No. SC91564

In the Supreme Court of Missouri

KENNETH BAUMRUK,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Lucy D. Rauch, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Kenneth Baumruk 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, for which he was sentenced to death. Appellant was tried by a jury on January 24-February 6, 2007, before Judge Lucy D. Rauch. (L.F. 2-15).[1] Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant filed for divorce from his wife Mary[2] in 1990 and moved the following year from St. Louis to the Seattle, Washington area. (Tr. 1118, 1221-23). Appellant sometimes talked about his impending divorce with his

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[1] The record on appeal will be cited as: SC88497 Direct Appeal Legal File (L.F.); SC88497 Direct Appeal Transcript (Tr.); SC88497 Sentencing Transcript (Sent.Tr.); SC88497 Competency Hearing Transcript (Comp.Tr.); SC91564 Post-Conviction Legal File (PCRL.F.); SC91564 Post-Conviction Transcript (PCRTr.). Separate transcripts for hearings conducted in both the trial and postconviction proceedings will be referenced by the date of the hearing, i.e., (9/21/09Tr.). In addition, the transcript from Appellant's first trial will be cited, where relevant, as (1stTr.).

[2] To avoid confusion, Mary Baumruk will hereafter be referred to by her first name. No disrespect is intended.

co-workers and friends, and on numerous occasions made statements to the effect that he should shoot Mary and the attorneys. (Tr. 1226-27). When questioned about those statements, Appellant would say that he was not serious and that he was just blowing-off steam. (Tr. 1227).

Appellant purchased two .38-caliber revolvers in January 1992. (Tr. 1302-03). He also bought forty rounds of multi-ball "Man Stopper" ammunition and a box of .38-special double-ended wad cutter ammunition that is primarily designed for target shooting. (Tr. 1309-11).

Appellant initially hired Frank Smiley as his attorney in the divorce proceedings. (Tr. 1157). Smiley withdrew as Appellant's lawyer after Appellant assaulted him. (Tr. 1162). Garry Seltzer then entered his appearance as Appellant's lawyer. (Tr. 1162, 1340). Mary had hired attorney Scott Pollard to represent her. (Tr. 1153-54). Pollard testified that Appellant had cursed at Mary following two of the initial court hearings, using "very, very, very crude language." (Tr. 1160-61).

The trial on the divorce petition was set for May 5, 1992, before Judge Sam Hais in the Division 38 courtroom on the second floor of the St. Louis County Courthouse. (Tr. 1016, 1164-65, 1242, 1344). Appellant arrived at the courthouse carrying a briefcase containing the guns and the box of wad-cutter ammunition. (Tr. 1128-29, 1349, 1605, 1607). The guns were loaded with the multi-ball and the wad-cutter ammunition. (Tr. 1702-03, 1705).

A few days before the trial, Mary's lawyer, Scott Pollard, began looking at the file from Appellant's first divorce and realized that he had represented Appellant about fourteen or fifteen years previously on a Motion to Modify in Appellant's first divorce. (Tr. 1165, 1168). Pollard notified Mary of the conflict and tried unsuccessfully to contact Appellant's lawyer, Garry Seltzer. (Tr. 1170).

Pollard was unable to inform Seltzer of the conflict until he arrived at the courthouse for the trial. (Tr. 1350-51). Seltzer then informed Appellant, who said that he had already recognized Pollard as having previously represented him. (Tr. 1353, 1391). The two lawyers met with Judge Hais in his chambers to discuss the situation. (Tr. 1172, 1243-44, 1351). Judge Hais decided to make a record in open court on whether Appellant and Mary were willing to waive the conflict. (Tr. 1174, 1245, 1353). Appellant told Seltzer that he was willing to waive the conflict so long as the trial took place that day. (Tr. 1383). Appellant and Seltzer had also appeared to be arguing immediately before the proceedings began in open court, with Appellant telling Seltzer that he wanted to be in on all back-room conversations and meetings. (Tr. 1066).

The Division 38 courtroom had a single table where both parties and their counsel would sit. (Tr. 1174). Pollard and Seltzer sat directly opposite each other. (Tr. 1174). Appellant sat to Seltzer's right and directly across

from Mary. (Tr. 1079-80, 1354, 1385). After the proceedings began, Pollard was making a statement and turned to ask Mary a question when Appellant pulled the guns out of his briefcase and shot her. (Tr. 1035, 1128-29, 1176, 1249, 1356). She slumped back in the chair and to the right. (Tr. 1035, 1129). Appellant and Pollard both stood up, and Appellant shot Pollard in the chest. (Tr. 1067, 1177, 1179, 1356). Appellant then shot Seltzer, with the projectiles striking him in the chest, left shoulder, near the left ear, and the left arm. (Tr. 1068, 1180, 1357). Seltzer crawled underneath a desk where the court clerk was also hiding. (Tr. 1040, 1358). As Pollard ran out the back door of the courtroom, he saw Appellant aiming his gun towards the judge's bench. (Tr. 1181-82).

Judge Hais had left the courtroom through a door behind the bench, and Appellant followed him. (Tr. 1036, 1249, 1357-58, 1389). Attorney Bruce Hilton was in the Division 38 clerk's office and he grabbed Judge Hais and threw him into the office. (Tr. 1463 1466). Hilton then turned around to see Appellant standing five to eight feet away from him. (Tr. 1466-67). Appellant pointed the two revolvers directly at Hilton, who closed the door. (Tr. 1467).

Rufus Whittier, an officer for the St. Louis County Justice Services Department, had seen Appellant chasing Judge Hais with gun in hand. (Tr. 1526, 1531, 1533-34). Whittier was unarmed and tried to get to safety. (Tr.

1528, 1531). Appellant caught up to Whittier near an elevator. (Tr. 1535). He put one gun to Whittier's midsection and another to his head and asked where the elevator went. (Tr. 1535). Whittier told Appellant that the elevator was used to transport prisoners, and that it went down. (Tr. 1535). Appellant responded that he did not want to go that way, and took off down the hallway. (Tr. 1536).

Jennings Police Officer Paul Neske was in the main hallway outside the Division 38 courtroom when he heard gunshots and saw people fleeing the courtroom. (Tr. 1503-04). Neske went into the courtroom and was told that the gunman had fled into the back hallway. (Tr. 1504). Neske drew his pistol and went through the door, where he saw Appellant holding a gun. (Tr. 1506, 1508). Neske initially thought Appellant was a bailiff, because he was wearing a blue blazer similar to what the bailiffs wore. (Tr. 1506). Neske said something to Appellant, who fired at him. (Tr. 1506-07). Neske ran back into the courtroom. (Tr. 1507).

Attorney Timothy Devereux was walking down the hallway when he saw Appellant walking toward him with a gun in each hand. (Tr. 1548). Appellant pointed both guns at Devereux and said, "Who are you?" (Tr. 1548-49). Devereux responded, "You're surrounded at this time. You have no way of getting out of here. You should give up." (Tr. 1548). Appellant replied, "Get out of my way. I have no quarrel with you." (Tr. 1548). Devereux

watched Appellant walk away and saw him stop, eject the shells from the gun, reload, and continue down the hall. (Tr. 1550-51).

Jim Hartwick, an investigator for the St. Louis County Prosecuting Attorney's Office, had gone down the hallway after learning that shots had been fired in that direction. (Tr. 1562-63, 1566-67). He passed an office where some women were working, apparently unaware of what was going on. (Tr. 1567-68). Hartwick then saw Appellant standing in the hall, facing the other way and moving his right arm slightly. (Tr. 1568). Hartwick also saw shell casings on the floor. (Tr. 1568). Hartwick, who had his gun drawn, started backing-up to warn the women in the nearby office. (Tr. 1570). Appellant fired a shot at him. (Tr. 1570). Hartwick flung himself into the office. (Tr. 1571). Appellant walked by and fired a shot through the window. (Tr. 1572).

Fred Nicolay was the bailiff in the nearby Division 36 courtroom. (Tr. 1480). Two attorneys came running to him, saying that someone was shooting up the courthouse. (Tr. 1482). Nicolay got the attorneys and the clerk into the judge's chambers, and then shut and locked the door. (Tr. 1482-83). As he did so, Nicolay sensed someone coming up behind him. (Tr. 1483). Nicoly turned around while raising his hands, and said, "Let's talk this over. It's not as bad as you think it is." (Tr. 1483). Nicolay testified that he thought that his hand hit the gun and that Appellant then shot him in the

shoulder. (Tr. 1484). Appellant walked around Nicolay, tried unsuccessfully to get into the judge's chamber, and left. (Tr. 1484).

St. Louis County Police Detective Steve Salomon was in the main hallway outside the Division 36 courtroom when he heard gunshots. (Tr. 1394-96). Salomon drew his weapon and went inside the courtroom to investigate. (Tr. 1397). Some people still inside the courtroom told Salomon that the gunman had gone out the back door. (Tr. 1398). Salomon went through that door and was joined by a Jennings police officer. (Tr. 1401, 1405). They were about halfway down the back hallway when Appellant stepped out and fired a shot at them. (Tr. 1401-02). Salomon dropped to the floor. (Tr. 1403-04).

Jennings Police Officer Paul Neske had meanwhile returned to the main hallway, where he met up with another Jennings officer, John Bozarth. (Tr. 1511). As Neske briefed Bozarth on what had happened, he heard gunshots, a door slamming, and people yelling, "He's coming. Here he comes." (Tr. 1511-12). Appellant came around the corner, firing two handguns at Ferguson Police Officer William Mudd and courthouse security officer Wade Dillon, who were outside the Division 38 courtroom. (Tr. 15131575, 1583, 1585, 1592-93, 1595). One of the bullets hit Dillon in the thigh. (Tr. 1587, 1597).

Appellant ran towards Neske and Bozarth, who opened fire along with the other officers who had gathered in the hallway. (Tr. 1513, 1587). Appellant immediately fell to the ground, but then tried to roll over to get back up while still holding one of the guns. (Tr. 1514). Neske fired two more times, and Appellant dropped the second gun. (Tr. 1514). He was handcuffed and searched. (Tr. 1408, 1514). Extra ammunition was found in both of his outside coat pockets. (Tr. 1408). As he was searched, Appellant asked in a calm voice, "Officer, did I get her, did I kill her." (Tr. 1409).

Appellant was taken to the emergency room at Barnes Hospital with bullet wounds near his right ear, chest, collarbone, both arms, left hand, and left foot. (Tr. 1655-56, 1662). Despite the wounds, Appellant was able to give the doctor his past medical history, his occupation, and his address. (Tr. 1660). Appellant commented to the doctor that he "wanted to shoot that bitch." (Tr. 1658). He also referred to "divorce." (Tr. 1658).

The autopsy on Mary showed that she suffered two gunshot wounds to the neck.[3] (Tr. 1725). One of the bullets fractured the second cervical vertebrae in the neck. (Tr. 1728). That wound could have been fatal and would have at least paralyzed Mary. (Tr. 1732-33). The second bullet passed

[3] It's not clear from the testimony when in the sequence of events Appellant shot Mary the second time.

into the spinal canal and was embedded in the middle portion of the brainstem. (Tr. 1735). That wound would likely have been fatal. (Tr. 1740).

Appellant presented an NGRI defense. (L.F. 435, 735). Psychologist Elizabeth Nettles testified that Appellant suffered from a delusional disorder, persecutory type on the day of the shootings. (Tr. 1780, 1788). Psychiatrist Moisy Shopper testified that Appellant suffered from a delusional disorder, paranoid type on the day of the shootings. (Tr. 1933-34, 1949). The State presented rebuttal evidence from psychiatrists Jerome Peters and John Rabun, who both testified that Appellant did not suffer from a mental disease or defect, that he fully knew and appreciated the nature, quality and wrongfulness of his conduct, and that he was capable of conforming his conduct to the requirements of the law. (Tr. 2199-2202, 2415-16). The jury found Appellant guilty of murder in the first degree. (L.F. 750).

The State presented six witnesses in the penalty phase. (Tr. 13). Trina Bland, a medical assistant at the St. Louis County Justice Center, testified that Appellant hit her in the face and body when she changed a dressing one day later than scheduled. (Tr. 2803, 2807, 2810-11). Robert Venable, a corrections officer at the Justice Center, took Appellant into custody after the assault. (Tr. 2823, 2829). Venable testified that Appellant said to him, "I killed once and I would do it again." (Tr. 2830). Mary Baumruk's sister,

father, and two daughters all testified about the impact of her death. (Tr. 2837, 2850, 2853, 2858).

Appellant presented four penalty phase witnesses. (Tr. 14). Appellant's brother, a nephew, and a co-worker testified about Appellant's upbringing and life prior to the murder. (Tr. 2868, 2907-08, 2919). An employee of a nursing home where Appellant's mother was a patient testified about Appellant's interactions with his mother and with the nursing home staff. (Tr. 2930-31).

The jury returned a verdict recommending a sentence of death. (L.F. 788). The jury found that the State had proven ten statutory aggravating circumstances beyond a reasonable doubt: (1) that the murder of Mary involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman; (2) that Appellant, by his act of murdering Mary, 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; and (3-10) that the murder of Mary was committed while Appellant was engaged in the attempted commission of other unlawful homicides of Scott Pollard, Gary Seltzer, Fred Nicolay, Paul Neske, Steve Salomon, James Hartwick,

William Mudd, and Wade Dillon. (L.F. 788). This Court affirmed the conviction and sentence. *State v. Baumruk*, 280 S.W.3d 600 (Mo.banc 2009).[4]

Appellant timely filed a *pro se* motion under Supreme Court Rule 29.15, and appointed counsel filed an amended motion that raised nineteen claims and incorporated eight claims from the *pro se* motion. (PCRL.F. 1, 3, 185-428). The motion court denied nine of the claims without an evidentiary hearing, and held a hearing on the remaining claims. (PCRL.F. 4-6). The court issued a judgment denying all claims. (PCRL.F. 7, 710-56).

[4] That opinion is the most recent of three issued by this Court in the aftermath of the charged crime and it will hereafter be cited as *Baumruk III*. The other cases are *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443 (Mo.banc 1998) ("*Baumruk I*") and *State v. Baumruk*, 85 S.W.3d 644 (Mo.banc 2002) ("*Baumruk II*").

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).

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. 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.

To prevail on a claim of ineffective assistance of appellate counsel, a Rule 29.15 movant must show that his counsel failed to raise a claim of error that a competent and effective lawyer would have recognized and asserted. *Williams v. State*, 168 S.W.3d 433, 444 (Mo.banc 2005). Appellate counsel is not, however, required to raise every possible issue asserted in the motion for new trial, and is under no duty to present non-frivolous issues where counsel strategically decides to winnow out arguments in favor of other arguments. *Storey v. State*, 175 S.W.3d 116, 148 (Mo.banc 2005). Therefore, a Rule 29.15 movant must also show that the claimed error was sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different. *Williams*, 168 S.W.3d at 444.

ARGUMENT

I.

Failure to object to statements made to ER doctor.

Appellant claims that trial counsel was ineffective for failing to object to evidence and argument about statements that Appellant made to an emergency room doctor because those statements fell within the physician-patient privilege. But counsel was not ineffective because Appellant's statements were not necessary for medical treatment and thus not privileged, and because Appellant waived the privilege by asserting an NGRI defense and making his medical records available to his experts. Appellant was also not prejudiced because his statements to Dr. Kane supported the defense theory that Appellant suffered from a delusional disorder at the time of the shootings.

A. Underlying Facts.

1. Trial Proceedings.

Dr. Alex Kane was the emergency room physician who treated Appellant for his gunshot wounds. (Tr. 1655-56). He testified in the guilt phase that he asked Appellant an open-ended question to see if he could talk. (Tr. 1657). Dr. Kane could not remember the exact question that he asked Appellant, but it was something like "what happened," or "how are you?" (Tr.

1657). Dr. Kane testified that he could not remember Appellant's exact words, but that he used quotation marks in his report to indicate actual words spoken by Appellant. (Tr. 1658). Those words included, "wanted to shoot that bitch" and "divorce." (Tr. 1658). The report was admitted into evidence. (Tr. 1664). Dr. Kane testified that he remembered the quoted remarks because, "it was very memorable and remarkable to me that despite being under the obvious stresses of multiple wounds this man was expressing great vehemence and coldness about having reached a conclusion to something." (Tr. 1665).

Appellant called clinical psychologist Elizabeth Nettles in the defense case-in-chief. (Tr. 1780). She reviewed Dr. Kane's deposition and emergency room records in evaluating Appellant's NGRI defense. (Tr. 1832).

Dr. Nettles diagnosed Appellant as having a delusional disorder, persecutory type on the date of the shootings. (Tr. 1788). Dr. Nettles testified that Appellant's overall delusional thought was that the system is corrupt and against him, and that the controlling feature of Appellant's delusion was "that if he is wronged then he is entitled to do whatever in the process of standing up for himself." (Tr. 1813, 1818). Dr. Nettles testified that Appellant had made statements indicating that Mary and her lawyer "were trying to fuck him out of his money." (Tr. 1817). Dr. Nettles testified

that Appellant therefore felt entitled to kill his wife and shoot at the lawyers and judges involved in his divorce. (Tr. 1861-62).

Psychiatrist Moisy Shopper also testified for the defense. (Tr. 1933-34). He read Dr. Kane's deposition and previous testimony in evaluating Appellant. (Tr. 2111). Dr. Shopper offered the opinion that Appellant suffered from a delusional disorder, paranoid type on the day of the shootings. (Tr. 1949). He testified that Appellant suffered from a delusion that no matter what happened, he was going to lose his house in the divorce. (Tr. 1961). Dr. Shopper also noted that Appellant had made statements about Mary and the lawyers conspiring to take his property, and that was why he shot them. (Tr. 1964). Dr. Shopper said that the shootings of Mary and the lawyers were a manifestation of his delusional belief that they were treating him in a malevolent way. (Tr. 2000). He testified that his diagnosis of a delusional disorder was supported by the fact that Appellant targeted specific victims. (Tr. 1999). And he said that Appellant's lack of remorse demonstrated that he did not appreciate the wrongfulness of his conduct. (Tr. 2000-01).

The prosecutor referred to Dr. Kane's testimony in his initial penalty phase closing argument:

> But all you heard the first five or six days of this trial was [Appellant] refer to Mary as "the bitch." His co-workers didn't even know her name because that's all he called her.
>
> That's all he called her to Dr. Cane (sic), another person who you could see how this affected him, a surgeon who fixes children. And almost 15 years later, he told you he would never forget how cold, how calm, how cruel Ken Baumruk was. Remember, each of these witnesses talked about the control that he had, the calmness, the coldness. Mr. Devereux talked about how when he had a gun to his neck and a gun to his stomach he was just cold. That's what he is.

(Tr. 3041-42).

2. 29.15 Proceedings.

The amended motion alleged the following. That counsel was ineffective for failing to object to Dr. Kane's testimony and the admission of his treatment records because Appellant's statements fell within the physician-patient privilege codified in section 491.060(5), RSMo. (PCRL.F. 234, 238). That the statements were elicited to assist Dr. Kane in determining Appellant's mental status. (PCRL.F. 239). That counsel's failure to object to the testimony and the medical notes was prejudicial because the State was able to argue in guilt phase closing that Appellant's

statements in the emergency room showed that the murder was premeditated and deliberate. (PCRL.F. 240-41). The motion went on to generally allege that the evidence was prejudicial to the jury's determination of whether or not death was the appropriate penalty. (PCRL.F. 241).

At the evidentiary hearing, trial co-counsel David Kenyon testified that he prepared for trial by reviewing Dr. Kane's emergency room notes and his deposition. (PCRTr. 335-38). Kenyon testified that he was familiar with the statutory physician-patient privilege, and that he did not believe that there was a strategy reason for not objecting to Dr. Kane's testimony. (PCRTr. 344). Kenyon testified on cross-examination that he had previous experience in presenting NGRI defenses and that he did not believe that Dr. Kane's testimony was privileged. (PCRTr. 425-26). Kenyon also testified that he understood Appellant to have waived the privilege when he placed his mental condition at issue. (PCRTr. 426-27). Kenyon testified that the statements were consistent with the defense that Appellant suffered from a delusional disorder. (PCRTr. 427).

Co-counsel Robert Steele testified that he had seen Dr. Kane's deposition prior to trial and was not surprised by his trial testimony. (PCRTr. 502). Steele testified that he thought about objecting to Dr. Kane's testimony on the basis of privilege, but decided not to because he believed that the testimony was not privileged. (PCRTr. 506). Steele also testified

that he believed any privilege that might have existed had been waived because Appellant had put his mental state at issue. (PCRTr. 511). Steele also testified that the statements that Dr. Kane testified to were consistent with Dr. Shopper's diagnosis. (PCRTr. 551).

In rejecting the claim, the motion court found that Appellant's statement that he "shot that bitch" and his reference to "divorce" was not confidential information necessary for treatment, and thus not privileged. (PCRL.F. 728). The court also found that Appellant waived the privilege when he placed his mental health at issue. (PCRL.F. 728-29). And the court found that the statement was consistent with Dr. Shopper's diagnosis of a delusional disorder and was thus helpful to Appellant's case. (PCRL.F. 729). The court concluded that counsel had a strategic reason for allowing the admission of the statement and that counsel was not ineffective for failing to object to Dr. Kane's testimony on the ground of privilege. (PCRL.F. 729).

B. Analysis.

Counsel will not be found ineffective for failing to make a non-meritorious objection. *Zink*, 278 S.W.3d at 188. Any objection that counsel might have made to Dr. Kane's testimony and to the admission of his treatment notes would have lacked merit because that evidence was admissible. *Wilkes v. State*, 82 S.W.3d 925, 930 (Mo.banc 2002). Dr. Kane's

testimony was admissible because Appellant's statements were not privileged, and even if they were, Appellant waived the privilege when he asserted his NGRI defense.

The statutory physician-patient privilege prohibits a physician from testifying to any information obtained from a patient that was necessary to enable the physician to prescribe and provide treatment for the patient. § 491.060(5), RSMo 2000. The person claiming the privilege has the burden of showing that necessity. *State v. Henderson*, 824 S.W.2d 445, 450 (Mo.App.E.D. 1991). Appellant claims that Appellant's statements about "shooting that bitch" and "divorce" were necessary for Dr. Kane to prescribe treatment because they were made in response to a question asked by the doctor to assess Appellant's airway and awareness. Appellant's focus on Dr. Kane's question, rather than on the content of his own statement, is contrary to the statutory language, which protects only **statements** that are necessary to provide treatment. *See id.* Appellant's interpretation also runs counter to the rule that statutes creating privileges are strictly construed. *State ex rel. Health Midwest Dev. Group, Inc. v. Daugherty*, 965 S.W.2d 841, 843 (Mo.banc 1998). Because claims of privilege are "impediments to discovery of truth" and "present an exception to the usual rules of evidence," statutes creating privileges are "accepted only to the very limited extent that

permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.*

The Southern District of the Court of Appeals thus rejected a claim of privilege in a very similar situation. A defendant charged with vehicular manslaughter was asked by the doctor treating him for injuries suffered in the fatal accident if he was driving the vehicle. *State v. Lewis*, 735 S.W.2d 183, 187 (Mo.App.S.D. 1987). The doctor testified at trial that the defendant admitted to being the driver. *Id.* The court found that while the doctor testified that she routinely asked motor vehicle accident victims whether they were the passenger or the driver, there was no indication that the defendant's medical treatment depended on whether he was the passenger or the driver. *Id.* In like manner, while Dr. Kane asked Appellant a very general question to gauge his responsiveness, nothing in the record indicates that his medical treatment depended on the information that Appellant had "shot that bitch." That comment was not even responsive to the doctor's question, which was along the lines of "what happened," or "how are you?" (Tr. 1657). A responsive answer would have been something like, "I've been shot." Thus, while Dr. Kane's question may have been routine and part of his treatment of Appellant, the information Appellant provided was not necessary to that treatment and was not privileged.

Even if Appellant's statement was considered privileged, it was still admissible because Appellant waived the privilege by asserting an NGRI defense. A defendant that interposes an NGRI defense waives the right to assert any claim of privilege. *State v. Carter*, 641 S.W.2d 54, 57 (Mo.banc 1982). The waiver of the physician-patient privilege that occurs when a defendant places his mental condition at issue is a full waiver. *State v. Skillicorn*, 944 S.W.2d 877, 897 (Mo.banc 1997), *overruled on other grounds*, *Joy v. Morrison*, 254 S.W.3d 885, 889 (Mo.banc 2008). The Court has recognized at least two reasons for the full waiver principle. *Skillicorn*, 944 S.W.2d at 897. The first is that once information is disclosed in any form, it is no longer confidential and therefore no longer privileged. *Id.* Second, and more important, Missouri courts have made it abidingly clear that a patient should not be allowed to use the medical privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence. *Id.* The first rationale applies to Appellant's case, since Appellant's statements to Dr. Kane were disclosed to numerous experts for both the State and the defense. (Tr. 1832, 2111, 2197-99, 2426). The second rationale refutes Appellant's argument about the scope of the waiver doctrine.

Appellant cites this Court's opinion in *State v. Johnson*, where the Court stated, "'when a party once places the question of his mental condition in issue he thereby waives the physician-patient privilege to exclude

testimony of any doctors **who have examined him for that purpose**.'" *State v. Johnson*, 968 S.W.2d 123, 131 (Mo.banc 1998) (quoting *Carter*, 641 S.W.2d at 57) (emphasis added). Appellant claims that the emphasized portion of that statement shows that the waiver only applies to physicians who examine a defendant for the purpose of determining whether they have a mental disease or defect excluding responsibility. But the phrase that Appellant relies on was made in the context of attempts by defendants to exclude testimony by experts who had evaluated the defendant and reached opinions contrary to the defense theory. *Johnson*, 968 S.W.2d at 131; *Carter*, 641 S.W.2d at 57. As the Court noted, a defendant cannot call as witnesses only those doctors whom he desires to call, and then invoke privilege to exclude the testimony of other doctors who examined him for the same condition. *Id*. Appellant's suggested reading of the cases to create a narrow waiver doctrine is at odds with the principle of narrowly construing statutory privileges and is also inconsistent with this Court's prior opinions finding that a waiver of the physician-patient privilege is a complete waiver.

Both of Appellant's counsels testified that Dr. Kane's testimony was consistent with the defense that Appellant had a delusional disorder. (PCRTr. 427, 551). Counsel is not ineffective for failing to object to evidence

that will promote the defense theory. *State v. Basile*, 942 S.W.2d 342, 356 (Mo.banc 1997).

Appellant also cannot show that he was prejudiced by admission of the evidence. The statements made to Dr. Kane were cumulative to similar statements admitted into evidence, where Appellant used crude language about or towards Mary, and where he talked about having shot her. (Tr. 1160-61, 1409, 2830). Furthermore, the evidence of Appellant's guilt was overwhelming, as was the evidence supporting the jury's finding that the mitigating circumstances did not outweigh the aggravating circumstances. Given all of the evidence presented in the guilt and penalty phases, Appellant cannot show a reasonable probability of a different outcome had Dr. Kane's testimony not come into evidence. *Zink*, 278 S.W.3d at 176.

II.

Failure to call EMT in penalty phase.

Appellant claims an evidentiary hearing should have been held on his claim that trial counsel was ineffective for failing to call an EMT whose testimony would have rebutted the State's evidence that Appellant lacked remorse. But the EMT's testimony would not have overcome Appellant's numerous other statements that demonstrated a lack of remorse.

A. Underlying Facts.

The amended motion alleged the following. That counsel failed to adequately investigate and present evidence in the penalty phase of the trial from Austin Worchester, an ambulance attendant employed by the Clayton Fire Department who worked on Appellant after he was shot. (PCRL.F. 396-97, 405). That a letter written by an assistant prosecutor in 1994 was in Appellant's trial file and memorialized information provided by Worchester. (PCRL.F. 405). The letter advised that when Worchester asked Appellant if he could hear him, Appellant replied, "I'm sorry." (PCRL.F. 406). Appellant said that a couple of times and then stated, "I don't want to die." (PCRL.F. 406). Appellant did not make any other statements and drifted in and out of consciousness while being taken to the hospital. (PCRL.F. 406). That Worchester's testimony would have provided mitigating evidence by showing

that Appellant felt sorrow for his actions. (PCRL.F. 406-07). That evidence of Appellant drifting in and out of consciousness would have lessened the prejudicial nature of his statements to Dr. Kane in the emergency room. (PCRL.F. 406-07).

The motion court rejected the claim without a hearing, finding that Worchester could not offer any testimony that would withstand a hearsay objection. (PCRL.F. 727). The court found that Appellant's statements did not meet any exception to the hearsay doctrine and would have been inadmissible. (PCRL.F. 727).

B. Analysis.

In response to the motion court's finding that Worchester's testimony would have been inadmissible, Appellant argues that it would have met the requirements for the dying declaration exception to the hearsay rule. But Appellant never claimed in the amended 29.15 motion that Appellant's statements qualified as dying declarations, nor did he offer any other theory under which the testimony would have been admissible. (PCRL.F. 405-07, 491-92). An argument not raised in a 29.15 motion is waived and cannot be brought for the first time on appeal. *State v. Clay*, 975 S.W.2d 121, 142 (Mo.banc 1998).

And Appellant cannot demonstrate prejudice in any event from the failure to call Worchester. The statement that Appellant made, "I'm sorry," is vague. While it would support an inference of remorse, that is not the only inference that could be drawn from the statement. Appellant might have been sorry about some of his actions, like shooting a bailiff, but not sorry that he had shot Mary and the lawyers. He might have been apologizing to the EMT for causing him inconvenience. The vague statement about being sorry can't reasonably be said to come close to equalling, much less outweighing, the multiple statements by Appellant indicating that he had no remorse about killing Mary. (Tr. 1409, 1658, 2830). And it's hard to imagine that the jury would have given credence to an argument that Appellant did show remorse after the defense had presented Dr. Shopper's testimony in the guilt phase that Appellant's lack of remorse demonstrated that he did not appreciate the wrongfulness of his conduct. (Tr. 2000-01).

Given the extensive evidence supporting the jury's determination that the mitigating circumstances did not outweigh the aggravating circumstances, a reasonable probability does not exist that the outcome of the penalty phase would have been different had Worchester been called to testify. *Zink*, 278 S.W.3d at 176.

III.

Failure to obtain new PET/CT scans.

Appellant claims that the motion court should have held an evidentiary hearing on his claim that trial counsel was ineffective for failing to obtain current CT and PET scans and have an expert testify about those scans. Appellant claims that the scans would have established that he was incompetent to proceed, and would have provided an alternative explanation for his post-shooting behavior and comments by showing that the brain injuries affected his decision making and impulse control. But Appellant failed to plead facts demonstrating that any information obtained from additional scans would have led the court to conclude that he suffered from a mental disease or defect that left him unable to understand the proceedings against him or to assist in his defense. And the record refutes the claim that additional scans would have changed the jury's sentencing recommendation, since the aggravating circumstances greatly outweighed any mitigating effect that the scans may have had.

A. Underlying Facts.

The amended motion alleged the following. That the only scans of Appellant's brain available to defense counsel were CT scans performed at Barnes Hospital in 1992, shortly after he was shot. (PCRL.F. 266). Counsel

retained Dr. Paul Kaufmann and ordered neuropsychological testing for Appellant in 2006. (PCRL.F. 266). Dr. Kaufmann's report from that testing stated that Appellant's "executive functions" were inconsistent, with weaknesses in divided attention, set-shifting skills, and concentration. (PCRL.F. 266-67). Dr. Kaufmann also concluded that Appellant's impulsivity and cognitive rigidity were likely exacerbated by the gunshot wounds to the head. (PCRL.F. 267). Dr. Kaufmann told counsel that a more recent brain scan could reflect possible areas of brain damage not clearly reflected in the 1992 CT scans. (PCRL.F. 267).

Counsel was aware before trial that any abnormality detected by PET or CT scans would be useful at the competency hearing and at the penalty phase. (PCRL.F. 268). Confirmation of an actual physical abnormality would explain Appellant's inability to make appropriate decisions and his irrational behaviors and statements after the shootings, would demonstrate the effect of the physical dysfunction on Appellant's impulse control and judgment, and would identify to the jury the anatomical scope and specific areas of the brain that were compromised. (PCRL.F. 268).

An expert like Dr. James Merikangas, a medical doctor whose work includes the interpretation of PET and CT scans, would have testified at the competency hearing and at trial that the scans would have shown abnormal metabolism levels in the frontal lobes of the brain, meaning that Appellant

had functioning deficits affecting his ability to inhibit impulses and control his impulses. (PCRL.F. 271). Dr. Merikangas would also have testified that the scans would have shown that there were numerous deficits in other areas of the brain that affect memory and behavior. (PCRL.F. 271). The motion included a footnote indicating that those allegations were based on a good faith belief as to what a PET scan and more recent CT scan would show. (PCRL.F. 270 n.1).

The 1992 CT scans were not displayed to the jury and no picture of Appellant's brain was provided to the jury. (PCRL.F. 271). The motion summarized testimony that was presented about Appellant's brain damage, but alleged that the jury did not receive specific information regarding the parts of Appellant's brain that were damaged and the impact of that damage on his behavior, impulse control, judgment, and ability to understand and comprehend. (PCRL.F. 272-75). The motion alleged that evidence would have been mitigating by itself and would have rebutted the State's evidence of Appellant's behavior after the shooting. (PCRL.F. 276).

Even though the court denied an evidentiary hearing on the claim, Appellant did present testimony at the hearing from two doctors who examined the injuries to Appellant's brain. Neuropsychologist Paul Kaufmann was retained by trial counsel to evaluate Appellant's memory and how it related to his competency to stand trial. (PCRTr. 24, 29). He

evaluated Appellant in 2003 and 2006. (PCRTr. 30-31). The 2003 evaluation led to a finding that Appellant had sustained brain damage affecting some of his "higher cortical functions." (PCRTr. 32-33). Dr. Kaufmann concluded that Appellant's brain damage reduced his "executive functioning" and resulted in cognitive rigidity and impulsiveness. (PCRTr. 49). He testified that those conditions could cause Appellant to draw premature or early inferences about social situations that are inaccurate and to respond impulsively. (PCRTr. 52). Dr. Kaufmann admitted on cross-examination that his testing of Appellant demonstrated improvement over tests conducted in 1993. (PCRTr. 68-71, 89-92). And he conceded that his tests of executive functioning did not provide any insight to the level of Appellant's executive functioning before he was shot. (PCRTr. 92-93). Dr. Kaufmann also admitted that he had concluded that Appellant's brain damage did not impair his ability to understand the nature or the purpose of the proceedings against him. (PCRTr. 80-81).

Psychiatrist Bruce Harry performed a court-ordered competency evaluation of Appellant in 1994. (PCRTr. 212, 217-19). Dr. Harry performed a second competency evaluation in 2003 at the request of defense counsel. (PCRTr. 219-20). Dr. Harry testified at the 2005 competency hearing, and reviewed CT scans of Appellant's brain taken before and after the post-shooting surgery. (PCRTr. 222). Dr. Harry testified that Appellant suffered

damage to the frontal lobe of the brain, which is involved in executive decision making. (PCRTr. 244). He testified that a damaged frontal lobe would lead to impulsivity. (PCRTr. 245).

Dr. Harry noted on cross-examination that he had testified on four prior occasions, including competency hearings in 1994, 2000, and 2005, and at the penalty phase of Appellant's first trial. (PCRTr. 251). Dr. Harry said that he noted improvement in Appellant's cognitive deficits between his first examination of Appellant in 1994 and his second evaluation in 2003. (PCRTr. 253). Dr. Harry also testified that determining the effects of a brain injury requires examining the injured person, collecting information, and linking it together, and that a CT scan alone does not permit that determination. (PCRTr. 256). Harry acknowledged giving testimony to that effect at Appellant's first trial. (PCRTr. 257).

In denying the claim, the motion court found that the record contained ample evidence of the brain injuries suffered by Appellant. (PCRL.F. 721). The court also found that the record contained the testimony of mental health examiners who noted improvement over the years in many of Appellant's brain functions. (PCRL.F. 721). The court also referenced Dr. Harry's testimony at Appellant's 2001 trial that the scans cannot by themselves tell what actual effect the brain injuries have on the patient, but that those effects must be discovered by interview and observation. (PCRL.F. 720, 721).

The court concluded that the scans would not have any probative value in any phase of the case, would be speculative, and would be cumulative to evidence already presented. (PCRL.F. 721).

B. Analysis.

Appellant failed to plead facts showing that he was entitled to relief. A new CT scan or a PET scan would have shown what was already conceded and testified to at trial – that Appellant had sustained significant brain damage after being shot in the head. (PCRL.F. 272-74). But as Dr. Harry testified, a scan by itself is insufficient to link the damage to particular effects on a person. (PCRTr. 256). That linkage requires an examination of the injured person in conjunction with a review of information from a variety of sources. (PCRTr. 256).

Appellant wholly failed to plead facts showing how a new CT scan or a PET scan would have led the trial court to find him incompetent to proceed. A criminal defendant is competent to stand trial if he suffers from a mental disease or defect that leaves him unable to understand the proceedings against him or or to assist in his own defense. § 552.020.1, RSMo 2000. Several experts who testified for both the State and the defense at Appellant's competency hearing diagnosed him with dementia due to head trauma. (Comp.Tr. 97-98, 269-71, 367-69, 387, 408, 422-23, 513-14). The

experts who opined that Appellant was not competent to stand trial based those opinions on the theory that Appellant's lack of memory of the events surrounding the charged crime left him unable to assist in his defense. (Comp.Tr. 233, 237-40, 246-48, 271, 274-76, 371-72, 393-94, 411-12, 425, 537-38, 541). But this Court has held that amnesia is not a bar to the prosecution of an otherwise competent defendant. *Baumruk II*, 85 S.W.3d at 648; *Baumruk III*, 280 S.W.3d at 608. So to the extent that additional scans would have shed new light on Appellant's memory loss, that information would not have aided him.

And Appellant has not pled facts showing how additional scans would have tied the diagnosis of dementia to a finding that he was either not able to understand the proceedings against him or to assist in his own defense.[5] While the motion refers to impulse control issues, Appellant points to no specific behavior that he exhibited during the course of the proceedings that interfered with his ability to stand trial. The trial court based its finding that Appellant was competent to proceed in part on its observation of Appellant interacting with his lawyers and behaving appropriately during the two-day competency proceeding. (L.F. 246). Appellant pled no facts demonstrating a

[5] The scans are not admissible for the purpose of determining the existence of a mental disorder. *Zink*, 278 S.W.3d at 180.

reasonable probability of a different result had additional scans been obtained and utilized during the competency proceedings.

And the record refutes the claim that obtaining and utilizing additional scans in the penalty phase of the trial would have led the jury to return a verdict of life imprisonment. It is not enough for Appellant to show that counsel's alleged errors had some conceivable effect on the outcoe of the proceeding. *Zink*, 278 S.W.3d at 181. He must instead show that, but for counsel's ineffective performance, there is a reasonable probability that the jury would have concluded after balancing the aggravating and mitigating circumstances that death was not warranted. *Id*.

Appellant pled only that the additional scans would have provided an alternative explanation for his behavior after the shootings, in particular his assaults on a medical assistant and a caseworker while in jail. (PCRL.F. 276). Initially it must be noted that Appellant presented expert testimony in the guilt phase that he suffered from a delusional disorder that produced anger and violent behavior, and that his delusions created a rage that clouded his self-control and caused him to overreact to situations where he felt that he had been wronged. (Tr. 1788, 1818, 1839, 1859-60, 1882-83). That expert testimony referenced behavior before the shooting as evidence of the presence of a delusion. (Tr. 1821). Appellant elicited testimony that his brain injuries were not the cause of those delusions because his delusions

after the shooting were of the same nature as delusions that were believed to exist before the shooting. (Tr. 1897-98). It is unlikely that the jury would have been receptive to a different and somewhat contradictory theory in the penalty phase about the causes for Appellant's behavior.

It stretches credulity to believe that those incidents so influenced the jury that it would not have returned a death sentence if it had been convinced that they were the result of Appellant's inability to contol himself due to his brain injuries. The jury found, beyond a reasonable doubt, the existence of ten aggravating circumstances. (L.F. 788). The evidence showed that Appellant planned his deadly attack in advance and traveled halfway across the country to carry it out. By carrying out that attack in a public place, he put several innocent bystanders at risk of death or serious physical injury. The testimony of the witnesses to the shooting demonstrated that he carried out his plan in a calm and calculated manner. Appellant received the death penalty because of the severity of his crime and not because of his actions afterwards. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the jury's conclusion as to punishment. *See id.* at 183.

IV.

Denial of request to obtain new CT and PET scans.

Appellant claims that the motion court clearly erred in denying his request to order new CT and PET scans because those scans would have supported the allegation in the amended Rule 29.15 motion that counsel was ineffective for failing to obtain those scans. But the denial of that request was rendered moot by the motion court's decision to deny without an evidentiary hearing the claim that counsel was ineffective for failing to obtain such scans.

A. Underlying Facts.

Postconviction counsel filed motions asking the motion court to order the Department of Corrections to transport Appellant to Barnes Hospital to obtain CT and PET scans. (PCRL.F. 25-48). The motion court denied the request and later denied a subsequent motion to reconsider. (PCRL.F. 182, 627-33, 636).

B. Analysis.

Appellant attempted to obtain CT and PET scans to support his claim that counsel was ineffective for failing to obtain such scans for use at trial. Because the motion court denied that claim without an evidentiary hearing, the assertion that the court erred in prohibiting the scans is essentially moot.

Respondent has argued in the previous point why the motion court correctly denied the claim of ineffective assistance of counsel without an evidentiary hearing. But should this Court disagree with those arguments and remand the claim for an evidentiary hearing, it would be appropriate for the motion court to revisit the issue of ordering the scans requested by Appellant.

V.

Failure to call an expert witness to use CT scans at trial.

Appellant claims that trial counsel was ineffective for failing to call an expert witness to use the CT scans of Appellant taken in 1992 to explain how the injuries to Appellant's brain affected his decision-making abilities and impulse control. But counsel made a strategic decision to not present the evidence, which was cumulative and had limited mitigation value.

A. Underlying Facts.

The amended motion alleged the following. That counsel was ineffective for failing to call an expert, such as Dr. Bruce Harry, to testify about the brain damage suffered by Appellant and to use the 1992 CT scans of Appellant's brain to illustrate and explain that damage and its impact on Appellant's behavior, impulse control, and ability to process and control his emotions. (PCRL.F. 342). That Dr. Harry's testimony, along with the CT scans, was persuasive mitigation evidence that also would have rebutted and explained the State's evidence of Appellant's post-shooting behavior. (PCRL.F. 352).

Trial co-counsel Robert Steele testified at the Rule 29.15 evidentiary hearing that he determined that it was not necessary to present evidence of the CT scans and the effect on Appellant of his brain injuries. (PCRTr. 537).

Steele testified on cross-examination that he had several reasons for deciding not to present the evidence. (PCRTr. 556). Steele said the first consideration was that the mitigating value of evidence runs along a spectrum and there had already been some testimony about the effects of the shooting on Appellant. (PCRTr. 556-57). Steele said that his second consideration was how the jury would respond to that evidence given the circumstances under which Appellant was injured. (PCRTr. 557). Steele said he was worried that the jury could construe that negatively. (PCRTr. 557-58). Steele said that he and co-counsel David Kenyon did have discussions on whether to present the evidence. (PCRTr. 558).

Kenyon denied on direct examination having any strategic reason for not showing the CT scans to the jury during the trial. (PCRTr. 396). Kenyon also denied having a strategic reason for not presenting testimony about the damage to Appellant's frontal lobe and the effect of that damage on his behavior. (PCRTr. 397). But Kenyon admitted on cross-examination that he and Steele discussed using Dr. Harry and the CT scans, and that although they did not always agree, the consensus was to not use that evidence. (PCRTr. 461). Kenyon testified that he believed the evidence had minimal mitigation value, while Steele believed that it had no mitigation value. (PCRTr. 461). Kenyon acknowledged that the evidence might have actually been aggravating. (PCRTr. 462).

Dr. Harry testified that he performed competency evaluations of Appellant in 1994 and 2003, and that his evaluation included a review of CT scans of Appellant's brain taken before and after the post-shooting surgery. (PCRTr. 212, 217-22). Dr. Harry testified that the CT scans showed that Appellant suffered damage primarily in the right parietal temporal area, the cerebellum, and the occipital region. (PCRTr. 225). Dr. Harry testified that the parietal lobe involves spatial orientation and the ability to recognize the existence within one's self of physical and mental problems. (PCRTr. 225-26). The temporal lobe is the place where memory is encoded into the brain. (PCRTr. 226). The occipital lobe is where vision is processed. (PCRTr. 227). The cerebellum involves coordination and motor ability. (PCRTr. 228). Dr. Harry also testified that Appellant suffered damage to the frontal lobes of the brain, which is involved in executive decision making functions. (PCRTr. 241, 244). He said that damage to the frontal lobes can lead to impulsivity. (PCRTr. 245). Dr. Harry's testimony included a review of the CT scans taken in 1992, and he said that he would have given the same testimony if contacted by defense counsel in 2006 or 2007. (PCRTr. 223-44, 249-50).

Dr. Harry testified on cross-examination that he was aware that Appellant suffered his head wounds after he shot at a uniformed officer, causing other officers to shoot him. (PCRTr. 250). Dr. Harry also testified that Appellant's cognitive deficits had improved, dramatically in some areas,

between 1994 and 2003. (PCRTr. 253). He noted that while some parts of the brain were dead, it was possible that healthier parts of the brain took over the functions previously performed by the damaged areas. (PCRTr. 254). Dr. Harry also acknowledged that there are things that even a CT will not show, and that he actually has to rely on the surgeon's report. (PCRTr. 255-56). Dr. Harry further noted that he cannot point to a CT and say that damage to a particular area of the brain is going to have an effect on the injured person. (PCRTr. 256). Making that connection would require an examination of the injured person along with a review of various sources of information. (PCRTr. 256). Dr. Harry noted that he testified to that effect in Appellant's 2001 trial. (PCRTr. 257). Dr. Harry further acknowledged that he used the CT scans while testifying in the penalty phase of the 2001 trial, and that Appellant received a death sentence. (PCRTr. 257, 260-62).

In denying the claim, the motion court found that a number of medical experts testified during trial about the brain injuries Appellant suffered in his shootout with the police, and that introduction of the CT scans would not have altered the outcome of the penalty phase. (PCRL.F. 747). The court noted that evidence of the CT scans and testimony about Appellant's brain injury were introducted in the penalty phase of the 2001 trial, which resulted in a death sentence. (PCRL.F. 747). The court also found that counsel had discussed presenting the evidence but decided that it would not mitigate

punishment since Appellant was shot in the head only after firing on a uniformed officer. (PCRL.F. 747). The court found that the act leading to the injury was more aggravating than any mitigation value, and that counsel thus made a reasonable strategic decision. (PCRL.F. 747-48).

B. Analysis.

While Point III posits that the 1992 CT scans were insufficient to help the jury understand how Appellant was affected by his brain injuries, this point contends that those scans were essential to explaining his post-shooting behaviors. Regardless, Appellant is not entitled to relief because the record shows that counsel made a strategic decision to not present the evidence, and that the additional evidence would have been cumulative to other evidence presented at trial demonstrating that Appellant sustained brain injuries when he was shot. *Forrest v. State*, 290 S.W.3d 704, 710 (Mo.banc 2009).

Appellant also failed to prove that the mitigating value of the evidence was of such a character that it might serve as the basis for a sentence less than death. *Zink*, 278 S.W.3d at 181. Dr. Harry's testimony at the evidentiary hearing established only that damage to the frontal lobes of the brain can affect decision making and result in impulsivity. (PCRTr. 244-45). He never specifically linked Appellant's brain injuries to any particular behavior by Appellant. And he testified that such a linkage could not be

made on the basis of CT scans alone. (PCRTr. 256). The lack of such a connection makes even more likely the concern expressed by counsel that the aggravating impact of the circumstances under which Appellant suffered his injuries would outweigh any potential mitigating value.

Counsels' determination that the mitigation value of the evidence was mininal is supported by the fact that it would only have been offered to provide an alternative explanation for Appellant's behavior after the shootings. Initially it must be noted that Appellant presented expert testimony in the guilt phase that he suffered from a delusional disorder that produced anger and violent behavior, and that his delusions created a rage that clouded his self-control and caused him to overreact to situations where he felt that he had been wronged. (Tr. 1788, 1818, 1839, 1859-60, 1882-83). That expert testimony referenced behavior before the shooting as evidence of the presence of a delusion. (Tr. 1821). Appellant elicited testimony that his brain injuries were not the cause of those delusions because his delusions after the shooting were of the same nature as delusions that were believed to exist before the shooting. (Tr. 1897-98). It is unlikely that the jury would have been receptive to a different and somewhat contradictory theory in the penalty phase about the causes for Appellant's behavior.

It stretches credulity to believe that his post-shooting behavior would have so influenced the jury that it would not have returned a death sentence

had it been convinced that behavior was the result of Appellant's inability to control himself due to his brain injuries. The jury found, beyond a reasonable doubt, the existence of ten aggravating circumstances. (L.F. 788). The evidence showed that Appellant planned his deadly attack in advance and traveled halfway across the country to carry it out. By carrying out that attack in a public place, he put several innocent bystanders at risk of death or serious physical injury. The testimony of the witnesses to the shooting demonstrated that he carried out his plan in a calm and calculated manner. Appellant received the death penalty because of the severity of his crime and not because of his actions afterwards. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the jury's conclusion as to punishment. *See id*. at 183.

VI.

Failure to present evidence on the impact of "life stressors."

Appellant claims that the motion court should have held an evidentiary hearing on his claim that trial counsel was ineffective for failing to call an expert to testify in the penalty phase about the impact on Appellant of various "life stressors," including his divorce, the death of his mother, and his relocation to begin a new job. But Appellant's pleadings show that counsel considered presenting that evidence but decided instead to pursue an NGRI defense, and the jury heard substantial evidence of the stresses in Appellant's life prior to the shootings.

A. Underlying Facts.

The amended motion alleged the following. That due to the causal connection of the divorce to the shootings, reasonably competent counsel would have investigated the circumstances of the divorce and conferred with an expert regarding the stress of the divorce and other stressors present in Appellant's life at the time of the crime. (PCRL.F. 359). That counsel stated at the 2005 competency hearing that the trial team had discussed calling a penalty phase expert regarding the impact of divorce on people, and in the process of attempting to locate such an expert was referred to Dr. Moisy Shopper. (PCRL.F. 359). That Dr. Shopper eventually informed counsel that

Appellant had an available NGRI defense based on delusional disorder and that counsel did not thereafter seek an expert to testify at penalty phase on how the stressors in Appellant's life affected his mental health during the time period leading up to the shooting. (PCRL.F. 359-60).

The amended motion went on to allege that an expert like Dr. William Logan would have testified that a confluence of events in Appellant's life would have been psychologically overwhelming even for an ordinary person. (PCRL.F. 376). The building up of those traumas (loss of wife, loss of home, loss of money, loss of job, loss of friends and connections with the St. Louis area) was more than Appellant's psychological structures could handle. (PCRL.F. 376). Dr. Logan's testimony would have shown the jury that the building up of psychological trauma led to Appellant's violent acts, and there was a reasonable probability that the jury would not have returned a death verdict had it considered that evidence. (PCRL.F. 383).

In denying the claim without an evidentiary hearing, the motion court noted that Drs. Elizabeth Nettles and Moisy Shopper testified in the guilt phase to their opinions regarding how the divorce proceeding and other stressors in Appellant's life related to his mental state at the time of the homicide. (PCRL.F. 724). The court also noted that defense counsel cross-examined State's experts Drs. Jerome Peters and John Rabun about

Appellant's angers and emotions resulting from the divorce proceedings. (PCRL.F. 724).

The court further noted that the penalty phase reflected counsel's strategy to humanize Appellant by showing that Appellant had a peaceful and productive life prior to the shootings. (PCRL.F. 725). The court found that counsel utilized the testimony of the guilt phase experts regarding the stress in Appellant's life around the time of the crime to illustrate how his behavior during the crime was uncharacteristic and in contrast to the rest of his life. (PCRL.F. 725). The court found that counsel's failure to present cumulative evidence was not objectively unreasonable or prejudicial. (PCRL.F. 725).

B. Analysis.

Appellant failed to plead facts showing that he was entitled to relief. The choice of witnesses is ordinarily a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *Strong v. State*, 263 S.W.3d 636, 652 (Mo.banc 2008). The amended 29.15 motion shows that counsel made a strategic decision. The motion alleges that counsel had discussed calling a penalty phase expert regarding the impact of divorce on people, and in the process of attempting to locate such an expert was referred to Dr. Moisy Shopper, whose examination of Appellant convinced counsel to

instead pursue an NGRI defense. (PCRL.F. 359-60). "Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices." *Middleton v. State*, 103 S.W.3d 726, 736 (Mo.banc 2003).

In presenting that NGRI defense in the guilt phase, counsel adduced evidence from Dr. Shopper and from Dr. Elizabeth Nettles that Appellant suffered from a delusional disorder that created beliefs that the system was rigged against him, that he would therefore lose his house in the divorce, and that he was justified in taking action to prevent that from happening. (Tr. 1788, 1813, 1818, 1897, 1949, 1961-62, 1964-66). The jury thus heard that those stressors in Appellant's life were tied to the shootings. The jury was also aware from that testimony and from other evidence that Appellant was dealing with the prospect of losing his home, with a change of jobs that required moving from St. Louis to Seattle, and with the need to care for his elderly mother who eventually passed away. (Tr. 1121-22, 1221-23, 1897, 2050, 2932-37). The jury could have considered those as mitigating factors without the presentation of additional expert testimony.

Finally, the overwhelming nature of the aggravating evidence against Appellant, as set forth in previous points, makes it unlikely that presenting expert testimony on "life stressors" would have changed the jury's sentencing verdict. *Zink*, 278 S.W.3d at 183.

VII.

Claim that counsel in 1995 competency proceedings were ineffective in seeking to have charges dismissed.

Appellant claims that an evidentiary hearing should have been held on his claim that the attorney who represented Appellant during the period that he was declared incompetent to stand trial was ineffective for pursuing a writ that resulted in the dismissal of the original charges against Appellant, that led in turn to the charges being refiled, to Appellant being declared competent to stand trial, and to his being convicted and sentenced to death. But Appellant has not stated a cognizable claim since he is not challenging the fairness of his trial. And he has also not articulated a proper theory of prejudice since he was never entitled under the law to remain in the custody of the Department of Mental Health with no possibility of being later declared competent and brought to trial.

A. Underlying Facts.

The initial charges against Appellant prompted a hearing in January of 1994 before the Circuit Court of Callaway County on Appellant's competency to stand trial. *Baumruk I*, 964 S.W.2d at 443-44. The trial court found that Appellant suffered from organic personality dementia, which rendered him incompetent to stand trial. *Id*. at 444. A second hearing was held a year-

and-a-half later after Appellant was re-evaluated under section 552.020.1, RSMo 1994. *Id*. The trial court found at that hearing that not only was Appellant incompetent to stand trial but that there was no substantial possibility that he would be mentally fit to proceed in the future. *Id*. Fulton State Hospital initiated a guardianship action under Chapter 475, RSMo, that was contested by Appellant. *Id*. A jury unanimously found that Appellant did not need a guardian or conservator. *Id*.

Following the guardianship proceedings, Appellant moved for the trial court to dismiss the charges against him. *Id*. The court denied the motion. *Id*. Appellant eventually petitioned this Court for a writ of mandamus ordering the trial court to dismiss the criminal charges and discharge him from custody. *Id*. This Court found that section 552.020.10(6), RSMo mandated that criminal charges be dismissed when an accused is found incompetent to stand trial with no reasonable probability of being fit to proceed in the reasonably foreseeable future, and when the court makes a finding on whether the accused is incapacitated and should have a guardian appointed. *Id*. at 447. The court issued an order directing the trial court to dismiss the criminal charges then pending against Appellant. *Id*.

The amended motion alleged that counsel's actions in pursuing dismissal of the charges led to the charges being refiled, Appellant subsequently being found competent to stand trial, and ultimately to a

conviction and sentence of death. (PCR L.F. 191-92). The amended motion went on to allege that but for counsel's actions, Appellant would be confined in the Department of Mental Health. (PCR L.F. 192).

In denying the claim without an evidentiary hearing, the motion court noted this Court's opinion in *Baumruk I* and found that the charges had to be dismissed under the clear mandate of section 552.020.10, RSMo, regardless of the outcome of the guardianship proceedings or the wishes of counsel. (PCR L.F. 716). The court further noted this Court's opinion in *Baumruk II* where the Court stated that an initial finding of incompetency did not bar a subsequent determination of competency to stand trial, nor did it bar the prosecution from refiling charges and prosecuting the defendant. (PCR L.F. 717). The motion court concluded that regardless of the actions of defense counsel, the prosecutor was free to prosecute Appellant based on his improved mental condition and fitness to proceed. (PCR L.F. 717). The court also ruled that Appellant, after twice being found fit to proceed, could not collaterally attack the previous dismissal of the charges. (PCR L.F. 717).

B. Analysis.

Appellant does not state a cognizable claim. Post-conviction relief for ineffective assistance of counsel is limited to errors that prejudiced the defendant by denying him a fair trial. *Strong*, 263 S.W.3d at 646.

Appellant's claim does not address the fairness of the trial that resulted in the conviction that he is seeking to vacate. Instead, he is claiming that the trial would not have taken place but for the actions of counsel who represented him in separate proceedings conducted more than a decade before that trial. Appellant fails to provide any authority showing that a Rule 29.15 motion is the proper vehicle to raise claims involving proceedings in a different case before a different court.

Even if the claim were cognizable, Appellant did not plead facts showing that he would be entitled to relief. His theory of prejudice is that but for counsel's actions in seeking to have the charges dismissed, those charges would have remained in place, he would have remained in the custody of the Department of Mental Health, and he would never have been tried, convicted, and sentenced to death. That theory flies in the face of the prejudice standard articulated by the Supreme Court in *Strickland*.

In determining whether counsel's errors resulted in prejudice to the defendant, a reviewing court must presume that the judge acted according to the law. *Strickland*, 466 U.S. at 694. As this Court noted in *Baumruk I*, the trial court was required to dismiss the charges against Appellant and discharge him once it found him incompetent to proceed and a determination was made on whether he required a guardian. *Baumruk I*, 964 S.W.2d at 447; § 552.020.10(6), RSMo 1994. Appellant's claim of prejudice requires a

determination that the lower court would have ignored its statutory duty and allowed the charges to remain in place. But a defendant seeking relief on a claim of ineffective assistance of counsel "has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Strickland*, 466 U.S. at 694. The Court subsequently cited that phrase in noting that a prejudice analysis that focuses solely on a diferent outcome is flawed because it fails to consider whether the result of the proceeding was fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 370 (1993). Unreliability or unfairness does not result if the alleged ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. *Id*. at 372. Appellant had no substantive or procedural right to remain in the Department of Mental Health following the determinations that he was not competent to proceed and that he did not require a guardian. Vacating Appellant's conviction and sentence merely because counsel's actions might have resulted in a different outcome would grant Appellant a windfall that he is not entitled to under the law. *Id*. at 370.

Another flaw in Appellant's claim is that it rests on the mistaken premise that his competency to stand trial could not have been revisited had counsel not sought to have the charges dismissed. As this Court has noted, the prohibition against trying a person who is incompetent due to a mental

disease or defect only lasts as long as the incapacity endures, and a determination of incompetency does not bar a later claim that the defendant is competent to stand trial. *Baumruk II*, 85 S.W.3d at 648, 649. The statute in effect at the time the charges were dismissed, as well as the version currently in effect, permit the State to raise the issue of whether a person previously declared incompetent has regained the mental fitness to proceed. §§ 552.020.9, RSMo 1994; 552.020.10, RSMo 2000. So even if different outcome was the correct standard of prejudice, Appellant cannot show that he never would have stood trial and been convicted and sentenced had counsel not succeeded in getting the charges dismissed in 1998.

VIII.

Failure to seek disqualification of the St. Louis County Prosecuting Attorney's Office.

Appellant claims that an evidentiary hearing should have been held on his claim that trial counsel was ineffective for failing to move to disqualify the St. Louis County Prosecuting Attorney's Office because there was an appearance of impropriety in that office prosecuting Appellant when one of the persons that he shot at was an investigator with the office. But the motion court, which also served as the trial court, found that no basis existed to disqualify the prosecutor.

A. Underlying Facts.

The amended motion alleged the following. That the St. Louis County Prosecuting Attorney's Office prosecuted the case against Appellant and decided to seek the death penalty. (PCRL.F. 199). That one of the aggravating circumstances pled and proven to support the death sentence was that Appellant committed the murder of Mary Baumruk while engaged in the attempted commission of the unlawful homicide of James Hartwick. (PCRL.F. 199-200). That Hartwick was an investigator with the St. Louis County Prosecuting Attorney's Office and was working in that capacity when Appellant shot at him on May 5, 1992. (PCRL.F. 200). That after the

shootings, Hartwick assisted in making a copy of a tape seized from a courtroom recording machine and that he collected taped copies of 911 calls to the Clayton Police Department and a typed synopsis of those calls. (PCRL.F. 200). That Hartwick's wife at the time of the shooting was employed as an attorney by the St. Louis Prosecuting Attorney's Office and that he spoke to her and other members of the office about the shootings. (PCRL.F. 204). That neither Hartwick nor his wife were screened from the case. (PCRL.F. 204). That Hartwick provided information to the elected prosecutor that helped him decide whether to seek the death penalty. (PCRL.F. 205).

That Hartwick's employment at the St. Louis County Prosecutor's Office prevented that office from being objective, conflict-free, and free of any bias when exercising its discretion to seek the death penalty. (PCRL.F. 205). That the decision to seek the death penalty in this case was arbitrary because a factor influencing that decision was that one of the victims was an agent and employee of the prosecutor's office. (PCRL.F. 206). That counsel's failure to seek disqualification of the St. Louis Prosecuting Attorney's Office resulted in prejudice because there was a reasonable probability that an unbiased prosecutor would not have sought the death penalty or would have made a plea offer, and because the prosecutor at trial made improper remarks that an unbiased prosecutor would not have. (PCRL.F. 216).

Appellant also filed a motion to disqualify the St. Louis County Prosecuting Attorney's Office from representing the State in the Rule 29.15 proceedings, based on the alleged conflict involving Hartwick. (PCRL.F. 49-131). Hartwick testified at a hearing on that motion that he conducted no investigation into the shootings and was very certain that his then-wife, who was an attorney in the prosecutor's office, had nothing to do with the case. (9/21/09Tr. 48). Hartwick said that he had no memory of picking up a cassette tape copy of the 911 calls and a typed synopsis of those calls from the Clayton Police Department, but that he was certain he did since he signed a receipt for those items. (9/21/09Tr. 48-49). Hartwick also acknowledged helping a detective make a copy of the tape from the courtroom where the murder took place. (9/21/09Tr. 50-51). Hartwick said one of the prosecutors had handed him the tape and asked him to make a copy, and he believed that the request was made because he just happened to be walking by at the time. (9/21/09Tr. 61). Hartwick said that he had nothing to with the investigation aside from dealing with those tapes. (9/21/09Tr. 62-63).

Hartwick was interviewed by attorneys in the office about what he saw and did on the day of the shootings, and testified that outside of that interview, he did not recall having any in-depth discussions about the shootings with his co-workers, including his then-wife. (9/21/09Tr. 36, 42, 60). Hartwick said that he had never expressed an opinion to the elected

prosecutor on whether the death penalty should be sought in a particular case and that he did not participate in the decision on whether to seek the death penalty in Appellant's case. (9/21/09Tr. 15, 65). Hartwick testified that both he and his former wife had left the prosecutor's office several years before Appellant's case first went to trial in 2001. (9/21/09Tr. 65-66).

The court entered an order on September 23, 2009, denying the motion to disqualify as untimely and also on the basis that Appellant had shown no conflict and no prejudice. (PCRL.F. 182). On March 19, 2010, the court issued an order denying an evidentiary hearing on the claim that counsel was ineffective for moving to disqualify the prosecutor. (PCRL.F. 199, 713).

In its judgment denying the claim, the court found that the evidence adduced at the September 21, 2009 hearing did not show the existence of a conflict of interest to disqualify the prosecutor. (PCRL.F. 718). The court found no evidence of a personal interest by the prosecutor, no indication that Appellant was treated unfairly, and no indication that the prosecutor conducted his role in anything but a fair manner. (PCRL.F. 718). The court noted that Hartwick was one of at least nine persons shot or shot at by Appellant, and that his situation was one of ten statutory aggravating circumstances found by the jury. (PCRL.F. 718-19). The court found that Hartwick was never consulted in the determination of the filing of the aggravating circumstances. (PCRL.F. 719).

The court further found that Hartwick had left the prosecutor's office before Appellant's first trial and that he did not have any meaningful participation in the investigation or prosecution of Appellant. (PCRL.F. 719). The court described Hartwick's actions in receiving and copying tape recordings as "nothing more than clerical acts." (PCRL.F. 719). The court concluded that any objection or claim of conflict on the part of the prosecutor's office would have been denied, and counsel cannot be ineffective for failing to make a meritless motion or objection. (PCRL.F. 719).

B. Analysis.

Although the court denied this specific claim without an evidentiary hearing, it had previously heard testimony from Hartwick on the motion to disqualify the prosecutor's office in the postconviction proceedings. That testimony refuted the allegation that a conflict existed and there was thus no need to have an additional hearing on the claim, as the failure to seek unwarranted relief does not constitute ineffective assistance of counsel. *State v. Redmon*, 916 S.W.2d 787, 793 (Mo.banc 1996).

A motion to disqualify a prosecutor is addressed to the sound discretion of the trial court. *State v. Newman*, 605 S.W.2d 781, 787 (Mo. 1980). Consequently, there has to be some indication that the trial court would have been required to grant a request to disqualify had counsel made such a

motion. *Cole v. State*, 2 S.W.3d 833, 835 (Mo.App.S.D. 1999). A disqualification is only called for when a prosecutor has a personal interest of such a nature that he might be precluded from affording the defendant the fair treatment to which he is entitled. *Id*. A prosecutor's relationship with a victim does not by itself require disqualification. *See, e.g., Newman*, 605 S.W.2d at 787 (prosecutor served as pallbearer at murder victim's funeral, had represented victim and his family while in private practice, and had socialized and hunted with victim); *Garton v. State*, 454 S.W.2d 522, 525 (Mo. 1970) (prosecutor in bank robbery case had served as counsel for bank, was a depositor with the bank, and a personal friend and political ally of the bank's executive vice president).

The Western District of the Court of Appeals found no disqualifying personal interest in a claim very similar to the one alleged here. The defendant in *Adkins v. State* was charged with second degree felony murder and second degree assault for a drunk driving accident where the two victims worked for the sheriff's department, the mother of one of the victims worked as a clerk for a judge and later worked part-time at the prosecutor's office, and the sister of that victim also worked at the courthouse. *Adkins v. State*, 169 S.W.3d 916, 917 (Mo.App.W.D. 2005). The defendant alleged that the prosecutor had a personal interest in the case that caused him to refuse to offer a plea bargain and to personalize his closing argument. *Id*. at 920. The

Western District noted that the motion court was also the trial court and was in the best position to assess whether the prosecutor's conduct demonstrated an unfair bias. *Id*. Because the motion court concluded that the relationship between the victim's family and the prosecutor provided no basis to disqualify the prosector, a motion for disqualification was unlikely to be granted, so that the failure to make the motion did not constitute ineffective assistance of counsel. *Id*.

The motion court in this case was also the trial court. The motion court found no evidence of a personal interest by the prosecutor, no indication that Appellant was treated unfairly, and no indication that the prosecutor conducted his role in anything but a fair manner, and it concluded that a motion to disqualify the prosecutor would have been denied. (PCRL.F. 718-19). Any motion to disqualify made by counsel would not have been granted and counsel was therefore not ineffective in failing to make such a motion. *Id*. And nothing in the record or the pleadings demonstrates that the court would have abused its discretion in denying a pre-trial motion to disqualify.

The Western District also concluded that because the prosecutor's familiarity with the victims did not require disqualification, the failure to move for disqualification did not result in prejudice. *Id*. at 921. And the court went on to find that prejudice would not lie even if the prosecutor should have been disqualified. *Id*. The defendant had argued that a different

prosecutor might have conveyed a reasonable plea offer and would not have made inflammatory arguments. *Id*. But the court concluded that, "Speculation about what a different prosecutor might have done does not meet the requirement that '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. (quoting *Strickland*, 466 U.S. at 694).

Appellant similarly alleges that he was prejudiced because there was a reasonable probability that an unbiased prosecutor would not have sought the death penalty or would have made a plea offer, and because the prosecutor at trial made improper remarks that an unbiased prosecutor would not have. (PCRL.F. 216). That allegation does not state a claim of *Strickland* prejudice because it does not demonstrate that Appellant was deprived of a substantive or procedural right that rendered his trial fundamentally unfair. *Lockhart*, 506 U.S. at 369-72.

Appellant's claim also fails to demonstrate prejudice under the reasonable probability of a different result standard used in *Adkins* because the allegation of what a different prosecutor would do is speculative and unreasonable. Appellant planned his deadly attack in advance and traveled halfway across the country to carry it out. He shot and killed his wife in a courtroom, shot and wounded two attorneys and chased after the judge with

the obvious intent of shooting him. Appellant shot at six other people, wounding two of them. By carrying out his attack in a public place, he put several innocent bystanders at risk of death or serious physical injury. The testimony of the witnesses to the shooting demonstrated that he carried out his plan in a calm and calculated manner. The jury found the existence of ten statutory aggravating circumstances. (L.F. 788).

To suggest that the prosecutor sought the death penalty, or failed to offer a plea bargain, only because one of the nine persons that Appellant shot at was employed by his office is absurd. Appellant was charged with, and received, the death penalty because he committed an aggravated crime. There is no reasonable probability that the prosecutor in this case would have acted differently had Hartwick not been involved, or that another prosecutor would have acted differently if assigned to the case.

IX.

Failure to move to suppress statements to Officer Glenn.

Appellant claims that trial counsel was ineffective for failing to move to suppress Appellant's statements to Officer Glenn while in jail because they were not preceded by the *Miranda* warnings. But a supression motion was filed and overruled during Appellant's first trial, and a *pro se* suppression motion was overruled during the second trial. Those rulings were correct, as the statement was not made during a custodial interrogation. This Court also rejected a claim on direct appeal that the trial court plainly erred in admitting evidence of the statement, which was cumulative to other evidence showing that Appellant had some memory of the shooting.

A. Underlying Facts.

1. Trial proceedings.

Appellant had a competency hearing in connection with his first trial on September 25, 2000. (1stTr. 3). Among the exhibits admitted at the 2000 competency hearing were a tape recording and transcript of a conversation that took place in October of 1999 between Appellant and Clayton Police Officer Stewart Glenn. (1stTr. 824-25, 835, 866). Those items were admitted after the trial court overruled a motion to suppress filed by defense counsel. (1stTr. 866).

Glenn testified at the 2000 competency hearing that he had gone to the jail to investigate a complaint by Appellant that he was not receiving his newspapers. (Tr. 825-29). Glenn said that he did not go to the jail with the intent of obtaining any information other than what related to the newspaper complaint, but he brought along a tape recorder for his own protection and used it during his conversation with Appellant. (1stTr. 826-29). Appellant volunteered during the conversation that he had been shot nine times and Glenn asked what had happened. (State'sEx. 21 to Sept. 25, 2000 Comp. Hrng., pp. 6-7).[6] Appellant said that he was told that he shot his wife in the courtroom, but professed not to remember it. (*Id*., pp. 6-7). But he later said, "When she crunched her lips, I just shot her then." (*Id*., p. 7).

Psychiatrist John Rabun conducted Chapter 552 evaluations of Appellant's competency to stand trial in May of 1999 and June of 2000. (1stTr. 243, 251-53). Dr. Rabun issued an opinion in May of 1999, prior to Appellant's encounter with Officer Glenn, that Appellant was suffering from a mental defect of amnestic disorder due to head trauma, but that he was

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[6] The transcript of Officer Glenn's conversation with Appellant was marked as State's Exhibit 21 and was filed with this Court as part of the direct appeal in case no. SC88497. This Court took judicial notice of that file for purposes of this appeal in an order dated August 30, 2011.

competent to stand trial. (1stTr. 278, 281, 288). When Dr. Rabun conducted his second evaluation the following year, he had available to him Officer Glenn's report about his encounter with Appellant. (1stTr. 276-77). Based on that report, plus additional evidence collected since the first evaluation, Dr. Rabun dismissed his earlier diagnosis of an amnestic disorder, but did not change his opinion that Appellant was competent to stand trial. (1stTr. 388-89, 412-13).

The transcript and exhibits from the 2000 competency hearing were admitted into evidence at the 2005 competency hearing preceding Appellant's second trial. (Comp.Tr. 6-8). Defense counsel stated that he had no objection to the admission of the transcript and exhibits. (Comp.Tr. 7-8). After the trial court issued an order finding Appellant competent to proceed, Appellant filed a *pro se* Motion to Suppress. (L.F. 41, 48, 235-52, 512). The motion alleged that Appellant's interview with Officer Glenn should be suppressed because Glenn failed to give Appellant the *Miranda*[7] warnings even though Appellant was arrested and the interview was held in the St. Louis County Jail. (L.F. 512).

At a pretrial hearing on January 17, 2007, defense counsel brought up the *pro se* motion at Appellant's request. (1/17/07Tr. 53-54). The prosecutor

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[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

stated that he did not intend on calling Officer Glenn or playing the tape during the State's case-in-chief, but that some of the mental health experts might refer to the conversation in discussing their opinion on the issues of competency and responsibility. (1/17/07Tr. 55-56). Defense counsel expressed agreement with that proposal, but Appellant argued that he did not want the statement to be used in any manner. (1stTr. 56-57). The trial court directed the State to not introduce any evidence of the interview in the case-in-chief, but denied the request to prevent any mental health professionals from referring to the interview. (1/17/07Tr. 57-58).

The only reference during trial to Appellant's statements to Officer Glenn came when Dr. Rabun testified as a rebuttal witness to Appellant's NGRI defense. (Tr. 2377). Dr. Rabun did not describe the details of Appellant's statement to Officer Glenn, but said only that Appellant had, "made a statement which suggested he recalled the moment that he shot his wife, some type of memory for that." (Tr. 2402). Rabun also testified that four people that he had interviewed indicated that Appellant had some memories of the shootings that he had not previously disclosed. (Tr. 2396). And Dr. Rabun based his opinion that Appellant was malingering his memory loss on statements that Appellant had made to numerous people, plus witness descriptions of Appellant's behavior at the courthouse. (Tr. 2398-2403). Appellant's Motion for New Trial contained a claim that the trial

court had erred in overruling the *pro se* Motion to Suppress because the statements were obtained while Appellant was in custody and without proper *Miranda* warnings. (L.F. 801).

2. Direct Appeal.

Appellant claimed on direct appeal that the trial court plainly erred in overruling his motion to suppress his statement to Officer Glenn and in failing to bar, *sua sponte*, any expert opinion that relied on that statement. *Baumruk III*, 280 S.W.3d at 616. The Court declined to consider whether the evidence was improperly admitted or whether Officer Glenn's conduct violated *Miranda*. *Id*. at 617. The Court instead concluded that Appellant did not demonstrate a manifest injustice or miscarriage of justice because evidence of Officer Glenn's conversation with Appellant was duplicative of other evidence. *Id*.

3. 29.15 Proceedings.

The amended motion contained a claim that trial counsel was ineffective for failing to move to suppress and object to the admission or use of Appellant's statements to Officer Glenn during the comptency hearing and at trial. (PCRL.F. 291). Trial counsel David Kenyon testified that he also represented Appellant at his 2005 competency hearing. (PCRTr. 334). Kenyon testified on direct examination that he did not know of a trial strategy reason for not objecting to Dr. Rabun's reference to Appellant's

statements to Officer Glenn. (PCRTr. 376). Kenyon was not asked why he did not file a motion to suppress.

Kenyon admitted on cross-examination that he asked a defense expert, Dr. Shopper, about Appellant's statements to Officer Glenn because Dr. Shopper found Appellant's concern over newspapers consistent with his diagnosis of a delusional disorder. (PCRTr. 448). Kenyon further admitted that he believed that the statement was proper evidence for an expert to consider when rendering their opinion. (PCRTr. 448). Kenyon conceded that not having a strategy for not doing something did not mean it was something that he would have done, and that there were legitimate reasons for not making certain objections. (PCRTr. 468-69).

Co-counsel Robert Steele testified that he considered filing his own motion to suppress Appellant's statements to Officer Glenn, but decided against it because Appellant had initiated the contact with Glenn. (PCRTr. 525, 555-56). Steele also testified that the defense experts considered some of Appellant's post-shooting statements to be consistent with their diagnosis that he was suffering from a mental disease or defect. (PCRTr. 534).

In denying the claim, the motion court noted that a motion to suppress had been denied during the first trial and that counsel had testified at the evidentiary hearing that further objections were unlikely to succeed, especially since Appellant initiated contact with the officer. (PCRL.F. 740).

The court also noted that the admission of Officer Glenn's testimony was raised on direct appeal, and that this Court had found that experts were allowed to rely on inadmissible hearsay in forming their opinions, and that the limited way in which Officer Glenn's testimony had been used did not prejudice Appellant. (PCRL.F. 740-41).

B. Analysis.

Appellant's point relied on and argument are limited to counsel's failure to file a motion to suppress and do not allege any error in the failure to object at trial. *See State v. Nunley*, 341 S.W.3d 611, 625 (Mo.banc 2011) (claim not raised in point relied on is waived and claim not supported by argument in brief is abandoned). Appellant's argument overlooks two facts. First, a motion to suppress the statement to Officer Glenn was made during the first trial and was overruled. Counsel will not be deemed ineffective for failing to raise an issue that was already raised without success. *Storey*, 175 S.W.3d at 158. Second, while counsel in the second trial did not file a motion to suppress, Appellant did file such a motion and counsel brought it before the court. The court denied that motion and there was no need for counsel to raise the issue again. Counsel is not ineffective for failing to file a motion to suppress that would have been rejected. *State v. Leisure*, 838 S.W.2d 49, 56 (Mo.App.E.D. 1992).

Counsel is also not ineffective for failing to file a meritless motion. *State v. Hunter*, 840 S.W.2d 850, 870 (Mo.banc 1992). Any motion filed by counsel would have lacked merit. Missouri courts have held that "[a] defendant's status as a prison inmate does not necessarily make an interview by prison officials a 'custodial interrogation' requiring the protections set out in *Miranda*." *State v. Brown*, 18 S.W.3d 482, 485 (Mo.App.E.D. 2000). The test for examining whether a prisoner is in custody for purposes of *Miranda* requires a showing that "a reasonable person would believe there has been a restriction of his freedom over and above that in his normal prisoner setting." *Id*. The courts consider several factors in determining whether this standard has been met, including the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him. *Id*.

Applying the *Brown* factors to this case shows that Appellant was not in custody for *Miranda* purposes when he talked to Officer Glenn. Not only was Appellant not summoned with coercive language, he initiated the encounter by filing a complaint and asking for an investigation. (1stTr. 828). The interview did not take place in Appellant's own cell, but the record does not indicate that the interview room that was used created a coercive atmosphere. Appellant was not handcuffed or otherwise restrained. (1stTr.

830). Officer Glenn did not confront Appellant with any evidence of his guilt. In fact, Glenn's knowledge of the case appears to have been limited to the knowledge that was generally available to the public. Glenn did not engage in coercive questioning techniques or apply any pressure to Appellant. He merely asked some open-ended questions that Appellant was free to ignore.

To trigger the requirements of the *Miranda* warnings, the suspect must not only be in custody, but must also be interrogated. *State v. Glass*, 136 S.W.3d 496, 510 (Mo.banc 2004). However, "*Miranda* warnings are not required every time the police question an individual." *Id*. The rule is no different in prison settings. "The type of interrogation the *Miranda* decision proscribed was lengthy interrogation, employing psychological schemes designed to elicit inculpatory statements from criminal suspects who do not know or are unaware of the implications of their right to remain silent and to be represented by counsel." *State v. Baker*, 850 S.W.2d 944, 950 (Mo.App.E.D. 1993). The record does not reflect the existence of that type of interrogation. The conversation between Glenn and Appellant does not appear to have been overly lengthy, and it mostly concerned Appellant's complaint about his missing newspapers. Glenn testified that he did not have the intention to elicit incriminating information from Appellant when he went to interview him, and the record does not indicate the Glenn employed any psychological schemes to elicit inculpatory statements. (1stTr.

829). Finally, the record as a whole conclusively refutes any notion that Appellant was unaware of the implications of his right to be silent and to be represented by counsel. The record, in fact, reveals the opposite – that Appellant was hypervigilent about asserting his rights, real or imagined.

The conversation also did not infringe Appellant's Sixth Amendment right to counsel. That right attaches once adversary judicial proceedings have been initiated. *State v. Greer*, 159 S.W.2d 451, 461 (Mo.App.E.D. 2005). Once the right has been invoked, subsequent waiver during *a police-initiated custodial interview* is invalid. *Id*. (emphasis added). As noted above, Appellant initiated the encounter with Glenn, and Appellant's statement did not take place during the course of a custodial interrogation. A statement that does not arise during an interrogation does not violate the Sixth Amendment. *State v. Johnston*, 957 S.W.2d 734, 750 (Mo.banc 1997). Appellant was not entitled to have his statement suppressed.

Finally, Appellant raised a claim on direct appeal that the trial court plainly erred in overruling his motion to suppress. *Baumruk III*, 280 S.W.3d at 616. The Court rejected that claim, finding no manifest injustice or miscarriage of justice because evidence of Officer Glenn's conversation with Appellant was merely duplicative of other admitted testimony. *Id*. at 617. While a finding of no plain error on direct appeal does not foreclose a post-conviction claim of ineffective assistance of counsel, it is the rare case where

a court will grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the *Strickland* test. *Deck v. State*, 68 S.W.3d 418, 428 (Mo.banc 2002). This is not one of those rare cases where a different result is mandated on post-conviction review.

The jury did not hear the substance of Appellant's statement to Officer Glenn. The only reference to the statement was Dr. Rabun's testimony that Appellant had, "made a statement which suggested that he recalled the moment that he had shot his wife, some type of memory for that." (Tr. 2402). But Dr. Rabun also testified that he had talked to four people who indicated that Appellant had some memories of the shooting, and that it was the information provided by all those persons that caused him to conclude that Appellant was not suffering from a mental disorder. (Tr. 2396). So even if counsel had succeeded in suppressing the statement made to Officer Glenn, Dr. Rabun's testimony in rebuttal to Appellant's NGRI defense would have been substantially the same. Dr. Rabun's vague reference to the statement thus did not undermine the reliability of the trial.

X.

Failure to move to suppress statements to Officer Salamon.

Appellant claims that trial counsel was ineffective for not moving to suppress Appellant's post-shooting statements to Officer Salamon because the officer questioned Appellant without giving him the *Miranda* warnings. But the credible testimony credited by the motion court was that Appellant volunteered his statement without any questioning by police. The statement was thus admissible and counsel was not ineffective for failing to file a meritless motion to suppress.

A. Underlying Facts.

1. Trial Proceedings.

St. Louis County Police Sergeant Steve Salamon was at the St. Louis County Courthouse on May 5, 1992, to attend a preliminary hearing. (Tr. 1393-94). Salamon was talking to a witness outside the Division 36 courtroom when he heard muffled noises coming from behind him. (Tr. 1395-96). Several people came running out of the Division 38 courtroom, saying, "He's shooting in there." (Tr. 1396-97). Salamon drew his service revolver and searched for Appellant, who fired a shot at him and got away. (Tr. 1397, 1401-03). Salamon was continuing his search for Appellant when he heard a volley of shots coming from the main hallway. (Tr. 1406).

Salamon went towards the shots and found Appellant lying on the ground, handcuffed. (Tr. 1407). No one appeared to be in control of Appellant, so Salamon searched him for weapons. (Tr. 1407). As Salamon was searching him, Appellant asked in a calm, clear voice, "Officer, did I get her, did I kill her." (Tr. 1409).

2. 29.15 Proceedings.

The amended motion alleged that counsel was ineffective for failing to move to suppress and object to testimony that Appellant had asked Sergeant Salamon whether he killed Mary. (PCRL.F. 304). The motion alleged that counsel had a copy of a police report indicating that Sergeant Salamon, in attempting to obtain a dying declaration, asked Appellant, "Did you do all this?", and that Appellant's statement was a response to that question. (PCRL.F. 305-06). The amended motion alleged that the statement should have been suppressed because Appellant was in custody and was not given the *Miranda* warnings. (PCRL.F. 307).

Sergeant Salamon testified at the 29.15 hearing that Appellant initiated the conversation by saying, "Officer, can I ask you a question?" (PCRTr. 146). Salamon replied, "What?" and Appellant then asked, "Did I get her? Did I kill her?" (PCRTr. 146). Salamon testified that he spoke to Clayton Police Detective Robert Perry before leaving the courthouse, but he denied giving him a statement. (PCRTr. 149). Salamon also denied telling

Perry that he had attempted to obtain a dying declaration from Appellant, and he denied asking Appellant, "Did you do all this?" (PCRTr. 149-50). Salamon said that he would have given the same testimony if called as a witness at a suppression hearing. (PCRTr. 152).

Former Clayton Police Detective Robert Perry testified that he took witness statements after the 1992 shootings. (PCRTr. 163, 166). Perry said that he could not recall whether he took a statement from Sergeant Salamon and just knew that a police report existed indicating that he had. (PCRTr. 167). Perry identified the report that he wrote, and it was admitted as Movant's Exhibit 21. (PCRTr. 168, 172-73). Perry acknowledged what he wrote on the report, but denied having a specific recall of what Sergeant Salamon said. (PCRTr. 170-71). Perry testified on cross-examination that Sergeant Salamon, at his request, supplied a written statement that was submitted along with his interview notes. (PCRTr. 178). Perry said that he never reviewed that statement and he did not recall showing his report to Sergeant Salamon so he could review it for accuracy. (PCRTr. 177-78).

Sergeant Salamon's written statement was admitted into evidence as Respondent's Exhibit A. (PCRTr. 158-59). Salamon read the portion of the statement that referenced Appellant's comments:

> While in control of the suspect he asked, "Officer, Officer can I ask you a question? I asked what. He stated "Did I get

her, did I kill her?" I responded "I don't know." He stated "God I hope so[.]"

(PCRTr. 159; Resp.'sEx. A, p. 3).

In denying the claim, the motion court found that the trial and evidentiary hearing records made it clear that Appellant's statements were unsolicited and not the subject of a custodial interrogation. (PCRL.F. 741). The court concluded that the *Miranda* warnings were not necessary and that counsel is not ineffective for failing to file a motion to suppress that would not have been successful. (PCRL.F. 741).

B. Analysis.

As noted in the previous point, to trigger the requirements of the *Miranda* warnings, the suspect must not only be in custody, but must also be interrogated. *Glass*, 136 S.W.3d at 510. "Since volunteered statements do not result from custodial interrogation, such statements are not barred by the Fifth Amendment and are admissible even though the person is in custody and has not been given his or her *Miranda* warning." *State v. Newberry*, 157 S.W.3d 387, 399 (Mo.App.S.D. 2005) (citing, *inter alia*, *Gregg v. State*, 446 S.W.2d 630, 632 (Mo. 1969)).

Sergeant Salamon testified at trial and at the 29.15 hearing that Appellant's question, "Did I get her, did I kill her?" was volunteered by

Appellant before Salamon had the chance to say anything to him. Salamon's written statement is consistent with that testimony. (Resp.'sEx. A. p. 3). In finding that Appellant's statement was unsolicited, the motion court noted the consistency of Salamon's account of what happened. (PCRL.F. 741). The court necessarily found that Salamon's testimony at trial and at the 29.15 hearing was credible, and this Court defers to the lower court's superior opportunity to judge the credibility of witnesses. *Clayton v. State*, 63 S.W.3d 201, 209 (Mo.banc 2002).

Because the credible evidence as found by the court showed that Appellant's statement was volunteered and not the product of police interrogation, that statement was admissible and a motion to suppress would have lacked merit. Counsel is not ineffective for failing to file a meritless motion. *Hunter*, 840 S.W.2d at 870.

XI.

Failure to file motion to suppress statement to Officer Venable.

Appellant claims that trial counsel was ineffective for not moving to suppress the statements that Appellant made to Officer Venable while in jail because Venable questioned him without giving the *Miranda* warnings. But counsel made a strategic decision that allowing the defense expert to use the statement to support the NGRI defense was a better option that trying to suppress the statement. Furthermore, admission of the statement by the State in the penalty phase was not prejudicial given the strength of the aggravating evidence.

A. Underlying Facts.

1. Trial Proceedings.

Trina Bland, a registered medical assistant at the St. Louis County Jail, testified for the State in the penalty phase of the trial that Appellant assaulted her while she was trying to change a dressing. (Tr. 2803, 2807-11). The next witness after Bland was St. Louis County Corrections Officer Robert Venable, who was called to the clinic in the immediate aftermath of the assault. (Tr. 2823, 2825, 2827). Venable arrived at the clinic to find that Appellant had been handcuffed by another officer. (Tr. 2827). Venable

testified that Bland was cowering in fear and had red marks and bruises on her face. (Tr. 2828).

Venable removed Appellant from the room and took him to an elevator to be transported to a secure area. (Tr. 2829). Appellant complained on the elevator that his handcuffs were too tight. (Tr. 2829). Venable said he would take care of that when they got off the elevator. (Tr. 2829). When Venable began to loosen the handcuffs, he asked Appellant why he had assaulted Bland. (Tr. 2830). Appellant replied that she had lied to him about his dressings. (Tr. 2830). Venable responded, "So, that's why you assaulted a woman?" and Appellant answered, "Yes, that's right. I killed once and I would do it again." (Tr. 2830). Venable said that he discontinued the conversation at that point. (Tr. 2830).

The first mention during the trial of Appellant's assault on Bland came through the guilt phase testimony of defense expert Dr. Moisy Shopper. Dr. Shopper testified that Appellant attacked Bland and later sued her because he believed those actions would lead to him getting better medical care, and he said that was an example of non-bizarre delusional thinking by Appellant. (Tr. 1962). Dr. Shopper later testified that a sign of Appellant's delusional disorder was the manner in which he reacted when he believed that other people were not doing their job correctly, one example of which was his belief that Bland had not changed his dressings frequently enough:

Q. And did he tell you that one of the reasons he wanted to fire Mr. Steele and I as attorneys was because we were unwilling to subpeona Dr. Rodnick to discuss what the actual order was as to whether he was suppose (sic) to get his dressings changed once every day or once every other day?

A. Well, that's true, but not only that but he wanted to subpoena Dr. Rodnik's computer because he wanted to determine that there were no records of any doctor's orders. Therefore, the records that he had kept about his treatment were then the only records that would be available, and therefore they would be given full weight. And therefore, Trina Bland was wrong. She should have changed his dressing. **And he was very open in saying that to her, you know, I have killed before and I can do it again,** which is – plus, you know, being hurt and him saying that he could have hurt her even more, and maybe he should have smashed her head against the wall.

Q. That's what he said, that's not what you're saying?

A. No, that's what he said, that's correct.

(Tr. 1974-75) (emphasis added).

2. 29.15 Proceedings.

The amended motion alleged that counsel was ineffective for failing to move to suppress testimony that Appellant stated, "I killed once and I would do it again." (PCRL.F. 324). Venable testified at the 29.15 hearing that, to his knowledge, Appellant had not been arrested when he asked the question that drew the response now at issue, but that Appellant was in custody. (PCRTr. 322-23). Venable also said that he did not give Appellant the *Miranda* warnings. (PCRTr. 323). Venable testified that he talked to Appellant while loosening the handcuffs to take Appellant's mind off any thoughts he may have had about resisting. (PCRTr. 329). Venable said that was something he typically did in similar situations. (PCRTr. 329).

Trial counsel David Kenyon testified that he did not recall a strategic reason for not moving to suppress the statement to Venable aside from the fact that the reports of the incident had to be supplied to the defense experts, so that the information was going to be coming out through the experts, one way or another. (PCRTr. 395). Kenyon testified that he was aware that Venable did not give the *Miranda* warnings to Appellant. (PCRTr. 395). Kenyon testified on cross-examination that he did not file a motion to suppress because he had already presented Venable's statement through Dr. Shopper, and the statement was consistent with the NGRI defense. (PCRTr.

458-59). Kenyon said it would have looked strange to object to Venable's testimony after bringing the statement into the case. (PCRTr. 459).

Co-counsel Robert Steele testified that he considered filing a motion to suppress the statement to Venable but decided against it. (PCRTr. 533). Steele testified that the defense experts believed that the statement was consistent with the diagnosis that Appellant was suffering from a delusional disorder, and that he believed that putting the statement at issue waived any claim of right regarding the statement. (PCRTr. 534). Steele said that he never considered moving to suppress the statement and then not disclosing it to the defense experts. (PCRTr. 536).

In denying the claim, the motion court found that Venable's question to Appellant was not an interrogation and admission of the statement therefore did not violate *Miranda*. (PCRL.F. 746-47). The court also found that counsel had a strategic reason to allow Dr. Shopper to testify about the statement to support his diagnosis of a mental disease or defect and further Appellant's NGRI defense. (PCRL.F. 747).

B. Analysis.

Appellant is not entitled to relief because the record demonstrates that counsel considered filing a motion to suppress Appellant's statement, but determined that a better strategy was to allow Dr. Shopper to use that

statement as evidence supporting his diagnosis of a delusional disorder that formed the basis for the NGRI defense. (PCRTr. 395, 458-59, 533-34). Trial strategy is not a ground for ineffective assistance of counsel. *Storey*, 175 S.W.3d at 125. Strategic decisions made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable. *Id*. Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices. *Id*.

Appellant also cannot show prejudice from the State's admission of evidence of the statement during the penalty phase of trial. The defense had already elicited evidence of the statement in the guilt phase. Even if the defense had instead opted to try and keep the statement completely out of the trial, the overwhelming nature of the aggravating evidence against Appellant, as set forth in previous points, makes it unlikely that the jury's sentencing verdict would have been different had evidence of the statement been suppressed. *Zink*, 278 S.W.3d at 183.

XII.

Failure to move to suppress statement to social worker.

Appellant claims that trial counsel was ineffective in not moving to suppress and in failing to object to Appellant's statements to social worker Buck because Appellant was not given the *Miranda* warnings and counsel was not present. But Appellant was not subjected to a custodial interrogation and his statements to Buck were cumulative to other statements showing that Appellant remembered the shootings.

A. Underlying Facts.

1. Trial Proceedings.

Larry Buck, a social worker at the St. Louis County Jail, testified for the State at the 2000 competency hearing. (1stTr. 750). Buck testified that he was assigned as Appellant's primary social worker and that his job was to assist with the adjustment and well being of inmates by helping meet their needs. (1stTr. 753-54). Buck scheduled weekly meetings with Appellant in his office. (1stTr. 755). The meetings began with general inquiries about how Appellant was getting along and progressed to conversations about how he found himself in jail. (1stTr. 755-56). Buck maintained notes of the meetings that were kept in Appellant's records. (1stTr. 756). Some of those

notes were admitted into evidence at the competency hearing and defense counsel stated "No objection" to their admission. (1stTr. 757).

Defense counsel did object when Buck began to testify about what Appellant had told him about the shootings. (1stTr. 761). Counsel objected on the basis of therapist/client privilege and on the basis that Appellant was in custody and Buck was an employee of the Justice Center. (1stTr. 761). The objection was overruled. (1stTr. 761). Buck testified that Appellant told him that he shot his wife and several other people at the courthouse because he was angry about a divorce proceeding that wasn't going his way. (1stTr. 762). Appellant said that he committed the shootings because the judge was going to award the house to his wife. (1stTr. 763). Appellant also told Buck that he had brought the revolvers used in the shootings from Seattle to St. Louis, that he took a bus to the courthouse, and that he took out the guns and started shooting when things did not go his way at the divorce hearing. (1stTr. 763-64). Buck said that Appellant began claiming a few months later that he had no memory of the shootings. (1stTr. 764).

The transcript of the 2000 competency hearing was entered into evidence at the 2005 competency hearing. (Comp.Tr. 6-7). The prosecutor cross-examined one of the defense experts, Dr. Shopper, on the issue of whether or not Appellant was feigning his memory loss. The prosecutor asked Dr. Shopper about several statements Appellant made that suggested

that he did have a memory of the shootings. In addition to the statement made to Buck, the prosecutor examined Dr. Shopper about statements made to Sergeant Salamon, to Dr. Kane, to Dr. Parwatikar, and Dr. Rabun. (Tr. 2020-23, 2025-26). The prosecutor also got Dr. Shopper to admit that memory testing given by Drs. Nettles and Kaufmann showed that Appellant had a very good memory. (Tr. 2019). Dr. Shopper testified that despite Appellant's claims to not remember the shooting, Appellant still said many things indicating that he believed that he did the right thing and the victims deserved what they got. (Tr. 2079-80). Dr. Shopper also said that whether he actually remembered the shootings or just had been told by others what had happened, Appellant had no remorse for his actions. (Tr. 2079).

On redirect examination, defense counsel elicited testimony from Dr. Shopper about a notation contained in Buck's report from the meeting where Appellant had recalled details of the shootings. (Tr. 2093). Buck had stated that Appellant had no insight into his criminal behavior and that he expected to be released and to return to his life in Seattle. (Tr. 2093). Dr. Shopper noted that Appellant's comments as related by Buck showed particularly poor insight into his situation. (Tr. 2094). Dr. Shopper also testified that no factual basis existed for Appellant's statement to Buck that the judge was going to award his house to his wife. (Tr. 2095). Defense counsel went through Buck's testimony at the competency hearing and Dr. Shopper said

that Appellant's statements to Buck were consistent with a delusional disorder. (Tr. 2097-2100).

Dr. John Rabun, who testified as a rebuttal witness to the NGRI defense, said that he had originally diagnosed Appellant with an amnestic disorder, but changed that diagnosis after reviewing fifteen depositions and talking with fourteen other people, including Buck. (Tr. 2390, 2393-2403). Dr. Rabun testified that Appellant demonstrated selective memory loss in an interview that he conducted. (Tr. 2403). Dr. Rabun also testified that a delusion is a false belief that a person rigidly holds despite what almost everyone else believes and despite incontrovertible evidence to the contrary. (Tr. 2476).

2. 29.15 Proceedings.

The amended motion alleged that counsel was ineffective for failing to move to suppress Appellant's statements to Larry Buck during either the competency hearing or at trial because those statements were illegally obtained. (PCRL.F. 280, 285).

Buck testified at the evidentiary hearing that he approached his meetings with inmates as a social worker and not as a member of law enforcement, so he did not give inmates the *Miranda* warnings when talking to them. (PCRTr. 190). But he said that it was completely up to the inmate whether to talk about a subject or answer a question. (PCRTr. 190). Buck

said that Appellant's statements to him about the shootings took place in his office, that Appellant was in custody at the time, and that he had been formally charged. (PCRTr. 196-97). Buck said that he did not know whether Appellant was represented by counsel at the time. (PCRTr. 197).

Buck testified on cross-examination that his only testimony in Appellant's case was during the 2000 competency hearing. (PCRTr. 199). Buck said that his job as a social worker was to talk to Appellant about what was on his mind and about his needs. (PCRTr. 200). Buck said that his job was not to interrogate Appellant and that he did not interrogate him. (PCRTr. 200). Buck testified that he was required to maintain notes of his conversations with inmates and that those notes go into the inmate's file. (PCRTr. 203). Buck said he was aware that the records could be subpoenaed and disclosed to doctors who were evaluating Appellant. (PCRTr. 204). Buck testified that he did not recall disclosing Appellant's statements about the shooting before being contacted by Dr. Rabun, who had reviewed Buck's notes. (PCRTr. 204-05). In particular, Buck did not disclose those statements to the prosecutor's office when it first contacted him about Appellant's assault on him. (PCRTr. 210).

Trial counsel David Kenyon testified that one of Appellant's previous attorneys had filed a motion to suppress Appellant's statements to Buck that was denied. (PCRTr. 371). Kenyon said he believed that he asked the court

to reconsider the ruling and that the motion was again denied. (PCRTr. 371). The non-foundational question asked of Kenyon about his failure to object to the statements was whether objecting would have preserved the issue for appeal. (PCRTr. 372). Kenyon testified on cross-examination that he did not understand Buck's conversations with Appellant to be in the nature of an interrogation. (PCRTr. 446).

Co-counsel Robert Steele testified that he did not consider objecting or moving to suppress Appellant's statements to Buck on Fifth and Sixth Amendment grounds. (PCRTr. 523). Steele testified on cross-examination that he thought that objection had already been made. (PCRTr. 554). Steele also said that some of the information that Steele testified to was going to come in through the experts. (PCRTr. 554).

In denying the claim, the motion court found that Appellant's statements to Buck were not the product of a custodial interrogation. (PCRL.F. 738). The court further found that Buck's notes of his conversations with Appellant were only revealed to the State after Appellant raised the issue of his mental competency and his mental responsibility for the crimes. (PCRL.F. 738). The court concluded that any objection or motion to suppress the statements would have been denied. (PCRL.F. 738).

B. Analysis.

The motion court correctly found that no *Miranda* violation occurred. Even if the rules surrounding *Miranda* apply to a jail social worker, Missouri courts have held that "[a] defendant's status as a prison inmate does not necessarily make an interview by prison officials a 'custodial interrogation' requiring the protections set out in *Miranda*." *Brown*, 18 S.W.3d at 485. The test for examining whether a prisoner is in custody for purposes of *Miranda* requires a showing that "a reasonable person would believe there has been a restriction of his freedom over and above that in his normal prisoner setting." *Id*. The courts consider several factors in determining whether this standard has been met, including the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him. *Id*.

Applying the *Brown* factors to this case shows that Appellant was not in custody for *Miranda* purposes when he talked to Buck. Appellant was not summoned with coercive language, and he not only was free to ignore the scheduled meetings with Buck, he did so on at least one occasion. (1stTr. 759). Nothing in the record suggests a coercive atmosphere from conducting the interviews in Buck's office. The record also does not indicate that

Appellant was handcuffed or otherwise restrained. Buck did not engage in coercive questioning techniques or apply any pressure to Appellant, and Appellant was free to ignore Buck's questions. (PCRTr. 190).

To trigger the requirements of the *Miranda* warnings, the suspect must not only be in custody, but must also be interrogated. *Glass*, 136 S.W.3d at 510. However, "*Miranda* warnings are not required every time the police question an individual." *Id*. The rule is no different in prison settings. "The type of interrogation the *Miranda* decision proscribed was lengthy interrogation, employing psychological schemes designed to elicit inculpatory statements from criminal suspects who do not know or are unaware of the implications of their right to remain silent and to be represented by counsel." *Baker*, 850 S.W.2d at 950. The record does not reflect the existence of that type of interrogation. Buck testified that his job was not to interrogate Appellant and that he did not interrogate him. (PCRTr. 200). Finally, the record as a whole conclusively refutes any notion that Appellant was unaware of the implications of his right to be silent and to be represented by counsel. The record, in fact, reveals the opposite – that Appellant was hypervigilent about asserting his rights, real or imagined.

The motion court's findings demonstrate that it would not, while sitting as the trial court, have granted a motion to suppress had one been filed. (PCRL.F. 738). That ruling would have been correct, for the reasons cited

above. Counsel is not ineffective for failing to file a motion to suppress that would have been rejected. *Leisure*, 838 S.W.2d at 56.

Appellant has also failed to demonstrate prejudice. He first claims that he was prejudiced by the use in the 2005 competency hearing of evidence of his statement to Buck, because that was the only evidence that he remembered the shooting. That argument ignores the fact that this Court has twice ruled that amnesia about the events surrounding the crime would not make Appellant incompetent to stand trial. *Baumruk III*, 280 S.W.3d at 608-09; *Baumruk II*, 85 S.W.3d at 648. Because Appellant was not entitled to a finding of incompetency to stand trial due to memory loss, he cannot have been prejudiced by the introduction of evidence disputing that memory loss. *See Strickland*, 466 U.S. at 694 (stating that a defendant seeking relief on a claim of ineffective assistance of counsel "has no entitlement to the luck of a lawless decisionmaker[.]").

Appellant further claims that he was prejudiced at trial because the State was able to use the statement to Buck as evidence that Appellant remembered the shooting, thus contradicting the defense that Appellant acted while under a paranoid delusion. But defense expert Dr. Nettles had previously testified that Appellant's memory loss appeared to be caused by the brain surgery he underwent after the shootings, while the delusional beliefs he held were present before the shooting. (Tr. 1832-33). Dr. Nettles

thus testified that Appellant fit one of the diagnostic criteria for a delusional disorder – that his disturbances were not due to a medical condition. (Tr. 1834). The other defense expert, Dr. Shopper, also testified that Appellant's delusions before and after the shootings were consistent and not the result of brain damage suffered after the shootings. (Tr. 1985-87). The defense testimony thus demonstrated that any claimed memory loss was unconnected to the existence of a delusional disorder. And the reference to the statement to Buck was cumulative of other evidence showing that Appellant had demonstrated having a memory of the shootings. (Tr. 2019-23, 2393-2403). Furthermore, Dr. Shopper testified that Appellant's statements to Buck were consistent with a delusional disorder. (Tr. 2097-2100). And even the State's expert testified that delusions have to do with false beliefs. (Tr. 2476). Memory would have nothing to do with whether a person had a delusion under that definition. Appellant has failed to show that his NGRI defense was prejudiced by the admission of the statements to Buck.

XIII.

Cross-examination of Officer Venable.

Appellant claims that an evidentiary hearing should have been held on his claim that trial counsel was ineffective for asking Officer Venable in the penalty phase whether Appellant's jail file showed past violent behavior, because that question allowed Venable to testify about an incident where Appellant stabbed a social worker with a pencil. But the evidence elicited through Venable's non-responsive answer was cumulative to evidence elicited prior to Venable's testimony about the details of numerous other assaults committed by Appellant and there is not a reasonable probability that Venable's vague reference to a pencil being used in the assault changed the outcome of the sentencing proceeding.

A. Underlying Facts.

1. Trial Proceedings.

St. Louis County Corrections Officer Robert Venable testified for the State in the penalty phase about his response to the incident where Appellant assaulted medical assistant Trina Bland. (Tr. 2823-31). Defense counsel asked Venable on cross-examination if there was anything in Appellant's file indicating that he had previously been violent within the jail. (Tr. 2832). Venable answered:

> I don't think there was anything current. In the past he had been violent in the facility. I'm aware of at least one incident where he stabbed a social worker [Buck] with a pencil, a lead pencil. At the time that this incident occurred that was not on his file.

(Tr. 2833). Venable testified that he did not know if Appellant was charged in connection with that incident. (Tr. 2833).

2. 29.15 Proceedings.

The amended motion alleged that defense counsel adduced otherwise inadmissible hearsay testimony that aided the State's position and was another aggravating circumstance that the jury considered in recommending a death sentence. (PCRL.F. 393). The motion alleged that but for counsel's actions, there was a reasonable probability of a different outcome in the sentencing phase. (PCRL.F. 395).

The motion court denied the claim, finding that it was refuted by the trial transcript. (PCRL.F. 725). The court noted that counsel asked whether Appellant's file reflected any violent behavior prior to the assault on Trina Bland, and that Venable did not answer that question but instead responded with his own recollection of the assault on Buck. (PCRL.F. 725-26). The court noted that counsel could have objected to the answer as non-responsive, but that would have risked highlighting the answer to the jury. (PCRL.F.

726). The court found no error by counsel and that the decision not to object was not unreasonable. (PCRL.F. 726).

B. Analysis.

Counsel did not perform deficiently by asking a question that was designed to soften the impact of evidence of Appellant's assault on Trina Bland, but to which Officer Venable gave a non-responsive answer. *See State v. Shurn*, 866 S.W.2d 447, 469-70 (Mo.banc 1993) (counsel cannot be ineffective for attempting to impeach a State's witness and receiving a non-responsive answer). In any event, the record refutes the claim that Appellant was prejudiced by that answer. Prior to Officer Venable's testimony, the jury had already heard extensive evidence in both the guilt and penalty phases of Appellant's assaultive behavior before and after the shootings.

Defense and State experts testified during the guilt phase that Appellant had been put in jail and had an adult abuse protection order issued against him after he allegedly assaulted Mary Baumruk by shoving her into a wall and hurting her shoulder. (Tr. 1821, 1880, 2032, 2034, 2413). The jury also heard that Appellant assaulted his first divorce lawyer, who was then 75 years old, by shoving him against a wall and landing several body blows. (Tr. 1816, 1879, 2041-42). When told years later that the attorney was deceased, Appellant replied that he hoped the man had suffered. (Tr. 2043). Appellant

had bragged before the shootings about "cold cocking" the lawyer. (Tr. 2044). The jury also heard testimony in the guilt phase that Appellant had assaulted jail nurse Trina Bland by grabbing her by the hair, ramming her head into a wall, and hitting her several times with his fists around her shoulder and face. (Tr. 1819-20, 1974-75, 2076, 2317). Bland testified in the penalty phase prior to Venable about the attack and the injuries she suffered, while Venable described the injuries he witnessed on Bland. (Tr. 2808-11, 2828). The jury also heard testimony in the guilt phase that Appellant had grabbed and threatened a nurse who was treating him at the hospital after the shootings. (Tr. 2398-99).

Given all that evidence of Appellant's assaultive behavior, it is not reasonably probable that the outcome of the sentencing proceeding was changed by informing the jury, which already knew that Appellant had assaulted Buck,[8] that the assault involved a stabbing with a pencil (with no further detail and no indication that any serious injury resulted). *Worthington v. State*, 166 S.W.3d 566, 582 (Mo.banc 2005). That makes this distinguishable from the *Gant* case that Appellant relies on, where defense counsel's questioning of the State's only witness at a suppression hearing provided the evidence needed to establish probable cause for the defendant's

[8] (Tr. 1990).

arrest. *Gant v. State*, 211 S.W.3d 655, 659 (Mo.App.W.D. 2007). Without that questioning, the State would not have established probable cause and there was a reasonable probability that the drug evidence gained through the arrest would have been excluded. *Id*. Counsel's error thus raised substantial questions about the outcome of the trial. *Id*. at 660. Given the overwhelming weight of the aggravating evidence, no such question arises in this case.

XIV.

Failure to make adequate record for appeal.

Appellant claims that trial counsel was ineffective for not making an adequate record that would have allowed direct appeal counsel to challenge the State's use of a slide show during penalty phase rebuttal argument. But Appellant does not state a cognizable claim because counsel's alleged inactions did not deprive Appellant of a fair trial.

A. Underlying Facts.

1. Trial Proceedings.

Defense counsel raised an objection during the prosecutor's final summation in the penalty phase of the trial:

> MR. KENYON: I'm sorry, Mr. Waldemer. At this point, your Honor, I'm going to object. I want the record to reflect that while Mr. Waldemer is going through his closing argument there is a nice little slide show that's going on behind him that's showing various pictures of the victim's family members, showing Mary Baumruk, various State's exhibits that have been admitted into evidence, pictures of the courtroom. And I anticipate that they will keep on flashing up as he goes through closing

argument. I would object to that, and I would at the very least want the record to reflect that this was going on.

THE COURT: The record will reflect that the photographs were being displayed. Do you have a response, Mr. Waldemer?

MR. WALDEMER: I didn't know if there was a legal objection, Your Honor. All I can say is these, every one of these exhibits is in evidence and has been available for the jury and they've all viewed them.

THE COURT: And the objection is overruled. You may proceed.

(Tr. 3077-78). Counsel included a claim in the motion for new trial that the court erred in overruling the objection to the slide show because the statements by the prosecutor in closing argument were independent of the "statements" broadcast to the jury through the pictures. (L.F. 838-39).

2. 29.15 Proceedings.

The amended motion alleged that trial counsel was ineffective for failing to properly object when the State continually displayed a photographic slide show during the penalty phase closing argument and for failing to properly preserve the issue for appellate review. (PCRL.F. 408).

Trial counsel David Kenyon testified at the evidentiary hearing that he did not have access to a DVD of the slide show to have put into evidence for

later review. (PCRTr. 407-08). Kenyon conceded on cross-examination that all of the photographs in the slide show had previously been admitted into evidence. (PCRTr. 467-68).

Co-counsel Robert Steele testified the pictures contained in the slide show corresponded to the prosecutor's argument, though he also said that the argument was not specific to the picture being displayed. (PCRTr. 544-45). Steele said that he had no recollection of how long the slide show played. (PCRTr. 544).

Direct appeal counsel Rosemary Percival testified that she did not raise a claim about the slide show because there was not enough of a record as to the substance of the photographs, their size, and how long the slide show went on. (PCRTr. 486). Percival said that she would need to be able to describe the slide show in detail in her brief and she felt that there wasn't enough on the record for her to do that effectively. (PCRTr. 486). Percival testified that it would have been helpful if a copy had been made of the slide show and put into evidence because she could then have described it in her brief. (PCRTr. 486-87).

In denying the claim, the motion court found that counsel's objection and inclusion of the claim in the motion for new trial preserved the issue for review. (PCRL.F. 751). The court also stated that it had reviewed the photographs as they played during the State's closing argument and had

reviewed the transcript of that argument, and found that the photographs corresponded with the victim impact portions of the presentation. (PCRL.F. 751). The court found no error from the playing of the slide show and it concluded that any further objection or preservation of the issue for appeal would not have resulted in Appellant obtaining relief. (PCRL.F. 751).

B. Analysis.

Although the claim as stated in Appellant's Point Relied On is slightly different than the claim stated in the amended motion, both the point and the motion suffer from the same fatal flaw. Post-conviction relief for ineffective assistance of counsel is limited to errors that prejudiced the defendant by denying him a fair trial. *Strong*, 263 S.W.3d at 646. Appellant's alleged errors do not concern the effect of counsel's performance on the trial, but instead address how counsel's performance affected the direct appeal. Appellant's claim, whether construed as a failure to preserve the issue for review or a failure to create a sufficient record to assist appellate counsel in raising a preserved claim, is not cognizable and was properly rejected by the motion court. *See id*. (the failure to preserve error for appellate review is not cognizable in a Rule 29.15 motion).

XV.

Failure to raise claim about slide show on direct appeal.

Appellant claims that direct appeal counsel was ineffective for failing to raise a claim that the trial court erred in overruling Appellant's objection to the State's use of a slide show during penalty phase rebuttal argument. But counsel made a strategic decision not to raise that issue on direct appeal because she would not be able to establish that the trial court abused its discretion in overruling the objection to the slide show.

A. Underlying Facts.

The amended motion alleged, as an alternative to the claim set forth in the previous point, that direct appeal counsel was ineffective for failing to raise a claim of error regarding the slide show. (PCRL.F. 414).

Direct appeal counsel Rosemary Percival testified at the evidentiary hearing that she did not raise a claim about the slide show because there was not enough of a record as to the substance of the photographs, their size, and how long the slide show went on. (PCRTr. 486). Percival said that she would need to be able to describe the slide show in detail in her brief and she felt that there wasn't enough information in the record for her to do that effectively. (PCRTr. 486).

In denying the claim, the court noted that it had reviewed the photographs as they played during the State's closing argument and found no error. (PCRL.F. 751). The court also stated that it had reviewed the transcript of the closing argument and found that the photographs corresponded with the victim impact portion of the presentation. (PCRL.F. 751). The court found that the statements and photographs were supported by the evidence, were relevant and probative to the issues presented and did not prejudice Appellant. (PCRL.F. 751). The court concluded that any further objection or preserving the issue for appeal would not have resulted in relief to Appellant. (PCRL.F. 751).

B. Analysis.

This argument is the converse of the previous argument. Where Appellant alleged in the prior point that appellate counsel was provided an insufficient record of the slide show to raise the issue on direct appeal, he now claims that appellate counsel was ineffective for failing to raise the claim despite the lack of a sufficient record. Counsel has no duty to raise every possible issue asserted in the motion for new trial. *Storey*, 175 S.W.3d at 148. In order to obtain reversal on direct appeal, counsel would have had to establish that the trial court abused its discretion in permitting the slide show and that the slide show prompted the jury to act other than on the basis

of reason. *State v. Strong*, 142 S.W.3d 702, 720-21 (Mo.banc 2004). In *Strong*, this Court found no abuse of discretion in allowing a slide show during penalty phase closing argument where nearly all of the photographs contained in the slide show had previously been admitted into evidence, and those not admitted were innocuous and lacked prejudice. *Id*. at 721. The motion court noted the opinion in *Strong* and particularly the Court's observation that gruesome crimes produce gruesome photographs, and a defendant may not escape the brutality of his actions. (PCRL.F. 751) (quoting *Strong*, 142 S.W.3d at 721).

Appellate counsel testified at the evidentiary hearing that she did not raise a claim about the slide show because the record did not contain sufficient information to effectively argue that claim. (PCRTr. 486). Put another way, counsel recognized that she would be unable to establish on the available record that the trial court abused its discretion in overruling the objection to the slide show. A strategic decision to not appeal an issue is not a ground for ineffective assistance of counsel. *Storey*, 175 S.W.3d at 149.

XVI.

Lack of findings on claim of ineffective assistance of appellate counsel.

Appellant claims that the motion court clearly erred in failing to issue findings of fact and conclusions of law on whether direct appeal counsel was ineffective for failing to raise a claim about the State's use of a slide show during penalty phase rebuttal argument. But the court's findings are sufficient to permit meaningful appellate review, and a remand for additional findings would be unnecessary in any event since the record shows that Appellant is not entitled to relief on his claim.

A court deciding a 29.15 motion is to issue findings of fact and conclusions of law on all issues presented. Supreme Court Rule 29.15(j). Those findings and conclusions must be sufficiently specific to allow meaningful appellate review. *Edwards v. State*, 200 S.W.3d 500, 513 (Mo.banc 2006). The court is not, however, required to individually address every claim brought by the movant. *Id*. Generalized findings are sufficient so long as they permit the appellate court an adequate record for review of movant's claim. *Id*. The motion court's finding that no error resulted from the slide show, that the photographs corresponded with the victim impact portion of the presentation, that the statements and photographs were

supported by the evidence, were relevant and probative to the issues presented and did not prejudice Appellant, and that preserving the issue for appeal would not have resulted in relief, reflect a finding that the claim of error would not have resulted in reversal had it been raised on appeal. (PCRL.F. 751). Those findings are sufficient for this Court's review.

Even if this Court were to find the motion court's findings insufficient, a "useless remand" will not be ordered to consider an issue where it is clear that the movant is entitled to no relief as a matter of law. *Ervin v. State*, 80 S.W.3d 817, 825-26 (Mo.banc 2002). As noted in the previous point, nothing in the trial record suggests that the court abused its discretion in overruling Appellant's objection, and the Rule 29.15 evidentiary hearing demonstrates that appellate counsel made a strategic decision not to raise a claim because she would have been unable to prove reversible error. Because Appellant cannot base a claim of ineffective assistance on counsel's reasonable strategic decisions and because the record does not show a reasonable probability of a different outcome had the claim been raised, Appellant is not entitled to relief as a matter of law and a remand for findings is unnecessary.

XVII.

Failure to impeach Dr. Rabun.

Appellant claims that trial counsel was ineffective for failing to impeach State's witness Dr. John Rabun with the fact that he first gave opinions about Appellant's mental state while his divorce was pending before Judge Sam Hais, the judge who presided over Appellant's divorce, because that cross-examination would have demonstrated Rabun's bias. But counsel was not ineffective because the proposed impeachment would not have provided a viable defense and Appellant failed to show a reasonable probability that it would have changed the outcome of the trial.

A. Underlying Facts.

1. Trial Proceedings.

Psychiatrist John Rabun testified for the State as a rebuttal witness to Appellant's NGRI defense. (Tr. 2377-2602). Dr. Rabun examined Appellant three times. (Tr. 2379). Dr. Rabun concluded in 1994 that Appellant was not suffering from any psychiatric diagnosis. (Tr. 2384). In 1999, Dr. Rabun diagnosed Appellant with an amnestic disorder due to the head trauma he suffered after being shot. (Tr. 2388). In 2000, Dr. Rabun was asked for the first time to evaluate Appellant's mental responsibility at the time of offense. (Tr. 2392-93). Dr. Rabun performed that evaluation by interviewing multiple

witnesses, reviewing numerous documents, and re-interviewing Appellant. (Tr. 2393-96). Based on that new information, particularly witnesses who said that Appellant expressed a memory of the shootings, Dr. Rabun vacated his diagnosis of an amnestic disorder and again arrived at the opinion that Appellant was not suffering from any mental disorder. (Tr. 2396). Dr. Rabun testified that, in his opinion to a reasonable degree of psychological certainty, Appellant knew and appreciated the nature, quality, and wrongfulness of his conduct. (Tr. 2415).

2. 29.15 Proceedings.

The amended motion alleged the following. That counsel was ineffective for failing to investigate and impeach Dr. Rabun with evidence that a divorce proceeding between Dr. Rabun and his wife was initiated on September 6, 1994 and assigned to Judge Hais, who signed a decree of dissolution on January 3, 1995. (PCRL.F. 245-46). That the dissolution decree ordered Dr. Rabun to pay maintenance and child support and any subsequent motions to modify custody, child support, or maintenance would have been heard by Judge Hais. (PCRL.F. 246). That the State's theory alleged that Appellant wanted to kill Judge Hais, and that Judge Hais's role in Dr. Rabun's then-pending divorce gave Dr. Rabun a reason to find Appellant competent to stand trial and to find that Appellant did not suffer

from a mental disease or defect which would have excluded his responsibility for the shootings. (PCRL.F. 248).

A certified copy of the court file from Dr. Rabun's divorce was entered into evidence at the Rule 29.15 evidentiary hearing. (PCRTr. 346-47). The file indicated that the petition for dissolution was filed on September 6, 1994 and was granted on December 9, 1994, and that the case was assigned to Judge Hais. (PCRTr. 347-49). Trial counsel David Kenyon testified that he was not aware prior to trial that Judge Hais was the judge in Dr. Rabun's dissolution. (PCRTr. 350). Kenyon admitted on cross-examination that the court records showed that Dr. Rabun's divorce was uncontested and thus would not have provided fertile grounds for impeachment since Judge Hais's only role was to approve the separation agreement that Dr. Rabun reached with his ex-wife. (PCRTr. 431-33).

Co-counsel Robert Steele testified that he was also unaware that Dr. Rabun had a divorce pending before Judge Hais when he first evaluated Appellant. (PCRTr. 509). Steele said that had he been aware of the divorce, he would have asked Rabun about it during the trial. (PCRTr. 509). Steele admitted on cross-examination that an uncontested divorce occurring thirteen years before the trial would not have provided fertile grounds for impeachment. (PCRTr. 551-52).

In denying the claim, the motion court found that a non-contested divorce would have been of no impeachment value, that an attack of such a personal nature would have diminished trial counsel's standing with the jury, and that it would not have provided Appellant with a defense in either the competency hearing or the trial. (PCRL.F. 730). The court concluded that there was not even a slight possibility of a different result had counsel cross-examined Dr. Rabun about his uncontested divorce that occurred eleven years prior to trial. (PCRL.F. 730).

B. Analysis.

While the amended motion refers to counsel's failure to discover the allegedly impeaching evidence, Appellant's point relied on makes no reference to counsel being ineffective for failing to investigate. Claims not included in the point relied on are waived. *Nunley*, 341 S.W.3d at 625. But even if a claim of failure to investigate were properly before the Court, "'the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up[.]'" *Strong*, 263 S.W.3d at 652 (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)). "In the real world containing real limitations of time and human resources, criminal defense counsel is given a heavy measure of deference in deciding what witnesses and evidence are worthy of pursuit." *State v. Twenter*, 818 S.W.2d 628, 635 (Mo.banc

1991). It is not reasonable to expect defense counsel to discover every facet of a potential witness's life. In particular, counsel should not be expected to determine whether the witness has gone through a divorce, on the off-chance that one of the persons involved in the shootings was also involved in that witness's divorce case.

Even if counsel should have discovered that information, the failure to impeach a witness does not constitute ineffective assistance of counsel unless the impeachment would have provided a viable defense or changed the outcome of the trial. *State v. Ferguson*, 20 S.W.3d 485, 506 (Mo.banc 2000). Information that Judge Hais presided over Dr. Rabun's divorce would not have provided a viable defense because it would not have negated an element of the crime. *Davidson v. State*, 308 S.W.3d 311, 317 (Mo.App.E.D. 2010); *State v. Kelley*, 953 S.W.2d 73, 94 (Mo.App.S.D. 1997). Appellant also failed to demonstrate that the proposed impeachment evidence would have affected the outcome of the trial. Defense counsel testified without contradiction at the evidentiary hearing that the divorce would not have provided fertile grounds for impeachment. (PCRTr. 432-33, 551-52). Dr. Rabun was one of two State's experts called to rebut the NGRI defense, and no showing has been made that the testimony of the other expert was not sufficient by itself for the jury to have rejected that defense.

XVIII.

Failure to call treating doctors at competency hearing.

Appellant claims that trial counsel was ineffective for failing to present opinion testimony from treating physicians Fisher and Perkowski that Appellant's memory deficits were genuine, because there was a reasonable probability that testimony would have led to a finding that Appellant was incompetent to proceed. But Appellant failed to show that the doctors' testimony would have changed the outcome of the competency proceeding.

A. Underlying Facts.

The amended 29.15 motion alleged the following. That Dr. Linda Fisher had been chief physician for the St. Louis Police Department and had been involved in Appellant's case since June of 1992. (PCRL.F. 251). That Fisher told one of Appellant's prior counsels, Larry Bagsby, that she believed Appellant's memory loss was permanent and that anything he remembered was confabulated. (PCRL.F. 252). That Dr. Les Perkowski was a staff psychiatrist with the Department of Mental Health who treated Appellant at the Fulton State Hospital. (PCRL.F. 253). That Dr. Perkowski diagnosed Appellant in 1994 with dementia due to head trauma and that his situation had little likelihood of improving. (PCRL.F. 253-54). That counsel was ineffective for failing to present evidence from the treating physicians

because it would have been more credible than testimony from State's expert Dr. John Rabun, who the motion alleged had previously been paid by the prosecutor's office. (PCRL.F. 254).

Former trial counsel Larry Bagsby testified at the 29.15 hearing that he interviewed Dr. Fisher on June 8, 1993. (PCRTr. 16). Bagsby's notes from that interview were admitted into evidence for the purpose of showing that it was in the file and available to trial counsel. (PCRTr. 17). The court also received Dr. Fisher's death certificate into evidence, reflecting that she died on January 23, 2006. (PCRTr. 12).

Trial counsel David Kenyon testified that he and Teoffice Cooper[9] represented Appellant at the 2005 competency hearing. (PCRTr. 334). Kenyon testified that prior to the competency hearing he reviewed Bagsby's memo of his interview with Dr. Fisher. (PCRTr. 350-51). Kenyon said that he did not interview Dr. Fisher prior to the competency hearing and he denied having a trial strategy reason for failing to talk to her and present her testimony. (PCRTr. 353-54). Kenyon also identified Appellant's treatment records from Fulton State Hospital, which were admitted at the 2000 competency hearing and readmitted at the 2005 hearing. (PCRTr. 355). Kenyon testified that he did not interview Dr. Perkowski and could not recall

[9] Cooper did not testify.

having a strategic reason for not calling him at the 2005 competency hearing. (PCRTr. 358-59).

Kenyon agreed on cross-examination that Dr. Fisher's specialty was internal medicine and that she was not a psychiatrist, psychologist, or neurologist. (PCRTr. 434). Kenyon said that the defense team had retained several experienced forensic psychiatrists and psychologists who conducted multiple evaluations of Appellant. (PCRTr. 434-35). Kenyon said that two of those experts, Drs. Parwatiker and Harry, had medical training and experience with head injuries and that each gave opinions about Appellant's head injuries that were based on more recent information than what was available in 1992 and 1993. (PCRTr. 435-36). Kenyon admitted that the testimony of those doctors would have rendered Dr. Fisher's opinion far less important. (PCRTr. 436). Kenyon also admitted that all of the defense experts agreed that Appellant's memory had improved between 1992 and 2005. (PCRTr. 436).

As to Dr. Perkowski, Kenyon noted that other doctors, including Dr. Harry, had diagnosed Appellant with dementia in 1994, but had dropped that diagnosis by the time of the 2005 hearing. (PCRTr. 437). Kenyon admitted that Dr. Perkowski would have disagreed with the other experts and that it would thus not have been wise to call him. (PCRTr. 437-38).

The motion court found that the testimony of Drs. Fisher and Perkowski would not have provided a viable defense. (PCRL.F. 732). The court found their testimony would have been cumulative in some respects, impeached by Appellant's current condition in most respects, and of insignificant value to his claim of incompetency. (PCRL.F. 732).

B. Analysis.

To prevail on a claim of ineffective assistance for failure to call a witness, Appellant must show that (1) counsel knew or should have known of the existence of the witness, (2) the witness could be located through reasonable investigation, (3) the witness would testify, and (4) the witness's testimony would have provided a viable defense. *Strong*, 263 S.W.3d at 652. Appellant failed to make the required showing.

While Dr. Fisher was deceased by the time of the evidentiary hearing there is nothing in the record indicating that Dr. Perkowski was unavailable. Because Appellant did not call him, he failed to establish that Dr. Perkowski would have testified at the 2005 competency hearing or what his testimony would have been, particularly in light of newer information showing that Appellant's memory deficits had improved. *State v. Boyce*, 913 S.W.2d 425, 430 n.3 (Mo.App.E.D. 1993).

The motion court also correctly found that any testimony by the doctors would not have provided a viable defense. Appellant does not dispute the motion court's finding that some of the testimony that Drs. Fisher and Perkowski allegedly would have provided would be cumulative to testimony from the defense experts who did testify at the hearing. The failure to introduce cumulative evidence does not constitute ineffective assistance of counsel. *Forrest*, 290 S.W.3d at 709. And while Appellant claims testimony by treating physicians would be more credible than testimony from retained experts, it was the motion court that presided over the competency hearing and would have made any credibility determinations. The court's findings show that it would not have decided differently had the doctors testified.

Counsel's testimony at the evidentiary hearing supported the motion court's findings that some of the purported testimony by the doctors would have been impeached to some extent by more recent evaluations of Appellant. Counsel is not ineffective for failing to present testimony that would be contradicted by the testimony of other defense witnesses. *State v. Clemons*, 946 S.W.2d 206, 221 (Mo.banc 1997).

Appellant has also failed to demonstrate prejudice. His argument that Drs. Fisher and Perkowski could have established at the 2005 competency proceeding that his memory loss was genuine ignores the fact that this Court has twice ruled that amnesia about the events surrounding the crime would

not make Appellant incompetent to stand trial. *Baumruk III*, 280 S.W.3d at 608-09; *Baumruk II*, 85 S.W.3d at 648. Because Appellant was not entitled to a finding of incompetency to stand trial due to memory loss, he cannot have been prejudiced by the failure to introduce evidence supporting that memory loss. *See Strickland*, 466 U.S. at 694 (stating that a defendant seeking relief on a claim of ineffective assistance of counsel "has no entitlement to the luck of a lawless decisionmaker[.]").

XIX.

Failure to call treating nurses in penalty phase.

Appellant claims that trial counsel was ineffective for failing to call treating nurses Gast and Johns in the penalty phase to testify that patients with head injuries can become belligerent. But counsel made a strategic decision not to call the witnesses and the testimony they offered at the 29.15 hearing does not demonstrate a reasonable probability of a different sentencing outcome.

A. Underlying Facts.

1. Trial Proceedings.

Psychiatrist John Rabun testified in the guilt phase as a rebuttal witness to Appellant's NGRI defense. (Tr. 2377). Dr. Rabun testified that he interviewed several people after being ordered by the court to determine Appellant's mental responsibility at the time of the shootings. (Tr. 2392-94). One of those persons was Lisa Williams, a nurse at St. Louis Regional Hospital. (Tr. 2395). Rabun testified that after talking to Williams and three other people who interacted with Appellant at the St. Louis County Jail, he changed his previous opinion that Appellant suffered amnesia. (Tr. 2396). Dr. Rabun testified that Appellant made statements to Williams while she cared for him in 1992 such as, "his wife deserved it" and "Those damn

lawyers deserved it." (Tr. 2398). Appellant also told her that he "wished he would have died in the shoot out." (Tr. 2398-99). He referred to Mary as "the bitch" and grabbed Williams's arm when he thought she was not doing her job and said, "Bitch, you deserve it like my wife did." (Tr. 2399). Dr. Rabun said that Appellant's words were significant because it showed that he remembered the reason why his wife and the lawyers "deserved it." (Tr. 2399).

2. 29.15 Proceedings.

The amended 29.15 motion alleged that counsel was ineffective for failing to introduce evidence from Catherine Gast and Cathy Johns, nurses who treated Appellant at Barnes Hospital, that other people with head injuries behave similarly to how Appellant behaved after being shot. (PCRL.F. 318-20, 322).

Cathy Johns testified at the 29.15 hearing that she worked in the ICU at Barnes when Appellant was hospitalized there in May of 1992. (PCRTr. 273-74). Post-conviction counsel attempted to ask general questions about her observations concerning patients with head injuries becoming belligerent, but the motion court sustained the prosecutor's objections to those questions. (PCRTr. 284-91). The court noted that Johns was not a psychiatrist or psychologist and the questions were phrased in such a vague way they would not be admissible at trial. (PCRTr. 290-91). Johns admitted on cross-

examination that her testimony was based on a review of nurse's notes and that she had no idea of Appellant's condition after he left Barnes. (PCRTr. 296-97). Johns acknowledged that the notes reflected that Appellant was unconscious part of the time that he was at Barnes, that he was sedated the entire time, that he was on a ventilator and unable to speak for much of the time, and that he was restrained most of the time. (PCRTr. 299-300). Johns said that she was unaware of assaults or inappropriate behavior by Appellant while he was at Barnes. (PCRTr. 302).

Catherine Gast worked in the neuro-science ICU at Barnes in May of 1992. (PCRTr. 304-05). She testified that Appellant was intubated and on a ventilator when he arrived at the ICU. (PCRTr. 307). The court again sustained the prosecutor's objections when post-conviction counsel attempted to ask general questions about whether patients who suffer head injuries can become belligerent. (PCRTr. 309-10). Gast testified on cross-examination that she had no contact with Appellant after he left Barnes. (PCRTr. 315-16). She also noted that Appellant was unconscious during part of the time that he was at Barnes and that she was unaware of any threats or inappropriate behavior by Appellant while he was there. (PCRTr. 319-20).

Trial counsel Kenyon testified that he interviewed the two nurses in 2004 and that they told him that Appellant was ornery, which was not unusual for patients with head trauma. (PCRTr. 389-90). Kenyon testified

that he had the nurses on stand-by to testify at trial if Lisa Williams testified, but determined that it was not necessary to call the women once it was learned that Williams would not testify. (PCRTr. 392).

In denying the claim the motion court found that the testimony of Gast and Johns would not have have rebutted the testimony of Nurse Williams. (PCRL.F. 744). The court found that counsel investigated the witnesses and made a reasonable strategic decision they would not have provided useful testimony. (PCRL.F. 744).

B. Analysis.

The choice of witnesses is ordinarily a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *Strong*, 263 S.W.3d at 652. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Id*. Counsel interviewed the two nurses before trial but decided that their testimony was not necessary at trial. (PCRTr. 389-92). Trial counsel has nearly unfettered discretion as to what witnesses to call, and in light of counsel's beliefs and the great discretion afforded him, his decision not to call the nurses was reasonable and within his discretion. *Id*. at 653.

Appellant also failed to demonstrate prejudice. Even if the testimony provided by the nurses at the 29.15 hearing had been admissible, the offer of

proof made by counsel only established that the nurses had seen patients with brain injuries act belligerently. (PCRTr. 286, 309). The testimony established no causal connection between the brain injuries and the belligerent behavior. The limited probative value of the testimony balanced against the extensive evidence supporting the jury's determination that the mitigating circumstances did not outweigh the aggravating circumstances shows that Appellant failed to establish a reasonable probability that the outcome of the penalty phase would have been different had Johns or Gast been called to testify. *Zink*, 278 S.W.3d at 176.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 27,418 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 22nd day of December, 2011, to:

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