3d at 175. The motion court's findings should be upheld if they are sustainable on any grounds. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo.banc 1991). A movant is not entitled to an evidentiary hearing unless: (1) he pleads facts, not conclusions, warranting relief; (2) the facts alleged raise matters not refuted by the record; and (3) the matters complained of resulted in prejudice to the movant. *Goodwin v. State*, 191 S.W.3d 20, 25 (Mo.banc 2006).

With the exception of points II and VIII, all of Appellant's points relied on claim that he received ineffective assistance of trial counsel and was prejudiced as a result. To be entitled to post-conviction relief for ineffective assistance of counsel, the movant must satisfy a two-prong test. *Zink*, 278 S.W.3d at 175, *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the movant must show that his counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would exercise in a similar situation. *Zink*, 278 S.W.3d at 175. To meet this prong, a Rule 29.15

movant must overcome a strong presumption that counsel's conduct was reasonable and effective. *Id.* at 176. The second prong requires the movant to show that he was prejudiced by trial counsel's failure. *Id.* at 175. To satisfy the prejudice prong, the movant must demonstrate that, absent the claimed errors, there is a reasonable probability that the outcome would have been different. *Id.* at 176. Regarding a sentence of death, a movant must show a reasonable probability that the jury, balancing all of the circumstances, would not have recommended the death penalty. *Id.* The existence of both the performance and the prejudice prongs must be established by a preponderance of the evidence in order to prove ineffective assistance of counsel. *Id.* at 175.

## ARGUMENT

### I.

#### **Counsel's strategic choices in presenting evidence of Appellant's background were reasonable.**

Appellant claims that trial counsel were ineffective for failing to call Drs. Levin and Cross in the guilt phase to support a diminished capacity defense. Appellant also makes an alternative claim that counsel should have presented as mitigating evidence in the penalty phase the opinions of Drs. Levin and Cross about their diagnosis that Appellant suffered from acute stress disorder and all information that provided a foundation for those opinions. But counsel made reasonable strategic choices on how to present evidence of Appellant's background. Appellant has further failed to demonstrate a reasonable probability of a different outcome had counsel pursued a different strategy.

#### **A. Underlying Facts.**

##### **1. Trial Proceedings.**

Psychologist Daniel Levin was one of thirteen witnesses who testified for the defense in the penalty phase of Appellant's trial. (Tr. Index, 2228). Dr. Levin performed a psychological evaluation of Appellant on behalf of DFS in 2003, when Appellant was seventeen years old. (Tr. 2232). He was retained by trial counsel in 2006 to come into court and "try and explain who

Kevin is . . . .” (Tr. 2234-35). Trial counsel provided Dr. Levin with nearly 1,700 pages of records from DFS, 700 pages of records from St. Louis County Family Court, records from several residential placement facilities where Appellant had stayed, school records, police reports of prior arrests, therapist records, and transcripts of Appellant’s previous trial testimony and of the statement that he made to police in July of 2005. (Tr. 2236-37). Dr. Levin also conducted a three hour interview of Appellant. (Tr. 2237).

Dr. Levin testified that Appellant’s father was incarcerated when Appellant was two years old and that it would be hard to imagine anything more devastating than that to a child. (Tr. 2239). Dr. Levin also noted that records from DFS showed that Appellant’s mother had tremendous problems caring for her children, and that twelve hot line calls were made on her:

Yes. There were accusations, first of all, that the mother had a serious drug habit, a cocaine problem, and she was often gone at night. She had to sell food stamps in order to get money to buy drugs. Caseworkers found no food in the house. They found the children alone with roaches and unsanitary living conditions. And when DFS provided some services, a parent instructor, to come and help, that instructor – notes from that instructor showed that there was no progress from the mother.

They observed Kevin's mother being very hurtful to the children verbally even when being observed by caseworkers.

(Tr. 2240). Dr. Levin testified that the parent instructor had observed Appellant's mother yelling at and threatening her children. (Tr. 2240-41).

Dr. Levin testified that Appellant began developing physical symptoms between the ages of two and four that indicated emotional trauma:

This is something we see in children who, first of all, have suffered terrible losses. He's already suffered the loss of his father, but now he has a mother who's very troubled. She's barely functioning. She has serious drug problems, she's abandoned the children at night, there's no food in the house. So what happens is that any child of Kevin's age, any child in that situation is going to become traumatized. It's going to be extremely traumatic for them. And they're going to be scared to death. They are going to be crying out for help and wondering where their parents are.

(Tr. 2241-42).

Dr. Levin testified that DFS removed Appellant and his younger sister from their mother's home when he was four-years-old, and that Appellant went to live with his aunt, Edythe Richey. (Tr. 2243-45). Dr. Levin said that DFS did not provide any counseling, education, or support to Richey to help

her understand how to help Appellant cope with the four years of severe neglect, loss, and trauma that he had experienced. (Tr. 2246). Dr. Levin said that a child who had been hurt and neglected as Appellant had cannot heal spontaneously without medical and psychological intervention and without the benefits of caretakers who understand what the child needs. (Tr. 2246). Dr. Levin testified that Appellant began wetting the bed and acting aggressively with other children when he was seven years old, which confirmed that he had not been receiving the help that he needed. (Tr. 2248). Dr. Levin said that Richey responded to the bedwetting by hitting him with a switch every night, and continued to do that into his teenage years. (Tr. 2250). He testified that response just made the situation worse. (Tr. 2250). At about the same time, Appellant learned that his mother was expecting another child, which would increase feelings of being unwanted by his mother. (Tr. 2251).

Dr. Levin noted that Appellant's father was released from prison in 1999, but that he beat Appellant upon learning that Appellant had been acting out in school. (Tr. 2255-56). He also kicked Appellant out of his house after learning that Appellant still wet the bed. (Tr. 2257). Dr. Levin described that rejection as devastating for Appellant. (Tr. 2257). At about the same time, the aunt, Edythe Richey, decided that she was no longer able to take care of Appellant, and he was placed in a series of homes. (Tr. 2257-

65, 2270). Dr. Levin said that Appellant had reported attempting suicide during the first placement. (Tr. 2259).

Dr. Levin first met Appellant while he was at one of those homes, and he administered psychological tests that showed “high levels of underlying anger, sadness, grief, emptiness, guilt, and a tremendous amount of psychic pain.” (Tr. 2268). Dr. Levin said that because Appellant kept those feelings inside he was vulnerable in times of high stress to being overwhelmed by those feelings and acting impulsively. (Tr. 2268-69). Dr. Levin also gave his opinion as to what was going on with Appellant on the day that he shot Sergeant McEntee:

I believe that the death of Kevin’s brother was a major trauma and that it stirred up in Kevin a number of complex, painful, intense and overwhelming feelings that have a direct – that directly affected what happened and why he shot Mr. McEntee. (Tr. 2271).

Appellant’s maternal grandmother, Patricia Ward, testified that after Appellant’s father went to prison, Appellant, his mother and his brother Marcus lived in a garage behind the home of Appellant’s great-grandmother. (Tr. 2082-83). Appellant’s mother, Jada Tatum, became hooked on drugs during that time and could not function. (Tr. 2084). She frequently went out to get high, leaving the boys to fend for themselves, even though Appellant

was only one or two years old. (Tr. 2083, 2087). As a two-year-old, Appellant would walk to the main house, saying he was hungry and asking where his mother was. (Tr. 2085). That activity continued until Appellant was placed with his aunt when he was four years old. (Tr. 2088).

Edythe Richey testified that Tatum did not provide clothing, food, or supervision for Appellant or his siblings. (Tr. 2098). Richey made a hotline call after Tatum spent money on drugs, leaving Appellant and his siblings without shoes. (Tr. 2098). Richey eventually took custody of Appellant through DFS, while his sister went to live with another relative. (Tr. 2099). Richey testified that Tatum made no attempts to visit Appellant while he was living at Richey's home. (Tr. 2100). She even failed to attend a hearing when DFS was trying to terminate her parental rights. (Tr. 2108). Richey said that she received no training from DFS on how to care for a child who had been abused and neglected. (Tr. 2100). Richey said that she spanked Appellant when he wet the bed, and she testified that her handling of that situation was "Not very good." (Tr. 2105). Richey had to ask DFS to remove Appellant from her home when he was about thirteen because his behavior, including alcohol use and sex inside the home while Richey was at work, had gotten out of control. (Tr. 2111).

Thomas Lemp, a social worker with Catholic Family Services, worked with Appellant when he was at Father Dunnes's home for boys. (Tr. 2186-

87). Lemp said that Appellant had issues of anger management, relationships with peers, and avoiding physical confrontations. (Tr. 2189). He was always angry that his parents were not part of his life. (Tr. 2192). Lemp testified that Richey cared deeply for Appellant, but that she was very demanding and verbally confrontational when her expectations were not met. (Tr. 2191).

Sharon Wheeler was Appellant's DFS foster care worker when Appellant was twelve or thirteen. (Tr. 2209). Wheeler said that she made several unsuccessful attempts to contact Appellant's mother. (Tr. 2211). Wheeler also said that DFS policy forbade the use of corporal punishment by foster parents, and that spanking a child for bedwetting was not an approved form of discipline. (Tr. 2213-14).

2. 29.15 Proceedings.

*a. Allegations of Amended Motion.*

The amended motion contained a claim that counsel was ineffective for failing to investigate and present a diminished capacity defense. (PCR L.F. 169). The motion alleged that had counsel done so, an expert such as Dr. Daniel Levin or Dr. Donald Cross, would have been available to testify that Appellant suffered from the mental disease or defect of acute stress disorder at the time of the murder, and was therefore not capable of deliberation or cool reflection. (PCR L.F. 187). The motion alleged a reasonable probability

that, had such a defense been offered, that Appellant would have been convicted of second degree murder. (PCR L.F. 169). The motion also alleged the alternative of a reasonable probability of a different outcome in the sentencing phase of the trial. (PCR L.F. 169).

The amended motion contained a separate claim that counsel were ineffective for failing to obtain all of the Division of Family Services (“DFS”) records for Appellant and his siblings, and for failing to present to the jury, through the testimony of Drs. Cross and Levin, specific instances of abuse and neglect suffered by Appellant that were documented in those records. (PCR L.F. 240). The motion contained an additional separate claim that counsel were ineffective for failing to hire Dr. Cross to conduct psychological testing on Appellant and to testify as a witness in the penalty phase of the trial that Appellant suffered post-traumatic stress disorder and major depression. (PCR L.F. 294). The motion alleged that testimony would have supported the statutory mitigating circumstance that Appellant acted under the influence of extreme mental or emotional disturbance at the time of the offense. (PCR L.F. 294).

*b. Evidentiary Hearing.*

Dr. Levin testified at the evidentiary hearing that post-conviction counsel retained him in April of 2009 to conduct a psychological evaluation of Appellant to determine if he was suffering from a mental impairment, mental

illness, or mental defect at the time of the crime that would interfere with his ability to deliberate. (PCR Tr. 168-69). Dr. Levin said that in conducting the evaluation he reviewed 3,500 pages of DFS records concerning Appellant, compared to the 1,690 pages that he reviewed in preparation for his trial testimony. (PCR Tr. 169-70). Post-conviction counsel had Dr. Levin discuss the contents of some of those DFS records plus other records that he reviewed as part of his evaluation. (PCR Tr. 173-281). Dr. Levin said that it was his opinion, within a reasonable degree of medical certainty, that Appellant suffered from the mental disease or defect of acute stress disorder at the time of the murder and that it impacted his ability to deliberate or coolly reflect. (PCR Tr. 282, 291). Dr. Levin also testified that it was his opinion that Appellant was completely impaired in his ability to conform his behavior and conduct to the law, and that he was under extreme stress at the time of the shooting. (PCR Tr. 292-93). Dr. Levin said that he would have been available to conduct the same evaluation before Appellant's October 2007 trial and that he would have given the same testimony at both the guilt and penalty phases if called as a witness at that trial. (PCR Tr. 293-94).

Psychologist Donald Cross was also retained by post-conviction counsel in April of 2009 to evaluate Appellant. (PCR Tr. 329-33). He interviewed family members, reviewed records and conducted three interviews with Appellant. (PCR Tr. 334). As she did with Dr. Levin, post-conviction counsel

discussed with Dr. Cross at the hearing some of the specific incidents documented in Appellant's DFS records. (PCR Tr. 335-49). Dr. Cross testified that it was his opinion within a reasonable degree of medical certainty that Appellant was experiencing an acute stress disorder at the time of the murder. (PCR Tr. 360). Dr. Cross further opined that the disorder seriously impaired Appellant's ability to coolly reflect and to make rational and reasonable decisions. (PCR Tr. 369). Dr. Cross testified that the anxiety and grief that Appellant was experiencing at the time of the murder significantly impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and that Appellant was under extreme stress at the time of the crime. (PCR Tr. 370). Dr. Cross said that he was available and willing to evaluate Appellant for his October 2007 trial, was available and willing to testify at both the guilt and penalty phases of that trial, and that he would have offered the same opinions if called to testify. (PCR Tr. 371-72).

Trial co-counsel Karen Kraft testified that she decided as a matter of trial strategy not to pursue a diminished capacity defense because she thought that Appellant's story was compelling in the sense of the shooting happening very soon after he lost his brother. (PCR Tr. 482, 484). Kraft said that if the defense presented a mental health expert in the guilt phase, the State would seek its own evaluation. (PCR Tr. 484). Kraft said that she did

not want to lose the compelling nature of Appellant's story by turning it into a battle of mental health experts. (PCR Tr. 484).

Co-counsel David Steele testified that he would not have wanted to present evidence of all the specific instances of abuse and neglect that Appellant suffered in his pre-school years. (PCR Tr. 505-06). Steele noted that the jury has a certain tolerance and a certain time frame in which it is receptive to hearing evidence. (PCR Tr. 506). Steele said that he would fear losing the jury's attention and focus if it got tired of hearing repetitive, cumulative evidence. (PCR Tr. 506). Steele also testified that a strategic decision was made not to pursue a diminished capacity defense. (PCR Tr. 525). Steele said that a jury could understand the emotions that a person would go through after losing a brother and could decide from that understanding how those feelings would have affected Appellant's ability to deliberate. (PCR Tr. 526-27). Steele said that delving into mental health diagnoses posed risks:

A. You take something that is very common, like death, something very simple, a response to that death, and you make it something complex or more complex than it is. Keep it simple, keep it plain, and the jury can follow you, the jury can understand. You get to going off into these complexities of what

disorder he had, and you start to lose the force of the case which is the simple emotional impact of a death upon a person.

Q. Also, perhaps if a diminished capacity defense were pursued, you would lose that, and also there could potentially be another expert to testify for the State that might diagnosis (sic) him with something else, is that correct?

A. Well, because then you start asking the jury to consider whether he has a mental disease or defect. And again, someone's emotional state is common after a death. It's not something that jurors don't already understand. And I don't think a normal juror would say that someone's mental state after that, that that person was suffering from a mental disease or a mental defect because that's not the experience that they would have had or have known when their mother died or their father, whoever, they wouldn't say that they were suffering from a mental disease or defect. They would understand the symptoms that they were depressed or whatever, but they would not equate that to a mental disease or defect.

Q. And with that understanding of how a jury would relate to that and not see it as a mental disease or defect, that the potential could be there for an expert to come in and say that, no,

he wasn't suffering from anything, and would that not hurt the case?

A. It would have sidetracked them from the major issue.

(PCR Tr. 528-29).

c. *Motion Court Findings.*

In denying the claim that counsel was ineffective for failing to present a diminished capacity defense, the motion court found that counsel's strategic decision was reasonable, given the strong evidence of deliberation. (Supp. PCR L.F. 32). The court further found that Appellant was not prejudiced since counsel did present and argue evidence of his emotional state at the time of the murder. (Supp. PCR L.F. 32). In denying the claim that counsel was ineffective for failing to present evidence of specific instances of abuse and neglect, the motion court found that counsel pursued a reasonable strategy of presenting Dr. Levin's testimony in the penalty phase, and that Appellant was not prejudiced because Dr. Levin's testimony was similar to the evidence that Appellant claimed should have been presented. (Supp. PCR L.F. 37-38).

**B. Analysis.**

Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable. *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006). Reasonable choices of trial

strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance. *Id.* at 33. Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices. *Id.* It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy. *Id.* Counsel's testimony at the 29.15 hearing reflects a clear trial strategy on how to handle the issues of Appellant's emotional state at the time of the murder and how he was affected by the conditions of his upbringing.

1. Decision not to present diminished capacity defense.

Both counsel testified that they believed relying on the jury's understanding of the trauma that Appellant experienced after the death of his brother would be more effective than delving into medical diagnoses of mental diseases that would be less understandable to the jury and potentially distracting. Strategic decisions not to present a diminished capacity defense because counsel did not believe a jury would be persuaded by such a defense have been upheld as reasonable. *See, e.g., Worthington v. State*, 166 S.W.3d 566, 574-75 (Mo. banc 2005); *Middleton v. State*, 103 S.W.3d 726, 737 (Mo. banc 2003); *Henderson v. State*, 111 S.W.3d 537, 539-40 (Mo. App. W.D. 2003).

Furthermore, this Court has held that the failure to pursue a diminished capacity defense is not prejudicial where there was overwhelming

evidence of deliberation. *Lyons v. State*, 39 S.W.3d 32, 37 (Mo. banc 2001).

This Court noted on direct appeal the evidence showing deliberation, evidence that could reasonably be characterized as overwhelming:

The record shows Appellant retrieved his gun from his vehicle after his brother was taken to the hospital and expressed his belief that the police did not help his brother because they were focused on finding him. Two hours later, Appellant approached Sgt. McEntee's patrol car, squatted down to see into the window, and said "you killed my brother" before firing his handgun approximately five times at Sgt. McEntee's head and upper body. Appellant took Sgt. McEntee's silver gun and walked down the street with both guns. He then saw his mother and told her "that m\_\_\_\_ f\_\_\_\_ let my brother die, he needs to see what it feel[s] like to die." After leaving his mother, Appellant walked around the neighborhood and came to Sgt. McEntee, whose patrol car had rolled down the street and hit a tree. Appellant approached Sgt. McEntee and shot him two more times in the head. Appellant drove to his father's house and later went to a family member's apartment for several days until he surrendered to police.

*Johnson*, 284 S.W.3d at 572. Appellant's actions before, during, and after the shooting are so strongly indicative of deliberation, that there is no reasonable probability that the presentation of mental health evidence would have caused the jury to return a conviction for second-degree murder instead of first-degree murder.

2. Penalty phase evidence of Appellant's upbringing.

Counsel likewise made a considered and reasonable decision as to how to present evidence of Appellant's upbringing in the penalty phase. Co-counsel Steele noted that a jury is able to process only so much information, and going into too much detail can actually be counterproductive as it can result in the jury losing attention and focus. (PCR Tr. 506). Steele could also have reasonably feared that an overly long and repetitious presentation of evidence would backfire by alienating the jury. As it was, the jury did hear that Appellant was abandoned by both parents at an early age, that he went without food, clothing and decent shelter due to his mother's neglect that was fueled by her drug addiction, that he was physically abused by his aunt, that he was sent to live in a series of homes, and that those experiences caused psychological scars that were reopened by the death of his brother. The evidence that Appellant claims should have been introduced would have been cumulative to the evidence that was presented, as it would simply have been

additional instances of what was testified to. Counsel is not deemed ineffective for failing to present cumulative evidence. *Lyons*, 39 S.W.3d at 40.

Appellant relies on three cases to argue that counsel was ineffective, all of which are distinguishable. Counsel in *Wiggins v. Smith* failed to follow the standard practice of public defenders in Maryland of retaining a forensic social worker to prepare a social history of the defendant, even though funds were available to do so. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). As a result, counsel offered no evidence of the defendant's life history in the mitigation phase of the trial. *Id.* at 515. In this case, counsel did offer substantial evidence of Appellant's background.

Defense counsel in *Williams v. Taylor* offered brief mitigation testimony with two family members describing the defendant as a "nice boy" who was not violent. *Williams v. Taylor*, 529 U.S. 362, 369 (2000). One of those witnesses had not been interviewed prior to trial, but was asked to testify on the spot after being seen in the audience. *Id.* The third mitigation witness was a psychologist who did little more than repeat a statement that the defendant made during an examination that concerned his actions in a prior robbery. *Id.* Counsel in this case, by contrast, presented thirteen mitigation witnesses, some of whom testified about Appellant's upbringing and established that he suffered a abuse and neglect as a small child. It is also significant that the Supreme Court's holding in *Williams* was based in

large part on the fact that the Virginia Supreme Court had applied an incorrect legal standard in overturning the trial court's finding that the defendant had met the *Strickland* test and was entitled to a new trial. *Id.* at 396-99. In this case, the motion court correctly applied the *Strickland* test and found that Appellant was not entitled to relief. (PCR L.F. 483).

Counsel in *Rompilla v. Beard* was found ineffective for failing to examine the file of the defendant's prior convictions despite being on notice that the State intended to use the information in that file in support of its case in aggravation. *Rompilla v. Beard*, 545 U.S. 374, 383-84 (2005).

Counsel was thus ineffective not only for failing to discover potential mitigating evidence, but also for failing to adequately prepare to rebut the aggravating evidence that the State relied on. Counsel also presented what the Court described as "relatively brief" mitigation testimony, none of which touched on the matters encompassed by the potentially mitigating evidence that was contained in the prior conviction file. *Id.* at 377.

The record in this case does not reflect the general lack of preparedness evidenced in the cases on which Appellant relies. *Lyons*, 39 S.W.3d at 41.

Counsel's preparation and strategic choices were reasonable under the circumstances and Appellant has failed to show that different choices were reasonably likely to have changed the outcome of either phase of the trial.

Appellant's point should be denied.

## II.

### **The record refutes Appellant's claim of a *Brady* violation.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that the State failed to disclose that witness Jermaine Johnson received a direct benefit in exchange for his testimony against Appellant. But Appellant's own evidence demonstrates that no deal existed between the State and Johnson. And the record further demonstrates that trial counsel was aware during trial that the prosecutor's office had intervened to obtain a continuance in Johnson's probation violation case.

#### **A. Underlying Facts.**

##### **1. Trial Proceedings.**

Appellant's cousin, Jermaine Johnson, testified for the State in the guilt phase of the trial. (Tr. 1423). Johnson testified that after hearing of Bam Bam's death, he saw Appellant driving down the street. (Tr. 1424-25). Appellant got out of his car and spent time walking and talking with Johnson. (Tr. 1426). They eventually ran into Appellant's girlfriend. (Tr. 1428). Johnson got into a truck with her and smoked a "blunt" of marijuana, while Appellant began walking down the street. (Tr. 1429, 1433). Johnson said that he saw a Kirkwood police car turn the corner in front of where Appellant was walking. (Tr. 1433-34). Johnson got out of the truck and began jogging towards Appellant. (Tr. 1434-36).

Johnson testified that the police car came to a stop and that Appellant was even with the passenger side window. (Tr. 1440-41). When asked what happened, Johnson initially said that he heard shots, stood there for a minute, and then took off running. (Tr. 1442). Under continued questioning, he testified that he saw a gun in Appellant's hand and saw Appellant put the gun through the window. (Tr. 1443, 1445). When asked if Appellant was "down like that with his gun inside the car," Johnson replied, "I think so. To my recollect, I think so, sir." (Tr. 1446). The prosecutor eventually got Johnson to concede that he was about the same size as Appellant and that he had to "get down like this" to see inside the police car while standing beside it. (Tr. 1446).

Johnson testified that he saw the officer's head jerking as the shots were being fired. (Tr. 1447). Johnson said that he started getting sick to his stomach, and that he saw Appellant open the car door and take the officer's pistol. (Tr. 1448). Johnson ran between two houses and ended up on all fours as he threw up. (Tr. 1449). Appellant ran past Johnson and called him a "pussy." (Tr. 1450). Appellant was carrying two pistols. (Tr. 1450). Johnson said that he later saw Appellant driving out of Meachem Park . (Tr. 1451-55).

Johnson testified that he initially told the police that he did not know anything and would not tell them if he did. (Tr. 1456). Johnson said that he

decided to talk to the police after he violated his probation for a strong-arm robbery. (Tr. 1456-60). Johnson testified that he was still on probation for the robbery case and that no deals had been made regarding that charge. (Tr. 1461-62). Johnson also testified that his probation did not get revoked for the incident that prompted him to talk to the police about Sergeant McEntee's murder. (Tr. 1462).

Johnson testified on cross-examination that Appellant never made any threatening comments when they were walking before the encounter with Sergeant McEntee, and that Appellant never talked about getting revenge for Bam Bam's death. (Tr. 1467-69). Defense counsel also questioned Johnson about his deposition testimony, where he said that he was still sitting in the vehicle where he had been smoking marijuana when he heard gunshots. (Tr. 1481-82). Defense counsel asked Johnson about the status of his probation:

Q. Now, in terms of your probation, there was a hearing on that probation?

A. Yes, sir.

Q. You did not go, is that right?

A. No, sir.

Q. Someone else took care of it for you?

A. Yes, sir.

MR. MCCULLOUGH: Judge, I object. Was the question before, you did not go?

MR. STEELE: That's correct.

MR. MCCULLOUGH: Okay.

Q. (By Mr. Steele) Did someone from the Prosecutor's Office take care of that for you?

MR. MCCULLOUGH: I object to the argumentative form of the question. He doesn't know that because he didn't attend the hearing.

THE COURT: Objection sustained.

Q. (By Mr. Steele) Who went and took care of that for you?

A. I have no idea, sir.

Q. Okay. Did someone tell you you didn't have to go?

A. No, sir.

Q. You just did not go?

A. I just didn't go.

Q. You know you had a violation already, right?

A. Yes, sir.

Q. You did not go at all?

A. No, sir.

Q. Because you knew they were taking care of it, didn't you?

A. No, sir.

(Tr. 1491-93).

2. 29.15 Proceedings.

The amended 29.15 motion alleged that the State violated Appellant's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose information that Jermaine Johnson expected a benefit in exchange for his trial testimony and received one in the form of a year's continuance of his alleged probation violation while Appellant's case was pending, and in the form of a continuance on probation after Appellant was sentenced. (PCR L.F. 81, 84). The amended motion alleged that an assistant prosecutor involved in Appellant's case became involved in the probation violation case and had that case continued both before and after Appellant's trial. (PCR L.F. 82-83). The amended motion also alleged that the court file in the probation violation case was not made available to trial counsel because it was inadvertently listed as a closed file by the circuit clerk. (PCR L.F. 84-85).

At a hearing on October 27, 2010, a Mr. Krautman, who apparently was from the circuit clerk's office, brought Johnson's court file to the hearing. (PCR Tr. 21). Krautman told the court that Johnson had originally received a suspended imposition of sentence when he pled guilty, that his probation

was later revoked and he was sentenced to the Department of Corrections subject to probation under Chapter 559, which he received. (PCR Tr. 25).

Krautman said that once that case was resolved, it would not longer be confidential. (PCR Tr. 25). Krautman said that Johnson then had a second probation revocation that was resolved with probation being terminated in June of 2009. (PCR Tr. 25-26). After that happened, the probation revocation file was mistakenly marked as confidential. (PCR Tr. 26).

At an October 22, 2010, hearing, the prosecutor told the court that the State never had a witness agreement with Johnson and that Johnson's hope for better treatment was laid out at trial. (PCR Tr. 47). The prosecutor stated that the continuance of Johnson's probation violation case was not a secret and that the defense cross-examined him on it. (PCR Tr. 47-48). The prosecutor also stated that the court file in that case was not closed until after Johnson's probation was terminated in 2009, two years after Appellant was convicted and the year after he was sentenced. (PCR Tr. 49). Post-conviction counsel stated that the file had been marked confidential when she tried to look at it, and that she assumed it was also unavailable to trial counsel. (PCR Tr. 49-50). The motion court noted that the file had been brought before the court at a previous hearing and had been discussed, and that an evidentiary hearing was unnecessary under the circumstances. (PCR Tr. 51-52).

At the Rule 29.15 evidentiary hearing, Appellant deposited with the court an affidavit executed by Johnson. (PCR Tr. 532, 535). The affidavit stated, in pertinent part:

3. In July of 2005, when the shooting took place, law enforcement made attempts to speak to me about the shooting, but I refused to speak with them at that time. It wasn't until January 2, 2007, when I was arrested on outstanding warrants that I gave a statement to law enforcement about the shooting of Sgt. McEntee. At the time of my arrest on January 2, 2007, I was on supervised probation and had a probation violation pending.

4. As a result of my statement to police and my testimony at Kevin Johnson's trials, my warrants were all dropped and my probation violation was put off until after I testified at Kevin Johnson's trials. I was then placed back on probation and was terminated from probation soon after that. When I gave my statement to law enforcement and at the time I testified at Kevin Johnson's trial, I did not have any formal "deal" with the prosecutor. I did, however, expect to get some benefit related to my pending cases in exchange for making my videotaped statement and for testifying at trial.

(Movant's Ex. 62).

In denying the claim, the motion court found that it was without merit and clearly refuted by the record. (Supp. PCR L.F. 7). The court noted that Johnson was extensively questioned by both sides about his probation violation, that he denied having a deal with the State, that he stated that he was still on probation and that it had not been dismissed, that he was never revoked for his probation violation, that he never appeared for his probation revocation hearing, and that someone else had taken care of it and he did not know who that was. (Supp. PCR L.F. 7-8). The court found that Johnson's motivation for testifying was clearly brought before the jury and that there was no *Brady* violation because there was no witness agreement between Johnson and the State. (Supp. PCR L.F. 9). The court additionally found no prejudice because Johnson's testimony was corroborated by other witnesses. (Supp. PCR L.F. 9).

Additionally, the court found that the allegation regarding the availability of Johnson's file was groundless. (Supp. PCR L.F. 10). The court stated that Johnson's court file was not closed until June 3, 2009, and remained open during the entire duration of the prosecution of Appellant. (Supp. PCR L.F. 10). Finally, the court noted that Johnson's affidavit contained the same information as his trial testimony, including that Johnson did not have a formal agreement with the State. (Supp. PCR L.F.

11). The court found that the affidavit made clear that no *Brady* violation took place. (Supp. PCR L.F. 11).

**B. Analysis.**

Prosecutors must disclose, even without a request, exculpatory evidence, including evidence that may be used to impeach a government witness. *Middleton*, 103 S.W.3d at 733. Promises of leniency or other “deals” with witnesses are among the types of evidence that must be disclosed under these rules. *Id.* Appellant failed to demonstrate the existence of any undisclosed deal between the State and Jermaine Johnson. In fact, Johnson in the affidavit that he executed and that Appellant submitted as part of his post-conviction case, specifically denied the existence of any deal between himself and the State. (Movant's Ex. 62, ¶ 4). Johnson merely said that he had an expectation of receiving some benefit in exchange for his cooperation. (Movant's Ex. 62, ¶ 4). Johnson did not state that he shared that expectation with anyone, so Appellant has not shown that the State had any knowledge of Johnson’s subjective desires. *See State v. Salter*, 250 S.W.3d 705, 714 (Mo. banc 2008) (*Brady* only applies to information known to the prosecutor at the time of trial). And if defense counsel had wanted to know whether Johnson had an expectation of favorable treatment all they had to do was ask him, either at his deposition or during trial.

Appellant's claim relies heavily on the fact that an assistant prosecutor involved in Appellant's trial entered an appearance in Johnson's probation case and obtained continuances of his probation. But those facts do not establish a *Brady* violation because the record shows that defense counsel was aware of that situation at the time of trial. *Storey v. State*, 175 S.W.3d 116, 143 (Mo. banc 2005). Defense counsel's cross-examination of Johnson demonstrated that counsel knew that Johnson had not attended a probation revocation hearing and that someone from the prosecutor's office had taken care of it for him. (Tr. 1491-93). That cross-examination refutes the claim that the file on Johnson's probation case was not available to trial counsel. The prosecution is under no obligation to disclose information of which the defense is already aware and which the defense can acquire. *State v. Brooks*, 960 S.W.2d 479, 494 (Mo. banc 1997). The knowledge reflected in defense counsel's cross-examination, coupled with the information provided to the motion court that Johnson's file was not marked confidential until some two years after Appellant's trial – and post-conviction counsel's admission that she only assumed that the file was not available to trial counsel – supports the trial court's finding that the file was available to counsel during the pendency of Appellant's trial.

The motion court also correctly found that no prejudice would have occurred from a nondisclosure because Johnson's testimony was largely

cumulative to the testimony of other witnesses to the shooting. Appellant disputes that finding, arguing that Johnson provided the primary testimony on what Appellant claims were two disputed points – whether Appellant reached into the patrol car and whether he took Sergeant McEntee’s gun. But two other witnesses, Norvell Harris and Manu Jones, testified that they saw a hand or arm in the car while shots were being fired. (Tr. 1348, 1385). Additionally, defense counsel conceded during closing argument that Appellant reached into the car and shot Sergeant McEntee, and did so on the understandable basis that stippling around the gunshot wounds indicated that McEntee had been shot at close range. (Tr. 1943). And Johnson’s testimony that Appellant took McEntee’s gun was consistent with the testimony of Patricia Hartman, a neighborhood resident who testified that shortly after the first set of gunshots were fired she saw Appellant walking with two guns in his hands, and the evidence that Sergeant McEntee’s gun was missing. (Tr. 1151, 1258, 1265). Even if additional information existed to impeach Jermaine Johnson, it is not reasonably likely that the failure to disclose that information changed the outcome of the trial. *Salter*, 250 S.W.3d at 715.

The record refutes Appellant’s claim of a *Brady* violation. His point should be denied.

### III.

**Appellant is not entitled to relief on claim of failure to object to reenactment video.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that trial counsel were ineffective for failing to object to the admission of State's Exhibit 88, a reenactment video, and to its use in closing argument. But Appellant failed to allege facts demonstrating that an objection to the video would have been meritorious. Appellant also failed to demonstrate prejudice, as the State presented overwhelming evidence of deliberation apart from the video.

#### **A. Underlying Facts.**

##### 1. Trial Proceedings.

St. Louis County Detective Paul Neske was the lead detective assigned to investigate Sergeant McEntee's murder. (Tr. 1721-22). He interviewed Appellant the day after his arrest. (Tr. 1724-25). Neske testified about Appellant's statements during that interview, and clips of the video of the interview were played for the jury. (Tr. 1727-47). Neske testified that at the request of the prosecutor's office, he had gone to Meachem Park a few days prior to his testimony to videotape a recreation of what Appellant said he had done in relation to the murder. (Tr. 1747). The DVD containing that video was admitted into evidence without objection and played for the jury. (Tr.

1749). Neske took on the role of Appellant and at one point apparently walked up to a patrol car that had an officer sitting inside. (Tr. 1748, 1750). Neske testified after the video had played that he was six to six-and-a-half feet tall and that the officer sitting inside the car was about five-feet ten-inches. (Tr. 1750). Neske said that when he was standing outside the car, he could only see the officer inside the car from the shoulders and torso on down. (Tr. 1750-51). Neske said that he could start to see the officer's neck and chin as he put his arm into the car, and could see the officer's face when his arm was all the way in the car. (Tr. 1751-52).

Neske acknowledged on cross-examination that Appellant was five-feet seven-inches tall, or five inches shorter than Neske. (Tr. 1756). Neske also acknowledged that in the reenactment, he approached the patrol car from the side, while Appellant had said that he approached the car as he walked down the street. (Tr. 1756-57). Neske admitted that he did not approach the car in the same way that Appellant said he did. (Tr. 1757). Neske acknowledged that the patrol car had a windshield and that Sergeant McEntee was six-feet, six-inches tall. (Tr. 1757).

In his guilt phase opening argument, the prosecutor addressed Appellant's claim that he "lost it" and started shooting after Sergeant McEntee smiled at him as he walked past the patrol car:

But again, look at all the evidence in the case. What he said when they asked him very specifically, where did you see McEntee? Did you see McEntee through the front window? No. I was at the passenger window. I saw him from the passenger window. Well, even a little man like him with a big gun is still going to have to squat down to see who's driving that car.

And you saw the reenactment or the attempted reenactment, and Neske probably did him a favor by bending over as far as he was because what he says is as he's walking down the street, the car is over to the far side of the street, and he's walking down the street, and he tells you, I didn't see him there, I saw him through the passenger window. And he even corrected me on his testimony, I saw him in the passenger window, through the window, through the passenger window. That's where I was. Even a guy who's 5'7" or whatever he is has to squat down to see that.

(Tr. 1917). Defense counsel in his closing argument also referred to the videotape when making his case that Appellant was guilty only of second-degree murder. Counsel first noted that it took Neske only four seconds to walk up to the car and that was insufficient time for Appellant to reflect on what he was doing. (Tr. 1943).

The prosecutor returned to the reenactment during his closing argument:

Now, as I said before, even a little guy like him has got to squat down to see inside the car. He can't possibly see him smile at him unless he is squatting down and looking inside that car. And McEntee smiles at him, and in exchange for that, he gets a bullet in his face and another bullet in his face and several more bullets in his face and across his chest. That's what he got.

That is cool reflection. He walked up to that car. This is Neske doing it here. You know, he's not walking down the sidewalk going by trying not to draw attention to himself. He comes right down the street, in the street. Not where Neske is but down the street in the street walking right to the passenger window of the car. You're telling me that's not drawing attention to yourself. What he's doing is making sure that that's the guy he wants to kill inside that car. That is cool reflection before he shoots the guy. Before he kills him.

Go ahead and run just that part if you could.

(A clip of State's Exhibit No. 88 was played for the jury.)

MR. MCCULLOUGH: You can't see him there. You can't see him there. Now, you can see him. Once he's inside, once he's

down. I know Neske is taller, but take that he starts five inches lower, Johnson does, but you still can't do that, and especially if you're walking down, just as everybody says, he's only a few feet from the side of the car as he's walking down in the street. He's not trying to avoid drawing attention to himself. He's trying to make sure that the guy or one of the guys he wants to kill is inside that car.

(Tr. 1992-93).

2. Rule 29.15 Proceedings.

The amended 29.15 motion contained a claim that trial counsel were ineffective for failing to object to the admission of the reenactment video. (PCR L.F. 86). The motion alleged that the tape was inaccurate because Appellant and Sergeant McEntee were not the same height as the persons portraying them in the reenactment. (PCR L.F. 88). The motion alleged that that disparity affected the reenactment due to the conflicting testimony over whether Appellant leaned into the car and whether he took Sergeant McEntee's gun. (PCR L.F. 88). The motion alleged that the use of the reenactment video and the State's argument concerning it were prejudicial and colored the jury's determination of deliberation. (PCR L.F. 91). The motion court denied an evidentiary hearing on the claim. (PCR Tr. 56).

In its judgment denying the claim, the motion court stated that it had reviewed the tape and found that it was admissible as demonstrative evidence, so that an objection would have lacked merit. (Supp. PCR L.F. 12). The court also found no prejudice because the complained-of disparity in height was admitted by Detective Neske on both direct and cross-examination, and that counsel for both the State and Appellant also discussed that disparity with the jury. (Supp. PCR L.F. 13). Finally, the court noted that there was “abundant” evidence of deliberation apart from what the video might have shown. (Supp. PCR L.F. 13).

**B. Analysis.**

Ineffective assistance of counsel is rarely found in cases of a failure to object. *Worthington*, 166 S.W.3d at 581. It will only be deemed ineffective when the defendant has suffered a substantial deprivation of the right to a fair trial. *Id.* In addition, counsel is not ineffective for failing to make a nonmeritorious objection. *Id.*

Demonstrative evidence is admissible if it is both logically and legally relevant. *State v. Brown*, 337 S.W.3d 12, 15 (Mo. banc 2011). When assessing the relevance of demonstrative evidence, a court must ensure that the evidence is fair representation of what is being demonstrated and that it is not inflammatory, deceptive or misleading. *Id.* The trial court has broad

discretion to admit or reject demonstrative evidence. *State v. Black*, 50 S.W.3d 778, 787 (Mo. banc 2001).

Appellant relies primarily on an opinion from the Western District of the Court of Appeals, which declared inadmissible a videotaped reenactment of a crime where the victim reenacts the crime with a third party playing the role of the defendant. *State v. Caudill*, 789 S.W.2d 213, 216 (Mo. App. W.D. 1990). The Western District noted that courts in other states were split on the admissibility of reenactment videos and chose to follow the reasoning of the Texas Court of Appeals, which had found that the use of actors to recreate events was fraught with danger. *Id.* (citing *Lopez v. State*, 651 S.W.2d 413, 415 (Tex. Ct. App. 1983)). The Eastern District of the Court of Appeals declined to apply *Caudill* to the admission of a reenactment video where the defendant reenacted the events of the crime and two police officers represented the victims, but did not attempt to dramatize or recreate their actions. *State v. Anderson*, 862 S.W.2d 425, 432 (Mo. App. E.D. 1993), *overruled on other grounds by*, *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002).

The videotape at issue in this case does not fall within the holding of either *Caudill* or *Anderson* because neither the victim nor the defendant were participants in the reenactment. The videotape falls instead into a category that does not appear to be addressed by any Missouri cases – a reenactment

involving only police officers or other persons acting on the State's behalf. Such reenactments have been ruled admissible by courts in other states so long as they are a reasonably accurate depiction of what occurred, and if any discrepancies between the reenactment and the actual occurrence are either obvious to the jury or are explained to the jury. *See, e.g., People v. Anzalone*, 894 N.Y.S.2d 279, 280-81 (N.Y. App. Div. 2010); *State v. Cowans*, 717 N.E.2d 298, 308 (Ohio 1998); *State v. Finch*, 975 P.2d 967, 983-85 (Wash. 1997); *People v. Rodrigues*, 885 P.2d 1, 26-27 (Cal. 1994); *Commonwealth v. Chipman*, 635 N.E.2d 1204, 1210-11 (Mass. 1994). The disparity that Appellant complained about in the amended 29.15 motion was the difference in height between Appellant and Sergeant McEntee and the officers who portrayed them in the video. (PCR L.F. 88). But that disparity was made clear to the jury both during the presentation of evidence and in the State's closing argument. (Tr. 1750, 1756-57, 1917, 1992-93). *See Cowans*, 717 N.E.2d at 308 (disparities in video recreation were explained to jury); *Rodrigues*, 885 P.2d at 27 (inaccuracies in video were either obvious or explained to the jury and the prosecutor did not attempt to pass the videotape off as depicting exactly what happened on the night of the murder).

Given the lack of controlling authority on the admissibility of a videotape such as the one at issue here, Appellant cannot establish that an objection would have been meritorious. *See Worthington*, 166 S.W.3d at 581

(counsel is not ineffective for failing to make a nonmeritorious objection). Appellant has therefore also failed to show that the motion court clearly erred in finding that the videotape was admissible. (PCR L.F. 458).

Appellant also cannot establish that he suffered prejudice from counsel's failure to object. The amended motion alleged that the height disparity affected the reenactment due to the conflicting testimony over whether Appellant leaned into the car and whether he took Sergeant McEntee's gun. (PCR L.F. 88). But as noted in the previous point, testimony from multiple witnesses established that Appellant reached into the car and shot Sergeant McEntee, and counsel conceded that fact on the understandable basis that stippling around the gunshot wounds indicated that McEntee had been shot at close range. (Tr. 1348, 1385, 1943). The jury also heard evidence that Sergeant McEntee's gun was missing and that a neighborhood resident saw Appellant walking with two guns in his hands shortly after the first set of gunshots were fired. (Tr. 1151, 1258, 1265).

The motion further alleged that the video was prejudicial because it colored the jury's determination of deliberation. (PCR L.F. 91). But as noted above, the evidence of deliberation – particularly Appellant's action of firing the fatal shot into the back of Sergeant McEntee's head after returning to the area of the initial shooting and finding McEntee outside his car, on his knees and disabled – was so substantial that there is no reasonable probability that

the jury would have reached a different result had the videotape been excluded. *See Johnson*, 284 S.W.3d at 572. Appellant's point should be denied.

#### IV.

**Appellant failed to plead facts entitling him to relief on his claim that counsel was ineffective for failing to object to the presence of uniformed police officers as spectators at trial.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that trial counsel were ineffective for failing to object to the presence of numerous uniformed police officers who attended the trial as spectators. But Appellant failed to allege facts showing either that an objection would have been meritorious or that he was prejudiced by counsel's failure to object.

##### **A. Underlying Facts.**

The amended motion contained a claim that numerous uniformed police officers were in the hallway and the courtroom during both the guilt and penalty phases of trial. (PCR L.F. 123-24). The motion alleged that trial counsel should have moved to exclude the uniformed police officers from observing the trial or from wearing their uniforms while observing the trial because "[t]his obvious display of support for the victim in the case was a cry for justice for the victim and a call for a harsh punishment for Movant." (PCR L.F. 124). The motion further alleged that the presence of the uniformed officers "necessarily impacted the jury's consideration of the case and its consideration of punishment." (PCR L.F. 124). In describing the

evidence that would be presented on the claim, the motion merely stated that trial counsel would testify that there were numerous uniformed police officers in the hall and in the courtroom through the voir dire proceedings and both phases of the trial. (PCR L.F. 316).

The motion court denied a hearing on the claim. (PCR Tr. 83). In its judgment denying the claim, the motion court stated that the jury was sequestered throughout the proceedings and had no contact with spectators at any point throughout the trial. (Supp. PCR L.F. 22).

**B. Analysis.**

To be entitled to an evidentiary hearing, Appellant had to plead facts, not conclusions, warranting relief and demonstrating prejudice. *Goodwin*, 191 S.W.3d at 25. For a claim of failure to object that means pleading facts showing that an objection would have been meritorious and that the failure to object resulted in a substantial deprivation of Appellant's right to a fair trial. *Worthington*, 166 S.W.3d at 581. Appellant failed to meet that pleading burden.

Appellant claims that the presence of the officers as spectators at trial was inherently prejudicial. Whenever a courtroom arrangement is challenged as inherently prejudicial, the court must consider whether the practice presents an unacceptable risk that impermissible factors will come

into play which might erode the presumption of innocence.<sup>3</sup> *State v. Gollaher*, 905 S.W.2d 542, 547 (Mo. App. E.D. 1995). If the challenged practice is not found inherently prejudicial and the defendant fails to show actual prejudice, the inquiry ends. *Id.*

There do not appear to be any Missouri cases discussing whether the presence of uniformed officers as spectators at trial is inherently prejudicial. Appellant's argument that it is relies primarily on a Ninth Circuit decision which found that the wearing of "Women Against Rape" buttons by spectators at a rape trial was inherently prejudicial. *Norris v. Risley*, 918 F.2d 828, 830, 834 (9th Cir. 1990). But *Norris* has at least been called into question, if not effectively overruled, by the Supreme Court in *Carey v. Musladin*, 549 U.S. 70 (2006). In that habeas case, the Court upheld a state court decision that the wearing by the victim's family of buttons containing the victim's picture had not prejudiced the defendant's right to a fair trial.

---

<sup>3</sup> The "inherent prejudice" standard stems from a Supreme Court case which found that forcing a defendant to wear prison clothes at trial was inherently prejudicial. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976). By contrast, the Court subsequently found that the seating of uniformed security guards behind the defendant and in the first row of the spectator section was not inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986).

*Id.* at 72, 77. The Court found that federal law did not clearly apply the inherent prejudice test articulated in *Williams* and *Flynn* to claims of spectator conduct at trial. *Id.* at 76.

Courts in other states that have addressed claims regarding the presence of uniformed officers as spectators have taken different approaches in deciding whether the defendant was entitled to relief. Some courts have applied the inherent prejudice test. *See, e.g., Commonwealth v. Gibson*, 951 A.2d 1110, 1139 (Pa. 2008). Other courts have found that the mere presence of uniformed police officers is not inherently prejudicial. *See, e.g., Brown v. State*, 752 A.2d 620, 630 (Md. Ct. Spec. App. 2000); *Howard v. State*, 941 S.W.2d 102, 118 (Tex. Crim. App. 1996). Yet other courts have applied an abuse of discretion standard in reviewing a judge's response to complaints about the presence of uniformed officers in the courtroom.<sup>4</sup> *See, e.g., People v. Grady*, 838 N.Y.S.2d 207, 214 (N.Y. App. Div. 2007); *Phillips v. State*, 70 P.3d 1128, 1138 (Alaska Ct. App. 2003); *Boches v. State*, 506 So. 2d 254, 261-62 (Miss. 1987). The Florida Supreme Court appears to have alternatively

---

<sup>4</sup> Those cases would appear to be consistent with this Court's recognition of a trial court's duty to maintain order and decorum in a courtroom and its inherent discretion in fulfilling that duty. *State v. Elbert*, 471 S.W.2d 170, 173 (Mo. 1971).

applied all three standards. *Shootes v. State*, 20 So. 3d 434, 438 (Fla. 2009) (requiring defendant to show either actual or inherent prejudice); *Kearse v. State*, 969 So. 2d 976, 989 (Fla. 2007) (finding that presence of uniformed officers is itself insufficient to demonstrate a hostile courtroom); *Woods v. State*, 490 So. 2d 24, 27 (Fla. 1986) (applying abuse of discretion standard).

A common theme among all the cases was that the defendant had to allege and/or prove facts and circumstances that demonstrated either actual prejudice or the existence of inherent prejudice that denied the defendant his right to a fair trial. *See, e.g., Kearse*, 969 So. 2d at 989 (failure to allege facts other than that the courtroom was full of uniformed officers); *Shootes*, 20 So. 2d at 439 (finding inherent prejudice based on specific facts about number of officers present, where they sat, and what they wore); *Brown*, 752 A.2d at 630-31 (denying relief where record did not indicate number of police officers present, the location of the officers in the courtroom, and where there was no evidence of disruption or intimidation of witnesses or jurors); *Boches*, 506 So. 2d at 261-62 (upholding trial court's determination that highway patrolmen did not create a disturbance in the courtroom and that the atmosphere was not saturated with bias, hatred, or prejudice against the defendant).

Two cases are particularly relevant because they provide insight to the question of what a defendant must allege to obtain relief on a claim such as that raised by Appellant. *Gibson* like this case, was a post-conviction capital

case. *Gibson*, 951 A.2d at 1113. The defendant claimed that the presence of numerous uniformed police officers in the courtroom and surrounding areas during the guilt and penalty phases of the trial created an inherently prejudicial atmosphere thereby depriving him of a fair trial. *Id.* at 1137. The court stated that it could not find the existence of inherent prejudice where the record did not indicate the number of uniformed officers present or that they caused any disturbance. *Id.* at 1139. In *Howard*, the defendant objected at trial to the presence of uniformed officers, but his objection was limited to the presence of the officers and any message such a presence may send.

*Howard*, 941 S.W.2d at 117. The defendant never contended that the officers actively conducted themselves in a manner that prejudiced his opportunity to receive a fair trial. *Id.* The court found that in the absence of such evidence, the defendant had failed to demonstrate that he was entitled to relief. *Id.* at 118. Appellant's allegations are similar to those raised in *Gibson* and *Howard*, and like those cases lack the specificity required to show that he is entitled to relief, whether that be under an inherent prejudice standard, an actual prejudice standard, or an abuse of discretion standard.

The amended 29.15 motion merely alleged that numerous uniformed police officers were present in the hallway and in the courtroom. (PCR L.F. 124). The motion also contained allegations that "This obvious display of support for the victim in the case was a cry for justice for the victim and a call

for a harsh punishment for Movant[,]” and that “The presence of numerous police officers necessarily impacted the jury’s consideration of the case and its consideration of punishment.” (PCR L.F. 124). The motion further alleged that trial counsel would “testify that there were numerous uniformed police officers in the hallway and in the courtroom, throughout the voir dire proceedings and both phases of the trial.” (PCR L.F. 316). Appellant failed to allege any facts indicating the number of officers present or that the officers caused a disturbance or otherwise conducted themselves in a manner that prejudiced Appellant’s opportunity for a fair trial. Because those type of facts have been deemed necessary to determining whether a defendant is entitled to relief due to the presence of uniformed officers as spectators at trial, Appellant had to plead them in the 29.15 motion to establish that counsel failed to make a meritorious objection or that he was prejudiced by counsel’s failure to object. *Goodwin*, 191 S.W.3d at 25 (a Rule 29.15 movant must plead facts, not conclusions, warranting relief and the matters complained of must have resulted in prejudice to the movant).

Appellant failed to plead facts entitling him to relief and the motion court did not clearly err in denying his claim without an evidentiary hearing. Appellant’s point should be denied.

## V.

**Appellant is not entitled to relief on his claim that counsel should have impeached a State's witness with a prior inconsistent statement.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that trial counsel were ineffective for failing to object to Norman Madison's assertion that his testimony at trial was the same as what he told police, and for failing to impeach Madison with his alleged inconsistent statement. Appellant claims that he was prejudiced because the alleged inconsistency was crucial to the issue of deliberation. But any objection would have lacked merit, and Appellant cannot demonstrate that he was prejudiced by counsel's failure to impeach Madison because the substantial evidence of deliberation means that there was no reasonable probability of a different result had Madison been impeached.

### **A. Underlying Facts.**

#### **1. Trial Proceedings.**

Norman Madison was dating Appellant's mother, with whom he had a child, at the time of the murder. (Tr. 1635-36). He testified that after hearing a commotion and what sounded like fireworks, he saw Appellant walking down the street with a gun in his hand. (Tr. 1651-53). Madison said that Appellant's mother asked him what he had done, and Appellant replied,

“that mother fucker let my brother die, he needs to see what it feel like to die.” (Tr. 1654). Madison testified that Appellant did not say anything else before he walked away. (Tr. 1654-55).

Madison also testified that he talked to the police several days later and that his trial testimony was the same as what he told the police. (Tr. 1657). Madison admitted telling a different story in a deposition taken by defense counsel. (Tr. 1657). Madison testified in the deposition that Appellant did not say anything about Sergeant McEntee killing his brother or deserving to die. (Tr. 1658). Madison said that he gave that false testimony because he was trying to help Appellant and because he loved his mother. (Tr. 1658). Madison said that his trial testimony and what he told the police were the same thing and reflected what actually happened. (Tr. 1658).

Defense counsel cross-examined Madison about what he heard Appellant say:

Q. Now, you testified that when you heard this conversation at the corner of Saratoga and Orleans, you said that Kevin said that he needs to know what it feels like to die?

A. Yes.

Q. You didn't tell the police officers that the first time they interviewed you, did you?

A. Yes, I did.

Q. Would it help to take a look at your statement?

A. Yeah.

MR. MCCULLOUGH: Judge, I object. There is no statement. That's not a proper form of refreshing the recollection. There is a narrative by the police.

THE COURT: The objection will be sustained. If you're –

MS. KRAFT: Okay. That's fine, Judge.

THE COURT: You're presuming for the jury's purposes that what you're showing him is a statement that he personally made out rather than a statement of some third person.

Q. (By Ms. Kraft) So you're telling us that the first time that you talked to the police you told them that's what Kevin said?

A. I thought I did, okay. I don't remember if I did or not. I was in the hospital.

Q. So maybe you didn't tell them that?

A. Maybe I didn't. I don't know.

Q. So it's possible that all you told them that Kevin said was he killed my brother?

A. No, I think it was more than that.

Q. So if the police don't have it in the report, they've got it down wrong?

A. That's possible.

(Tr. 1660-61).

2. 29.15 Proceedings.

The amended motion contained a claim that counsel was ineffective for not establishing what Madison told the police about Appellant's statements about Sergeant McEntee. (PCR L.F. 127). The motion alleged that Madison told the police that Appellant had said that Sergeant McEntee "killed my brother" and not that McEntee "let my brother die and needs to see what it feel like to die." (PCR L.F. 127-28). The motion alleged that the distinction was important because the prosecutor argued that Appellant was seeking revenge for the death of his brother, while the defense argued that Appellant was confused and distraught and lost control after his brother's death. (PCR L.F. 128).

According to the motion, counsel should have objected to the State's question that what Madison testified to was the same as what he told the police, should have asked Madison to review the police report to refresh his memory, or if that were objected to, should have called Detectives Stephen Guyer and/or Douglas Raymond to testify to what Madison told them. (PCR

L.F. 127-28). The motion went on to allege that the officers would testify that they interviewed Madison on July 7, 2005, at DePaul Health Center and that Madison stated:

Madison observed Kevin Johnson, Jr. . . . Madison stated that he saw Johnson appeared to be extremely distraught as evidenced by his facial expressions and postures. Madison stated that he observed a gun in Kevin Johnson, Jr.'s left hand, which he described as an aluminum covered pistol. As Johnson approached, [Jada] Tatum asked Johnson what was going on. Johnson replied, "The motherfucker killed my brother." Jada Tatum replied, "That's not true."

(PCR L.F. 317). The motion went on to allege that the officers wrote a police report as set forth in the above paragraph, and thereby recorded what Madison told them. (PCR L.F. 317).

The motion court denied a hearing on the claim. (PCR Tr. 83). In its judgment denying the claim, the court found that counsel was not ineffective. (Supp. PCR L.F. 22-23). The court also found that Madison's prior inconsistent statements were brought out during his examination and that Appellant suffered no prejudice. (Supp. PCR L.F. 23).

## B. Analysis.

### 1. Failure to object.

The first part of Appellant's claim is that counsel should have objected when the prosecutor asked Madison whether his trial testimony was the same as what he told the police. Ineffective assistance of counsel is rarely found in cases of a failure to object. *Worthington*, 166 S.W.3d at 581. It will only be deemed ineffective when the defendant has suffered a substantial deprivation of the right to a fair trial. *Id.* In addition, counsel is not ineffective for failing to make a nonmeritorious objection. *Id.*

Appellant claims that the prosecutor's question was objectionable as improper rehabilitation and bolstering because Madison was testifying on direct and had thus not been impeached. But a prosecutor may anticipate possible bases for impeachment and expose inconsistencies on direct examination. *State v. Reilly*, 674 S.W.2d 530, 533 (Mo. banc 1984); *see also State v. Blankenship*, 830 S.W.2d 1, 9 (Mo. banc 1992) (a party may elicit prior inconsistent statements of its own witness without a showing of surprise or hostility). Because there were inconsistencies between Madison's in-court testimony and his deposition testimony, the question about Madison's statement to the police was part of a proper effort by the prosecutor to blunt the effect of an anticipated area of cross-examination by

defense counsel. An objection would have lacked merit and counsel was not ineffective for failing to make it. *Storey*, 175 S.W.3d at 155.

Appellant also makes an argument that Madison's testimony about his statement to the police was untrue and that the prosecutor knew it. But the prosecutor's remarks during defense counsel's cross-examination indicated that the police report contained a narrative summary prepared by the detectives and not a verbatim account of what Madison told them. (Tr. 1660-61). The allegations of the amended 29.15 motion confirm this. (PCR L.F. 317). The record thus does not clearly show that Madison's testimony was incorrect. And the police report itself was not made a part of the record of either trial or the Rule 29.15 proceedings.<sup>5</sup> (Tr. Index; PCR Tr. vi-viii). This Court cannot assume facts or evidence not found upon the record, and it cannot assume facts presented as mere allegations on appeal. *State v. Sager*, 600 S.W.2d 541, 577 (Mo. App. W.D. 1980); *see also State v. Williams*, 34 S.W.3d 440, 446 (Mo. App. S.D. 2001) (appellate courts will not presume an error that the record does not affirmatively show). Appellant failed to plead

---

<sup>5</sup> As opposed to the depositing of Jermaine Johnson's affidavit with the motion court even though an evidentiary hearing was denied on that claim. *See Point II above.*

facts, not refuted by the record, showing that counsel was ineffective for failing to object.

2. Failure to impeach Madison with police report.

The second part of Appellant's claim is that counsel should have tried to impeach Madison by refreshing his recollection with the police report. But defense counsel did try to refresh Madison's recollection with the police report and the trial court sustained the prosecutor's objection on the basis that the report contained the officer's narrative and not a verbatim statement by Madison.

Defense counsel continued to question Madison about whether the only statement of Appellant's that he had relayed to the police was that Sergeant McEntee had killed Appellant's brother. (Tr. 1661). Those questions were sufficient to lay a foundation to impeach Madison with his previous statements to the police. *State v. Garrison*, 276 S.W.3d 372, 379 (Mo. App. S.D. 2009).

3. Failure to call detectives.

Madison's denial that he only told the police that Appellant had said that Sergeant McEntee had killed his brother opened the door for defense counsel to call the officer who interviewed Madison to testify about any statements Madison made that were inconsistent with his trial testimony. *Blankenship*, 830 S.W.2d at 10, 12. This Court need not determine whether

counsel should have called that officer because the record refutes the claim that Appellant was prejudiced by counsel's action.

Appellant's theory of prejudice is that the alleged difference in statements was crucial to the question of whether Appellant deliberated. But as noted above, the evidence of deliberation was so substantial that there is no reasonable probability that the jury would have reached a different result had defense counsel successfully impeached Madison. *See Johnson*, 284 S.W.3d at 572.

Appellant failed to plead facts, not refuted by the record, demonstrating that he was entitled to relief. The motion court did not clearly err in denying the claim without an evidentiary hearing and Appellant's point should be denied.

## VI.

**Appellant is not entitled to relief on his claim that counsel was ineffective for failing to object to the prosecutor's arguments on deliberation.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that trial counsel were ineffective for failing to object to the prosecutor's erroneous definition of deliberation during closing argument. But the motion court did not clearly err in finding that an objection would have lacked merit, given this Court's direct appeal opinion where it declined to reach the question of whether the prosecutor's argument was erroneous. Even if counsel should have objected, their failure to do so was not prejudicial given the overwhelming evidence of deliberation and the jury being correctly instructed on that element.

### **A. Underlying Facts.**

Appellant raised a plain error claim on direct appeal that the prosecutor's argument on deliberation misled the jury, contravened the law, and created a manifest injustice. (SC89168, Appellant's Brf., pp. 22, 56).

Appellant's brief cited several examples of what he alleged were improper argument. (SC89168, Appellant's Brf., p. 57-59). This Court found no plain error in the prosecutor's use of the phrase "conscious decision" in arguing deliberation, even though that phrase is not used in the approved definition

of deliberation. *Johnson*, 284 S.W.3d at 574. The Court noted that the prosecutor initially read that approved definition of deliberation to the jury, and that the jury was presumed to follow the jury instruction that properly defined deliberation. *Id.* The Court further stated, “We do not reach whether the term ‘conscious decision’ was error at all. *Id.* at 574 n.8.

The amended Rule 29.15 motion contained a claim that trial counsel were ineffective for failing to object to portions of the prosecutor’s closing argument that allegedly misstated the definition of deliberation and lessened the State’s burden of proof on deliberation. (PCR L.F. 122, 128-133). The amended motion not only referenced the same arguments made by the prosecutor that were referenced in Appellant’s direct appeal brief, but repeated the analysis from the brief almost verbatim. *Compare* (SC89168, Appellant’s Brf., pp. 57-62) *with* (PCR L.F. 128-33). The amended motion did contain one portion of the prosecutor’s closing argument that was not included in the direct appeal brief. (PCR L.F. 129-30 (citing Tr. 1973)). That argument is not referenced in Appellant’s brief in the present case. (SC92448 Appellant’s Brf., pp. 93-98).

The motion court denied an evidentiary hearing on the claim. (PCR Tr. 83). In its judgment denying the claim, the motion court stated that the proposed objections were without merit and that Appellant had failed to demonstrate either deficient performance or prejudice. (Supp. PCR L.F. 23).

## B. Analysis.

An attorney's failure to object during closing arguments only results in ineffective assistance of counsel if it prejudices the accused and deprives him of a fair trial. *Zink*, 278 S.W.3d at 187. As an initial matter, it cannot be said that the motion court clearly erred in finding that any objection would have lacked merit, given the direct appeal opinion where this Court declined to reach the question of whether the prosecutor's argument was erroneous. *Johnson*, 284 S.W.3d at 574 n.8. Counsel will not be deemed ineffective for failing to make a non-meritorious objection. *Storey*, 175 S.W.3d at 155.

Indeed, making a conscious decision to kill is part of the deliberative process. The prosecutor argued as much when he said, "[Y]ou make a conscious decision to go after somebody and kill them, that is cool reflection[.]" (Tr. 1908-09). Appellant's argument is not aided by the *Rousan* decision on which he relies, since that opinion does not distinguish "conscious decision" from "cool reflection," but instead distinguishes "knowingly causing the death of another person" as used in the second degree murder statute, from "cool reflection." *State v. Rousan*, 961 S.W.2d 831, 851-52 (Mo. banc 1998). When the argument is considered in its full context, along with the instructions read by the prosecutor and given to the jury, it becomes apparent that the prosecutor was discussing how the evidence gave rise to a fair

inference that Appellant knowingly caused Sergeant McEntee's death after deliberating on the matter. That argument did not misstate the law.

Even if the argument was improper, that does not mean counsel was ineffective for not objecting. *State v. Clemons*, 946 S.W.2d 206, 230 (Mo. banc 1997). Courts will weigh several factors in determining ineffective assistance, including whether the jury was properly instructed on the law and whether, in the total context of the trial, it was reasonably probable that the outcome would have been different absent the improper argument. *Id.*

In *Clemons*, the jury found that counsel was not ineffective for failing to object to the prosecutor's misstatement of the law on accomplice liability, where that error was corrected by the jury receiving the proper instructions. *Id.* The jury in this case was properly instructed on deliberation, and the prosecutor even began his argument by reading the approved definition of deliberation to the jury. *Johnson*, 284 S.W.3d at 574. The jury being properly instructed led to this Court's finding of no plain error in the prosecutor's argument. *Id.* While this Court's finding of no plain error on direct appeal does not foreclose a finding of *Strickland* prejudice, it is the rare case where an error that is not outcome-determinative on direct appeal will meet the test for *Strickland* prejudice. *Deck*, 68 S.W.3d at 428. This is not one of those rare cases.

In addition to the jury being properly instructed, this Court in *Clemons* also pointed to the overwhelming evidence of guilt in finding that the defendant was not entitled to relief on his claim of ineffective assistance of counsel. *Clemons*, 946 S.W.2d at 230; *see also Tisius v. State*, 183 S.W.3d 207, 217 (Mo. banc 2006) (counsel not ineffective for failing to object to erroneous “acquittal first” argument where jury was properly instructed and the strength of the evidence of deliberation precluded a finding of prejudice). As noted in previous points, the evidence of deliberation was overwhelming, and when combined with the correct instructions given the jury, the record refutes Appellant’s claim that counsel’s failure to object resulted in prejudice or deprived him of his right to a fair trial. Appellant’s point should be denied.

## VII.

**Appellant failed to plead facts entitling him to relief on his claim that counsel should have objected to Appellant wearing a leg brace during trial.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that trial counsel were ineffective for failing to object to Appellant's appearance before the jury while wearing a shackling device underneath his clothing. But the claim can be considered refuted by the record because there is no indication that Appellant raised the issue of shackling before the trial court. Also, any objection to the leg brace would have been nonmeritorious, since the routine use of shackles underneath a defendant's pants does not violate due process.

### **A. Underlying Facts.**

The amended 29.15 motion alleged that Appellant was brought into the courtroom at various times by the transport officers after the jury was already seated. (PCR L.F. 137, 316-17). According to the motion, Appellant asserted that he had on a leg brace and that the jury would have observed a slight limp when he walked. (PCR L.F. 137, 317). The motion further alleged that Appellant had to pull a latch on the brace when he sat down and that doing so made a noise. (PCR L.F. 137, 317). The motion stated that if post-conviction counsel were permitted to contact the jurors, they would testify

that they were aware that Appellant was restrained. (PCR L.F. 137). The motion asserted that counsel should have objected and made a record regarding Appellant's appearance before the jury in a restraint that the jury was aware of. (PCR L.F. 138).

The motion court denied an evidentiary hearing on the claim. (PCR Tr. 84). In its judgment denying the claim, the motion court found that it was a mere allegation and that Appellant had not demonstrated prejudice. (Supp. PCR L.F. 23).

#### **B. Analysis.**

No pre-trial motions concerning shackling were filed, nor was shackling raised as an issue in the motion for new trial. (L.F. 1-19, 556-78).

Respondent has also not found any references to shackling in the trial transcript. An after-the-fact claim of improper shackling can be considered refuted by the record where the question of shackling was not raised before the trial court. *Cf. Dickerson v. State*, 269 S.W.3d 889, 892-93 (Mo. banc 2008) (finding that evidentiary hearing was warranted where the question of shackling was raised in a pre-trial motion).

Appellant's claim also fails because it relies on the United States Supreme Court decision of *Deck v. Missouri*, which found that due process is violated by the routine use of visible shackles without adequate justification. *Deck v. Missouri*, 544 U.S. 622, 635 (2005). This Court has, however,

previously rejected an attempt to extend *Deck* to the wearing of a leg brace under the defendant's pants, even when the effects of the brace are seen by the jury. *Zink*, 278 S.W.3d at 186. In finding that the holding of *Deck* was limited to the use of visible shackles, this Court noted that the Supreme Court, "expressly noted that the trial court did not explain 'why, if shackles were necessary [the trial court] chose not to provide for shackles that the jury could not see – apparently the arrangement used at trial.'" *Id.* (quoting *Deck*, 544 U.S. at 634-35)).

Because the use of a concealed leg brace does not violate due process, any objection made by trial counsel would have lacked merit. Counsel will not be deemed ineffective for failing to make a meritless objection. *Zink*, 278 S.W.3d at 188. In addition, Appellant failed to plead facts showing that he was prejudiced by counsel's failure to object. The amended motion merely alleged that some jurors were aware that Appellant was shackled, but *Zink* demonstrates that mere awareness is not sufficient to make out a viable claim of ineffective assistance of counsel. *Id.* at 185 (jurors testified by deposition that jurors did not see shackle but that the defendant's gait caused them to believe that he was wearing a shackling device).

Because Appellant raises a claim of ineffective assistance of counsel, he must demonstrate the existence of *Strickland* prejudice. But Appellant does not discuss *Strickland* prejudice in his brief, arguing instead that a showing

of prejudice is not required due to the existence of structural error.

(Appellant's Brf., pp. 101-02). That argument fails because it is based on an erroneous interpretation of the scope of the *Deck* opinion. *See Deck*, 544 U.S. at 635 ("Thus, where a court, without adequate justification, orders the defendant to wear shackles **that will be seen by the jury**, the defendant need not demonstrate actual prejudice to make out a due process violation.") (emphasis added). Appellant does not contend that he was wearing shackles visible to the jury, and his pleadings demonstrate that he was not. Appellant failed to plead facts relieving him of his burden of demonstrating *Strickland* prejudice due to counsel's alleged errors.

Appellant failed to plead facts entitling him to relief and the motion court did not clearly err in denying the claim without an evidentiary hearing. Appellant's point should be denied.

## VIII.

**Claim that Missouri's death penalty statutes are unconstitutional is not cognizable in a motion for post-conviction relief. Even if it were cognizable, the arguments raised against the statutes have repeatedly been rejected by this Court.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that Missouri's death penalty statute is unconstitutional because it does not genuinely narrow the class of people eligible for the death penalty. But Appellant's claim is non-cognizable because it should have been brought on direct appeal, and even if cognizable, each of the attacks Appellant levies against Missouri's statutory scheme have been consistently rejected by this Court.

### **A. Underlying Facts.**

The amended Rule 29.15 motion alleged that Appellant suffered various constitutional deprivations because Missouri's death penalty statutes do not narrow the class of defendant's eligible for the death penalty. (PCR L.F. 304). To support that claim the amended motion cited a study by professors Sloss, Thaman and Barnes, the results of which were published in the Arizona Law Review in the summer of 2009. (PCR L.F. 349-58). The motion court denied an evidentiary hearing on that claim. (PCR Tr. 122). In

its judgment, the motion court found that the claim lacked merit, in that the death penalty statutes have been repeatedly upheld. (Supp. PCR L.F. 24-25).

**B. Analysis.**

As an initial matter, this Court should decline to consider Appellant's constitutional challenge to Missouri's death penalty statute because his challenge should have been raised on direct appeal. In fact, that is exactly what this Court did in a recent case where a similar claim was raised, relying upon the same law review article that Appellant relies on in this appeal. *McLaughlin v. State*, 378 S.W.3d 328, 357 (Mo. banc 2012). The Court noted that post-conviction relief under Rule 29.15 is not a substitute for direct appeal or a mechanism to obtain a second chance at appellate review. *Id.* The Court further stated that claims challenging the constitutionality of the death penalty are for direct appeal and are not cognizable on a motion for post-conviction relief. *Id.* The Court concluded that the appellant in *McLaughlin* had not identified any reason for his failure to assert the constitutional claim on direct appeal, and that the motion court had not erred in denying the claim without an evidentiary hearing. *Id.* Appellant has likewise not alleged the existence of any exceptional circumstances that prevented him from attacking the constitutionality of Missouri's death penalty statute on direct appeal, and no such circumstances are apparent

from the record.<sup>6</sup> Accordingly, this Court should summarily deny his point as non-cognizable.

Even if this claim were properly before this Court, it would fail on the merits. The study that Appellant's argument is based upon has already been reviewed by this Court. The defendant in *Johnson v. State* challenged the constitutionality of Missouri's death penalty statute based on the same study that Appellant relies on here. *Johnson v. State*, 333 S.W.3d 459, 471-72 (Mo. banc 2011). This Court found no error in the motion court's conclusions that the study was "severely flawed," marred by deficiencies in the data and by the lack of "professional and practical experiences in criminal law." *Id.* at 472. Moreover, as the Court pointed out, "even if the study was not flawed, it does

---

<sup>6</sup> Were Appellant to argue in reply that the law review article on which he relies was not available at the time his direct appeal was pending that would still not make his claim cognizable, as the underlying data was available (PCR L.F. 305), and the theories to which that data is now being applied have been raised before. Furthermore, it should be noted that the 2009 law review article was also not available when the direct appeal was pending in *McLaughlin. State v. McLaughlin*, 265 S.W.3d 257 (Mo. banc 2008). That did not prevent the Court from finding the claim non-cognizable on the basis that it should have been raised on direct appeal.

not necessarily establish that Missouri's statutory scheme is unconstitutional." *Id.* Apart from the study, Appellant cites no authority to support his specific constitutional attacks against Missouri's death penalty law. (Appellant's Brf., pp. 103-07).

Indeed, the constitutional arguments criticizing Missouri's death penalty scheme outlined in the study and advanced in Appellant's brief have all been explicitly rejected by this Court. First, Appellant argues that the distinction between first and second degree murder in Missouri – the mental states of “deliberation” and “knowingly” – fails to narrow the pool of those eligible for death. (Appellant's Brf., p. 106). But this Court has repeatedly rejected the argument that the definition of “deliberation” is too indefinite to plainly distinguish between first and second degree murder. *Rousan*, 961 S.W.2d at 851-52; *State v. Middleton*, 998 S.W.2d 520, 524 (Mo. banc 1999); *State v. Strong*, 142 S.W.3d 702, 716 (Mo. banc 2004).

Second, Appellant argues that the “wantonly vile” aggravator has been construed so broadly as to apply to almost any murder. (Appellant's Brf., p. 106). This Court has held otherwise. *See State v. Williams*, 97 S.W.3d 462, 473-74 (Mo. banc 2003); *State v. Cole*, 71 S.W.3d 163, 171-72 (Mo. banc 2002); *State v. Johns*, 34 S.W.3d 93, 113 (Mo. banc 2000); *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. banc 2000); *State v. Knese*, 985 S.W.2d 759, 778 (Mo. banc 1999); *State v. Ervin*, 979 S.W.2d 149, 165-66 (Mo. banc 1997).

Finally, Appellant argues that “geographical disparities dictate which defendants receive death.” (Appellant’s Brf., p. 106). But, as the allegations in Appellant’s amended motion make plain, “geographical disparities” is just another term for prosecutorial discretion. (PCR L.F. 306) (alleging that, “in Missouri, who gets charged with first degree murder and, of those charged, who actually stand in jeopardy of the death penalty, is completely up to the individual county prosecutors who may exercise their discretion in any manner they chose (sic)”). Time and again, this Court has rejected the claim that Missouri’s statutory death penalty procedure is unconstitutional because it vests too much discretionary power in local prosecutors. *See, e.g., Johnson*, 333 S.W.3d at 471; *State v. Forrest*, 290 S.W.3d 704, 716-17 (Mo. banc 2009); *State v. Ramsey*, 864 S.W.2d 320, 330 (Mo. banc 1993); *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo. banc 1992); *State v. Powell*, 798 S.W.2d 709, 714 (Mo. banc 1990); *State v. McMillin*, 783 S.W.2d 82, 101-02 (Mo. banc 1990), *abrogated on other grounds by, Morgan v. Illinois*, 504 U.S. 719 (1992).

In light of the overwhelming weight of authority rejecting Appellant’s constitutional arguments, the motion court did not clearly err in denying the claim without an evidentiary hearing. Appellant’s point should be denied.

## IX.

**Appellant is not entitled to relief on his claim of failure to object to an allegedly sleeping juror.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that trial counsel were ineffective for failing to seek to replace sleeping jurors. But the trial record refutes the claim that an objection would have been sustained had one been made, and Appellant has further failed to plead facts showing that he was prejudiced by a juror potentially missing a portion of defense counsel's closing argument.

### **A. Underlying Facts.**

#### 1. Trial Proceedings.

Defense counsel's guilt phase closing argument was interrupted by the trial court, which addressed the jury:

Ladies and gentlemen, some of you seem to be having a little trouble keeping your focus. Do you want to stand up and stretch out for just a second, and then we'll continue.

You may be seated again.

Counsel may continue.

(Tr. 1955-56). Neither the transcript of the remainder of the trial nor the motion for new trial contain any references to sleeping jurors. (L.F. 556-78).

2. 29.15 Proceedings.

The amended 29.15 motion contained a claim that counsel were ineffective for failing to object and make a record of sleeping jurors. (PCR L.F. 136). The motion alleged that at least one juror began to sleep during defense counsel's closing argument, which prompted the court to ask the jurors to take a break to stretch and regain their focus. (PCR L.F. 136, 316). The motion went on to allege that at least one juror missed key points of defense counsel's closing argument, including: counsel's argument that prior to the second shooting of Sergeant McEntee, Appellant was going back to see his daughter one last time and was not going back to further shoot McEntee; and counsel's argument that the shots could have been fired in as little as two or three seconds. (PCR L.F. 136, 316). The motion alleged that trial counsel noticed the problem and would testify that at least one juror dozed off during defense counsel's closing argument. (PCR L.F. 136). The motion alleged that due to counsel's failure to object, Appellant was subjected to a verdict by a jury that had not considered all of the argument in the case, and that counsel should have requested the removal of the allegedly sleeping juror. (PCR L.F. 136-37).

The motion court denied an evidentiary hearing on the claim. (PCR Tr. 84). In its judgment denying the claim, the motion court found that it was a

mere allegation and that Appellant had not demonstrated prejudice. (Supp. PCR L.F. 23).

## **B. Analysis.**

Ineffective assistance of counsel is rarely found in cases of a failure to object. *Worthington*, 166 S.W.3d at 581. It will only be deemed ineffective when the defendant has suffered a substantial deprivation of the right to a fair trial. *Id.* In addition, counsel is not ineffective for failing to make a nonmeritorious objection. *Id.* The record in this case shows that an objection would have lacked merit.

The removal of a juror who may be asleep is left to the discretion of the trial court, even if one of the parties requests removal. *State v. Martin*, 956 S.W.2d 364, 365 (Mo. App. S.D. 1997). The trial court's discretion extends to permitting it to remove a sleeping juror even over a defendant's objection. *State v. Youngblood*, 648 S.W.2d 182, 187-88 (Mo. App. S.D. 1983). Both the trial transcript and the amended 29.15 motion show that the court gave the jurors a break when it noticed that some of them might be having trouble following defense counsel's closing argument. It was at this time that the amended motion alleged at least one juror was sleeping. (PCR L.F. 136, 316). But if that had been the case, it would have been noticed by the trial court, which could then have moved to replace the sleeping juror or to at least bring the matter to the attention of counsel for both sides and ask if any relief were

desired. The record thus indicates that the court did not observe any jurors to be sleeping, but instead that some jurors were experiencing a momentary lapse of attention, which is not prejudicial and does not mandate replacement. *State v. Tabor*, 657 S.W.2d 317, 320 (Mo. App. E.D. 1983). The record refutes Appellant's claim in that it does not show that an objection or request for replacement would have been granted had one been made.

Even if a juror or jurors did fall asleep during a portion of the trial, that fact alone does not entitle Appellant to relief. *Vann v. State*, 26 S.W.3d 377, 381 (Mo. App. S.D. 2000); *State v. Williams*, 945 S.W.2d 575, 583 (Mo. App. W.D. 1997), *overruled on other grounds by, Deck*, 68 S.W.3d at 427. He must show that he was prejudiced by that sleeping. *Id.* The one case Respondent has found where a Rule 29.15 movant pled sufficient facts to warrant an evidentiary hearing on a claim such as this alleged that jurors slept through the presentation of evidence. *State v. Fritz*, 913 S.W.2d 941, 945-46 (Mo. App. S.D. 1996). The potential prejudice from jurors sleeping through the presentation of evidence is apparent, since "Jurors determine facts from all of the evidence. They cannot determine facts from evidence they have not heard." *Youngblood*, 648 S.W.2d at 188.

By contrast, the allegation here is that a juror slept through part of defense counsel's closing argument. The prejudicial effect of doing so is tenuous. The jury was instructed that its duty was to determine the facts

and to do so only from the evidence and the reasonable inferences from the evidence. (L.F. 466). The jury was further instructed that the arguments of counsel were not evidence, and was reminded that its duty was to be governed by the evidence and to render a verdict under the law and the evidence. (L.F. 474). The jury is presumed to follow those instructions. *Tisius*, 183 S.W.3d at 216. Missing a portion of an argument, whether by dozing off or through momentary inattention, would not prevent a juror from fulfilling his or her duty to apply the evidence to the law as presented in the instructions. In other words, Appellant was not deprived of a jury that was able to “determine facts from all of the evidence.” *See Youngblood*, 648 S.W.2d at 188.

And the arguments that were allegedly missed were not reasonably likely to have changed the outcome of the trial. The first argument mentioned in the motion was that Appellant was going back to see his daughter when he encountered and shot Sergeant McEntee a second time. (PCR L.F. 136). The jury heard that evidence from Appellant’s prior trial testimony and even a juror who might have missed the argument on that testimony was able to consider the evidence in reaching a verdict. (2007 Tr. 801-03). The other portion of the argument mentioned in the amended motion was that the shots, according to the evidence, could have been fired in as little as two or three seconds. (PCR L.F. 136). The prosecutor responded

to both of those arguments in his closing, so even a juror that might have missed it a first time likely was aware of it. (Tr. 1975, 1995). And neither one of those arguments, even if believed by the jury, foreclosed a finding of deliberation when Appellant fired the fatal shots.

Regardless of why Appellant was walking in the area where Sergeant McEntee ended up after the initial shooting, once he saw McEntee he had ample time to deliberate before telling the bystanders to get out of his way and then putting a bullet in McEntee's head. (Tr. 1352-53; 2007 Tr. 804). And regardless of how long it took to fire the shots, the evidence showed that all of the bullets fired at Sergeant McEntee came from a nine-millimeter Hi-Point semi-automatic firearm, which required the shooter to pull the trigger each time a bullet was fired. (Tr. 1565-71, 1574-75). Because the jury was instructed that deliberation means "cool reflection upon the matter for any length of time no matter how brief," it could have found the existence of deliberation from the act of pulling the trigger multiple times, even if it believed that doing so took only a matter of seconds. (L.F. 471).

Appellant failed to plead facts, not refuted by the record, entitling him to relief. His point should be denied.

X.

**Appellant failed to demonstrate ineffectiveness or prejudice from counsel's failure to make additional *Batson* challenges.**

Appellant claims that the motion court erred in denying without an evidentiary hearing his claim that trial counsel were ineffective for failing to properly object to alleged *Batson*<sup>7</sup> violations in the peremptory strikes of veniremembers Clark, Jackson, Cottman, and Stephenson, and that he was prejudiced because counsel's performance violated his rights to a fair trial.<sup>8</sup> But Appellant failed to plead facts showing either that the proposed *Batson* challenges would have been meritorious, or that there was a reasonable probability of a different result at trial had counsel made the challenges.

---

<sup>7</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>8</sup> Appellant's brief contains an additional argument that counsel was ineffective for failing to preserve the *Batson* claim for appellate review. Allegations or issues not raised in a post-conviction motion are waived on appeal. *Johnson*, 333 S.W.3d at 471. Furthermore, the failure to preserve error for appellate review is not cognizable in a Rule 29.15 motion. *Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008).

## A. Underlying Facts.

### 1. Trial Proceedings.

The State exercised peremptory strikes against veniremembers Clark, Cushman, Jackson, and Cottman. (Tr. 1048). The State also struck two persons from the alternate panel, Stephenson and Stasiak. (Tr. 1048).

Defense counsel Kraft raised *Batson* challenges to the strikes of Jurors Clark and Cottman. (Tr. 1049).

The prosecutor stated that he struck Clark because Clark stated that he would have to be heavily in favor of death, which led the prosecutor to believe that he might hold the State to a higher burden than was required by law. (Tr. 1049). The prosecutor added that Clark had said several times that he could not sign the verdict form and that he laughed about it, which got a response from Appellant's family. (Tr. 1049-50). The prosecutor also said that Clark spoke out on various comments from other jurors, and that he felt the comments were inappropriate. (Tr. 1050). The prosecutor reiterated that the primary factors were that Clark would not sign the verdict form and that he would have to be heavily in favor of death. (Tr. 1050). The court asked Kraft if she had a response, and she answered, "No, Your Honor." (Tr. 1050). The court found that Clark's apparent requirement that he would have to be heavily convinced of guilt was a race-neutral reason and denied the *Batson* challenge. (Tr. 1050).

As to Juror Cottman, the prosecutor stated that she was “not all that willing to answer the questions regarding the death penalty and other issues surrounding that.” (Tr. 1051). The prosecutor further noted that Cottman was a foster parent for the Annie Malone Children’s Home and had indicated that she still saw a lot of the kids for whom she was foster parent. (Tr. 1051). The prosecutor said those children appeared to have been around Appellant’s age, and that there would be evidence in the penalty phase of the trial that Appellant spent some time in the custody of Annie Malone. (Tr. 1051). The prosecutor said that he assumed that Cottman probably had a very high opinion of Annie Malone and that would not be favorable to the State’s position. (Tr. 1051).

Kraft argued that Juror Bayer was a white male who was also a foster parent at one time. (Tr. 1052). The prosecutor responded that Bayer was a foster parent for a brief period of time at St. Vincent’s and had no connection to Annie Malone. (Tr. 1052). The prosecutor characterized Bayer’s foster parent experience as “a completely different situation.” (Tr. 1052). The court ruled that the State had provided a race-neutral reason and upheld the strike. (Tr. 1053).

The court asked Kraft if she was raising a *Batson* challenge to Juror Stephenson, and Kraft replied that she was not. (Tr. 1053). The court further noted that Kraft had not raised a *Batson* challenge to Juror Jackson.

(Tr. 1057). Kraft acknowledged that she had made an affirmative decision not to make that challenge:

THE COURT: As a matter of trial strategy?

MS. KRAFT: I believe she's the juror who said her son had been charged with murder and acquitted.

THE COURT: I just want to make sure the record reflected that you made a conscious decision on that, that we don't end up with a PCR saying you should have challenged it.

MS. KRAFT: That's correct.

(Tr. 1057-58).

## 2. Direct Appeal Proceedings.

A claim was raised on direct appeal that the trial court erred in overruling the *Batson* challenge to juror Cottman because both of the reasons given by the prosecutor were pretextual. (SC89168, Appellant's Brf., pp. 21, 43). In making that claim regarding Cottman's involvement with Annie Malone, Appellant argued that he had also received services from DFS and there were similarly-situated white jurors with professional or personal experience with DFS that were not struck by the State. (SC89168, Appellant's Brf., p. 50). Appellant argued that DFS had investigated an allegation that Juror Bayer beat his son; that Juror Duggan was a teacher who called DFS three times to report something going on with a student that

concerned her; that Juror Georger was a mentor for the Family Court for two or three years during the time that Appellant was in DFS custody and had to appear in Family Court every six months; and that Juror Boedeker worked with new moms and babies and would occasionally talk with DFS if it was called in due to a positive drug screen on the mother or baby after delivery. (SC89168, Appellant's Brf., pp. 50-52).

In denying the claim, the Court determined that the prosecutor's stated reason for striking Cottman was not pretextual because Appellant's involvement with the Annie Malone Children's Home was significant, given the services it had provided to Appellant. *Johnson*, 284 S.W.3d at 571. The Court found no evidence that the State had engaged in improper behavior to constitute a *Batson* violation, and concluded that the trial court had not erred in denying the *Batson* challenge. *Id.* The Court stated that because the trial court found one race-neutral reason for the strike, it was unnecessary to review whether Cottman's unwillingness to answer death qualification questions was pretextual. *Id.* at 571.

3. 29.15 Proceedings.

The amended 29.15 motion alleged that counsel were ineffective for failing to make proper and complete *Batson* challenges to the African-Americans who were peremptorily stricken by the State. (PCR L.F. 74). The motion alleged that had counsel not been ineffective, Appellant would not

have been convicted of first-degree murder and would not have been sentenced to death. (PCR L.F. 74).

The motion alleged that the State exercised four of its peremptory strikes on the regular panel and one strike on the alternate panel, and struck three African-Americans on the regular panel (John Clark, Cleeta Jackson, and Debra Cottman) and one African-American on the alternate panel (Harry Stephenson). (PCR L.F. 76). The motion alleged that counsel failed to make proper and complete *Batson* objections to the strikes of Clark and Cottman, and failed to make any *Batson* objections to the strikes of Jackson and Stephenson. (PCR L.F. 74).

The motion alleged that counsel had no response to the State's reason for striking Clark. (PCR L.F. 76). The motion did not make any allegations as to what response counsel could or should have made. (PCR L.F. 76).

As to juror Cottman, the motion alleged that counsel failed to bring to the court's attention three similarly situated white jurors who had contacts and connections with DFS. (PCR L.F. 77). Those jurors were Bayer, who had been a foster parent and who had been investigated by DFS on an allegation that he beat his son; Duggan, a teacher who called DFS to report concerns she had about students; Boedeker, who worked with "new moms and babies" and occasionally would talk with DFS if they were called in due to a positive drug screen on the mother or baby after delivery. (PCR L.F. 77). The motion

further alleged that counsel should have mentioned Juror Georger, who was a mentor in the Family Court and had worked with kids in a variety of locations during the time the Family Court placed and maintained Appellant in DFS custody. (PCR L.F. 77-78).

The only witnesses that were listed in support of the claim were trial counsels Kraft and Steele. (PCR L.F. 310). The motion merely alleged that both would testify that they did not have a strategic reason for failing to properly object and preserve the *Batson* issues during voir dire. (PCR L.F. 310).

The motion court denied a hearing on the claim. (PCR Tr. 46). In its judgment denying the claim, the motion court found that Appellant had failed to allege, must less demonstrate, any prejudice that he suffered from the removal of Jurors Jackson, Stephenson, or Clark. (Supp. PCR L.F. 6). The motion court noted this Court's ruling that the trial court did not err in sustaining the strike of Juror Cottman, that the State's reason for striking Juror Clark was race neutral, and that the record of voir dire revealed valid race neutral reasons for the State to have struck Jurors Jackson and Stephenson. (Supp. PCR L.F. 6-7).

## B. Analysis.

### 1. *Motion did not establish Strickland's performance prong.*

A successful *Batson* challenge requires the defendant to demonstrate that the prosecutor's race neutral explanation for the strike is pretextual. *Johnson*, 284 S.W.3d at 571. In regard to Juror Clark, after noting the State's explanation for the strike, the amended 29.15 motion merely alleged that counsel did not respond to that reason. (PCR L.F. 76). The motion contained no allegations as to what counsel could or should have said in response, and it alleged no facts demonstrating the State's reason was pretextual. Appellant failed to plead facts showing that the *Batson* claim had merit. *Clemmons v. State*, 785 S.W.2d 524, 530 (Mo. banc 1990).

Appellant also failed to plead any facts regarding the strikes of Jurors Jackson and Stephenson that would demonstrate that a *Batson* challenge to those strikes would have been meritorious. In addition, the record made at trial shows that counsel made a strategic decision not to challenge those strikes, thus making an evidentiary hearing on that part of the claim unnecessary. *State v. Lacy*, 851 S.W.2d 623, 632 (Mo. App. E.D. 1993), *Cf.*, *Wilkes v. State*, 82 S.W.3d 925, 930 (Mo. banc 2002) (finding that a hearing was required where the record did not conclusively show that counsel's action was trial strategy). Counsel chose not to object to the strike of Jackson because she had approached the bench during voir dire to note that her son

had spent about a year in prison after being charged with a murder for which he was eventually tried in St. Louis County and acquitted. (Tr. 960-62; 1057). While the reasons for not challenging the strike of Juror Stephenson do not appear in the record, the trial court specifically asked counsel if she was making a *Batson* challenge to that strike, and counsel replied that she was not. (Tr. 1052). That exchange shows that the failure to make a strike was a deliberate and considered decision, and not inadvertance.

The majority of Appellant's claim concerns the *Batson* challenge to the strike of Juror Cottman, and counsel's failure to bring other supposedly similarly-situated white jurors to the court's attention. But the arguments made in the motion largely mirror those made on direct appeal. *Compare* (PCR L.F. 77-79) *with* (SC89168, Appellant's Brf., 50-52). Given this Court's finding that the record did not demonstrate pretextual behavior by the prosecutor, the mere reiteration of those arguments in the amended motion does not establish that the *Batson* challenge would have been meritorious.<sup>9</sup> *Johnson*, 284 S.W.3d at 571.

---

<sup>9</sup> It should also be noted that counsel was operating under the stresses of trial, where she did not have the luxury of a verbatim transcript to comb through after the fact. It is easy for Appellant to comb through the record and fault counsel for failing to catch certain facts, but this sort of leisurely,

Even if Appellant had succeeded in persuading the trial court that Cottman's involvement with Annie Malone was a pretextual reason for the strike, the court could still have rejected the *Batson* challenge and upheld the strike had it accepted the other reason given for the strike – Cottman's unwillingness to answer death qualification questions. *State v. Taylor*, 18 S.W.3d 366, 370 n.6 (Mo. banc 2000). The amended motion alleges no facts demonstrating that reason was pretextual. (PCR L.F. 77-79, 310).

2. *Motion did not establish Strickland's prejudice prong.*

Appellant also failed to plead facts, not refuted by the record, showing prejudice. Because the amended motion did not allege that any unqualified persons served on the jury, Appellant was not entitled to a presumption of prejudice, but rather had to show a reasonable probability of a different outcome. *Strong*, 263 S.W.3d at 648-49. Appellant thus had to show that, absent counsel's alleged error, there is a reasonable probability that he would not have been found guilty, or that, with respect to the sentencing phase,

---

hindsight evaluation of the record should be avoided in resolving claims of ineffective assistance of counsel. *Strickland*, 466 U.S. at 689. Trial counsel should thus not be faulted for failing to make every possible argument that a post-conviction review of the verbatim record might support.

there is a reasonable probability that the jury would have concluded that the death penalty was not warranted. *Id.* at 647.

Even if it could be said that the prosecutor engaged in purposeful, racial discrimination in making any of the strikes (which Respondent does not concede), there is no reasonable probability that a jury composed of a greater number of African-American jurors would have acquitted Appellant. “A person’s race simply ‘is unrelated to his fitness as a juror.’” *Batson*, 476 U.S. at 87. Thus, to suggest that the jury would have been more more “fair and impartial” or unbiased if an additional African-American juror had served on it, “is ‘to engage, at best, in mere speculation and, at worst, in the stereotyping that *Batson* and its progeny strive to prevent.” *Morrow v. State*, 21 S.W.3d 819, 827 (Mo. banc 2000) (holding that there was no reasonable probability that female jurors would have rendered a different verdict); *Young v. Bowersox*, 161 F.3d 1159, 1160-61 (8th Cir. 1998) (rejecting the defendant’s claim of ineffective assistance of counsel because there was no reasonable probability that jurors of another race would have decided the case differently).

The amended motion contains only conclusory allegations of prejudice and sets forth no facts demonstrating a reasonable probability of a different result. Indeed, because there is no reasonable probability that a jury comprised of different qualified jurors (with a somewhat different racial

composition) would have reached a different verdict, it cannot be said that counsel was ineffective for failing to take actions that might have replaced one qualified juror with a qualified African-American juror. In short, there is simply no basis for Appellant's conclusory claim that the outcome of his trial would have been different.<sup>10</sup> *See Strong*, 263 S.W.3d at 649 (denying 29.15 claim where defendant made no attempt to show a reasonable probability of a different outcome at trial had counsel made *Batson* objections).

Additional facts refute any finding of prejudice regarding the failure to challenge the strike of Juror Stephenson. He was struck from the alternate panel and none of the four alternates selected for the trial deliberated in either the guilt or penalty phases. (Tr. 1048, 1996, 2342). Counsel's decision not to challenge that strike thus did not create a reasonable probability of a

---

<sup>10</sup> This is not to suggest that the equal protection (and other societal) concerns of *Batson* and its progeny are not significant. But whether there was an equal protection violation at Appellant's trial simply has little or no bearing on whether Appellant's Sixth Amendment right to effective counsel was violated. *See generally Allen v. Hardy*, 478 U.S. 255, 259 (1986) (finding that *Batson* standard did not have such a fundamental impact on the integrity of the fact-finding function of trial as to compel retroactive application).

different result in either phase of the trial. Furthermore, *Batson* does not stand for the proposition that there is a constitutional right to be an alternate juror, and *Batson* is not violated by the strike of an alternate who would not have taken part in deliberations had he been seated as an alternate. *State v. Carter*, 889 S.W.2d 106, 109 (Mo. App. E.D. 1994), *habeas relief denied by, Carter v. Kemna*, 255 F.3d 589, 592 (8th Cir. 2001) (finding that state court's decision was not contrary to clearly established Supreme Court precedent). If the strike of Juror Stephenson did not amount to a *Batson* violation, it goes without saying that Appellant was not prejudiced by counsel's decision not to challenge the strike.

Appellant failed to plead facts, not refuted by the record, showing that he was entitled to relief. He therefore also failed to plead facts entitling him to an evidentiary hearing, and the motion court did not clearly err in denying his claim without a hearing. Appellant's point should be denied.

## XI.

**Counsel was not ineffective for failing to investigate and call his daughter's grandmother as a mitigation witness.**

Appellant claims that trial counsel were ineffective for failing to investigate and call Lavonda Bailey as a witness in the penalty phase to testify about Appellant's relationship with his daughter. But counsel made a reasonable decision not to call Bailey based on information gained from Appellant that indicated that he and Bailey did not have a good relationship. Appellant also was not prejudiced because Bailey's testimony would have been cumulative to testimony presented by other witnesses establishing that Appellant had a good relationship with his daughter.

### **A. Underlying Facts.**

#### 1. Trial Proceedings.

Appellant's grandmother, Patricia Ward, was one of the thirteen defense witnesses that testified in the penalty phase of the trial. (Tr. 2080). She testified that she knew Appellant's daughter, who was three years old at the time of the trial. (Tr. 2090). Ward said that Appellant interacted with the child "all the time," and she described his relationship with the child as "Fantastic." (Tr. 2090).

Also testifying for the defense was Appellant's aunt, Edythe Richey. (Tr. 2094-95). Richey testified that she saw Appellant with his daughter and

that he loved her. (Tr. 2116). Richey said that Appellant kept the child most of the time, that he bathed her, fed her, and learned how to comb her hair. (Tr. 2116). Richey described Appellant as “a great father.” (Tr. 2116). Richey testified that Appellant was still seeing his daughter at the time of the trial, that the girl knew Appellant was her father and that she liked coming to see him. (Tr. 2117). Richey also identified two pictures of Appellant with his daughter and those pictures were admitted into evidence as Defendant’s Exhibits L and M. (Tr. 2124-26).

Pam Stanfield was the principal at Westchester Elementary School when Appellant was a student there. (Tr. 2134). She testified for the defense that she visited Appellant after he was arrested for Sergeant McEntee’s murder, and that Appellant showed her a picture of his daughter. (Tr. 2135). Stanfield testified that Appellant was very proud of his daughter and showed Stanfield the picture so that she could see what the child looked like. (Tr. 2135). Stanfield said that Appellant expressed to her that it was very hard for him to be away from his daughter. (Tr. 2136). Stanfield testified that she encouraged Appellant to write letters to his daughter so “that when she learned to read that she would have letters from her daddy showing her how much he loved her and cared about her.” (Tr. 2136).

Melissa Fuoss was a teacher at Kirkwood High School who had Appellant as a student in her American literature and creative writing

classes during his senior year. (Tr. 2143-45). Fuoss testified that she assigned the students in the creative writing class to write a poem about a moment in their lives that they could describe in words. (Tr. 2146). She said that Appellant wrote about giving his daughter a bath. (Tr. 2146).

Romona Miller taught Appellant biology during his sophomore year at Kirkwood High School. (Tr. 2148-49). Miller testified that she was very visible in the Meachem Park community and that she sometimes saw Appellant with his daughter in a park that was across the street from the house where Miller's mother-in-law lived. (Tr. 2150-51). Miller described Appellant as "a very doting father." (Tr. 2151). Miller said that she could tell that the child was very fond of Appellant and wanted to stay with him. (Tr. 2151). Miller further testified that "you could tell that he was a very caring and loving father of his little girl." (Tr. 2151).

Romona Miller's husband, Alvin, also testified that he saw Appellant playing with his daughter in the park. (Tr. 2158, 2161). He said that Appellant sometimes came over to show the baby to him and his wife. (Tr. 2161). Alvin Miller testified that Appellant seemed concerned and interested in the child. (Tr. 2161).

2. 29.15 Proceedings.

The amended motion contained a claim that counsel were ineffective for failing to investigate and call Lavonda Bailey, the grandmother of Appellant's

daughter, to testify in the penalty phase of the trial about the close relationship between Appellant and his daughter. (PCR L.F. 291-92). The motion alleged that a reasonable probability existed that the jury would not have sentenced Appellant to death had it heard Bailey's testimony. (PCR L.F. 292).

Bailey testified at the Rule 29.15 evidentiary hearing that before the murder, Appellant spent time with his daughter. (PCR Tr. 417). She said that Appellant took his daughter to the park, took her for rides in the car, and played with her. (PCR Tr. 418). Bailey also said that Appellant, his daughter, and the girl's mother (Bailey's daughter) waited outside on the porch until Bailey got home from work at 2:00 a.m. (PCR Tr. 418). Bailey agreed that Appellant had a fairly good relationship with his daughter, and that he would care for her at his home for two or three days at a time. (PCR Tr. 418). She also testified that Appellant stayed at the hospital with his daughter when she became ill at three months old. (PCR Tr. 419). Bailey testified that Appellant saw his daughter every day from the time she was born until he was arrested, and that she considered him a good father. (PCR Tr. 419-20). Bailey said that since Appellant had been arrested, he continued to call his daughter every week, and that she sometimes visited him in prison. (PCR Tr. 420). Bailey said that she favored Appellant continuing to have a relationship with his daughter while he was incarcerated. (PCR Tr.

420-21). Bailey described her own relationship with Appellant as “Fine.” (PCR Tr. 421).

Bailey said that she was never contacted by Appellant’s trial attorneys. (PCR Tr. 422). She said that she would have complied if subpoenaed to come to trial and would have given the same testimony. (PCR Tr. 421). Bailey testified that she was aware of an incident where Appellant had hit her daughter, leaving a handprint on her face, and that she was also aware that he pleaded guilty to charges arising from that incident. (PCR Tr. 421-23).

Co-counsel Karen Kraft testified to her recollection that Appellant had given her the impression that he may not be on good terms with Bailey, and that was why she did not contact Bailey. (PCR Tr. 470). Kraft testified that she put on evidence from Appellant’s relatives and from a teacher that Appellant had a loving relationship with his daughter. (PCR Tr. 480). Co-counsel Robert Steele testified that Bailey was not called to testify because counsel had information regarding her view of Appellant that led them to believe that she would not be helpful. (PCR Tr. 512).

In denying the claim, the motion court found that evidence of Appellant’s involvement in his child’s life was presented through the testimony of Patricia Ward, Edythe Richey, and Romona Miller, and through the admission of photographs of Appellant and his daughter. (Supp. PCR L.F. 38). The court found that Bailey’s testimony would have been

cumulative and that Appellant had failed to show how it would have broken any new ground or provided a viable defense. (Supp. PCR L.F. 39). The court further found that counsel were not ineffective for not pursuing Bailey due to the impression that Appellant gave them that Bailey did not have a positive opinion of him. (Supp. PCR L.F. 39). The court found that counsels' impression was logical, given Appellant's assault on Bailey's daughter. (Supp. PCR L.F. 39).

## **B. Analysis.**

Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable. *Anderson*, 196 S.W.3d at 37. Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance. *Id.* at 33. Additionally, "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ervin v. State*, 80 S.W.3d 817, 824 (Mo. banc 2002) (quoting *Strickland*, 466 U.S. at 691)).

Counsel testified at the evidentiary hearing that they decided not to investigate or call Bailey because Appellant had led them to believe that he and Bailey did not have a good relationship. What investigation decisions are reasonable depends critically on what information the defendant has supplied

his lawyer, and when a defendant has given counsel reason to believe the pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. *Ervin*, 80 S.W.3d at 824.

Even if counsel should have investigated Bailey despite the information provided by Appellant, counsel's failure to investigate and call her was not prejudicial. Evidence of Appellant's relationship with his daughter was amply presented to the jury through the testimony of the six witnesses described above. Bailey's testimony as adduced at the evidentiary hearing would have added nothing substantial to the evidence that the jury heard. The failure to present evidence that is cumulative to that presented at trial does not constitute ineffective assistance of counsel. *McLaughlin*, 378 S.W.3d at 343.

Thus, in *Smulls v. State* this Court found that counsel was not ineffective for failing to interview and present certain mitigating witnesses who would have testified to certain aspects of the defendant's character, including that he cared for his children. *Smulls v. State*, 71 S.W.3d 138, 154-55 (Mo. banc 2002). The Court noted that counsel presented five penalty phase witnesses who testified to the same matters about which the unrepresented witnesses would have testified. *Id.* at 154. In addition to finding that unrepresented testimony cumulative, the Court noted that there

was no showing of a different result, given the aggravating factors found by the jury. *Id.* at 155.

Appellant likewise makes no showing of a reasonable probability of a different result had Bailey testified. He claims that her testimony would have rebutted evidence concerning an incident where Appellant slapped his child's mother, leading to a misdemeanor conviction. But Bailey testified that while she maintained a good relationship with Appellant she also "thought that he shouldn't have no right to hit on a woman." (PCR Tr. 422). She further testified that she did not know what her daughter did at the time of the assault. (PCR Tr. 422). The suggestion from that testimony that the victim of the assault may have shared some blame for what happened would likely have left a negative impact on the jury that could easily have neutralized or outweighed any positives from Bailey's cumulative testimony about Appellant's relationship with his child. Even if Bailey had managed to neutralize the evidence of the assault, that still would not be reasonably likely to change the outcome given the statutory aggravators found by the jury and the overall strength of the evidence in aggravation.

The trial court did not clearly err in finding that counsel were not ineffective and Appellant was not prejudiced. Appellant's point should be denied.

## CONCLUSION

In view of the foregoing, Respondent submits that the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

CHRIS KOSTER  
Attorney General

/s/ Daniel N. McPherson  
DANIEL N. McPHERSON  
Assistant Attorney General  
Missouri Bar No. 47182

P. O. Box 899  
Jefferson City, MO 65102  
Phone: (573) 751-3321  
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT  
STATE OF MISSOURI

## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 25,656 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 26th day of December, 2012, to:

Kent Denzel  
Office of the State Public Defender  
Woodrail Centre, 1000 W. Nifong  
Building 7, Suite 100  
Columbia, MO 65203

/s/ Daniel N. McPherson  
DANIEL N. McPHERSON  
Assistant Attorney General  
Missouri Bar No. 47182

P.O. Box 899  
Jefferson City, Missouri 65102  
Phone: (573) 751-3321  
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT  
STATE OF MISSOURI