No. SC95303

In the
Missouri Supreme Court

MICHAEL TISIUS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Boone County
Thirteenth Judicial Circuit
The Honorable Kevin M.J. Crane, Judge

RESPONDENT'S BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF FACTS

Appellant was convicted of two counts of first-degree murder following a jury trial in the Circuit Court of Boone County for the murders of Randolph County Deputies Leon Egley and Jason Acton and sentenced to death. *State v. Tisius*, 92 S.W.3d 751 (Mo. 2002). As this Court stated in its opinion on direct appeal, appellant and accomplice Roy Vance were cellmates at the Randolph County Jail in early June 2000. *Id.* at 757. The two conspired for appellant, who was only serving a thirty-day sentence, to come back to the jail with a firearm to help Vance escape. *Id.* After his release, appellant visited the jail several times with Vance's girlfriend Tracie Bulington to leave items for Vance which told him details about the plot. *Id.* at 758. Finally, shortly after midnight on June 22, 2000, appellant entered the jail to carry out the plan. *Id.* Appellant shot both of the unarmed victims to death. *Id.* at 759. Appellant unsuccessfully tried to free Vance from the jail and then fled to Kansas, where he and Bulington were arrested. *Id.* The gun used in the murder and keys to the jail were recovered from appellant. *Id.* Appellant confessed to the murders. *Id.*

This Court affirmed appellant's convictions and sentences. *Id.* at 757. Appellant subsequently filed a motion for post-conviction relief under Rule 29.15. *Tisius v. State*, 183 S.W.3d 207, 211 (Mo. 2006). The motion court

denied appellant's post-conviction claims as to the guilt phase, but remanded for a new penalty phase. *Id.* at 211. This Court affirmed the denial of appellant's guilt-phase post-conviction claims. *Id.* at 218.

At the new penalty phase, the State called numerous witnesses, including accomplice Bulington, to establish the facts surrounding the crime and establish that appellant committed both murders at the same time and that both Deputy Acton and Deputy Egley were peace officers engaged in active duty at the time of their murders (Tr. 575-854). The State called four witnesses and read into evidence the prior testimony of one other witness to testify about the impact of the victims' deaths on their families (Tr. 855-875). The State offered into evidence records of appellant's subsequent conviction for possession of a prohibited article in the Department of Corrections for possessing a piece of metal "commonly known as a boot shank" (Tr. 895-897). Finally, the State called two jailers to testify about episodes of appellant's conduct following the shootings (Tr. 898-910). In July 2000 at the Chariton County Jail, appellant raised his hands and pointed his fingers at a jailer while making motions with his mouth, as if he was mimicking shooting a gun at her (Tr. 898-900). In April 2001 at the Boone County Jail, appellant asked one of the jailers, asking "Don't you know who I am?" and said he was the one that killed the two jailers in Randolph County (Tr. 906-910).

Appellant called his mother, his half-brother, two former teachers, two former neighbors and a youth program worker to testify about appellant's upbringing, who established that appellant was rejected by his father throughout his entire life, was badly beaten up by his half-brother on numerous occasions, was poorly supervised by his mother due to her needing to work, suffered from depression from childhood, and became a poor student, although he excelled in art (Tr. 920-1042, 1061-1065, 1082-1095). He also called several friends from his life closer in time to the murders (Tr. 1050-1060, 1068-1075). He presented testimony from a prison minister who befriended him while in the Department of Corrections (Tr. 1078-1080).

Appellant also presented testimony from three psychiatric or psychological practitioners (Tr. 1067, 1077, 1101-1163). Dr. A.E. Daniel treated appellant for depression in the Boone County Jail after the murders (Daniel 58-82). Dr. Peterson and psychologist Shirley Taylor testified that, due to his upbringing, appellant suffered from major depressive disorder and childhood-onset post-traumatic stress disorder, which rendered him needy and immature and thus open to being manipulated by accomplice Vance (Tr. 1116; Peterson 235-291).

The jury recommended death sentences for each of the murders, finding three aggravating circumstances for the murder of Deputy Egley and two

aggravating circumstances for the murder of Deputy Acton (L.F. 204, 208). The court sentenced appellant to death for each murder (L.F. 222-224). This Court affirmed those sentences. *State v. Tisius*, 362 S.W.3d 398, 404 (Mo. 2012).[1]

On July 27, 2012, appellant timely filed his *pro se* post-conviction motion seeking to set aside his sentences (PCR L.F. 9-14). On October 29, 2012, appointed counsel timely filed an amended motion raising six groups of claims of ineffective assistance of trial counsel setting out thirty-three alleged errors by counsel, a claim of ineffective assistance of appellate counsel, a claim of trial court error and ineffective assistance counsel regarding appellant's "mental age," six claims of trial court error regarding instructions, and a claim that trial counsel had a conflict of interest (PCR L.F. 22-120). After an evidentiary hearing, the motion court denied appellant's motion (PCR L.F. 321-358).

[1]Respondent cites to this Court's direct appeal opinion throughout this brief. For the sake of brevity, respondent will provide the pinpoint citation for that opinion.

STANDARD OF REVIEW

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. *Nicklasson v. State*, 105 S.W.3d 482, 484 (Mo. 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. *Id.* On review, the motion court's findings and conclusions are presumptively correct. *Edwards v. State*, 200 S.W.3d 500, 505 (Mo. 2006).

To establish ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Nicklasson*, 105 S.W.3d at 483. To establish prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Nicklasson*, 105 S.W.3d at 483. In the context of capital sentencing, prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Johnson v. State*, 388 S.W.3d 159, 163

(Mo. 2012).

A movant has the burden of proving grounds for relief by a preponderance of the evidence. *Nicklasson*, 105 S.W.3d at 484; Supreme Court Rule 29.15(i). This Court gives deference to the motion court's superior opportunity to judge the credibility of witnesses. *Barton v. State*, 432 S.W.3d 741, 760 (Mo. 2014). Moreover, actions that constitute sound trial strategy are not grounds for ineffective assistance claims, and this Court presumes that any challenged action was a part of counsel's sound trial strategy and that counsel made those decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689-690.

ARGUMENT

I.

Appellant failed to prove ineffective assistance of counsel for failing to present additional evidence about appellant's conviction for possessing a prohibited object in the Department of Corrections.

Appellant claims that counsel was ineffective for failing to present evidence regarding his conviction for possession of a "boot shank" in prison, including evidence that another inmate "compelled" appellant to possess it for him, that the shank was not sharpened into a weapon, and that his *Alford* plea meant that he did not admit his guilt (App. Br. 41-58). But the evidence regarding the other inmate was inadmissible, the decision not to offer photos of the boot shank and the plea transcript was not deficient performance, and the proposed admissible evidence would not have created a reasonable probability of a different result.

A. Facts

At trial, over counsel's objection, the State introduced and read into evidence parts of the record of appellant's *Alford* plea for possession of a prohibited item in the Department of Corrections (Tr. 895-897). That evidence showed that appellant entered "an *Alford* plea of guilty" to the crime and was sentenced to a concurrent five-year sentence (Tr. 896). The

complaint setting out the charge was read showing that the crime was committed when appellant "knowingly possessed a metal object commonly known as a boot shank" (Tr. 897).

Later, defense expert Dr. Taylor testified that, having done evaluations in the Department of Corrections, she was aware that a "shank" was a "homemade tool[]" that inmates could "sharpen…up so they can use them as weapons" (Tr. 1150). When asked if she was aware that appellant was convicted of possessing a boot shank in prison, she replied, "I know he had a piece of metal that he was holding for someone else" (Tr. 1151). When confronted with the fact that this was what appellant told her had happened, she said that he should be believed because "the context rang true" (Tr. 1151).

In his amended motion, appellant alleged that counsel was ineffective for failing to investigate and present evidence to rebut the State's evidence (PCR L.F. 43-45). He alleged that no other information about the boot shank or circumstances surrounding the charge was offered other than that contained in the court records read into evidence (PCR L.F. 48). He alleged that the jury did not know that appellant did not admit his guilt but only that there was enough evidence to convict him of the crime (PCR L.F. 48). He alleged that there was no description or photos of the boot shank and that the

jury would not have understood that the term did not refer to its use as a weapon but the fact that it was part of a boot (PCR L.F. 48). He alleged that counsel should have sought admission of the plea transcript which would have shown: 1) appellant was not admitting to the crime but only that there was enough evidence to convict him; and 2) that another inmate put the boot shank in appellant's radio and told him it was in appellant's best interest to keep it there (PCR L.F. 49).

He alleged that counsel should have investigated prison records showing that he wrote a letter claiming that he kept the boot shank in his radio because he was scared of an inmate named Charlie Hurt (previously convicted of stabbing and killing a prison cellmate), who put the shank in the radio and told appellant to keep it there (PCR L.F. 30). He alleged that inmate Timothy O'Hara would have testified that he "heard of" appellant's problem with the boot shank and knew that Hurt had put the shank into the radio (PCR L.F. 51). He alleged that O'Hara also knew of "Hurt's reputation for setting people up and then snitching on them" (PCR L.F. 51). He alleged that O'Hara would testify that appellant was not the "type" to have or use a shank (PCR L.F. 51). He alleged there were other records showing that appellant made numerous requests for protective custody because he was afraid of being hurt in prison (PCR L.F. 50).

Appellant also alleged that counsel failed to present evidence that boots would no longer be allowed in the prison and thus that a boot shank was no longer a threat (PCR L.F. 52). He alleged that presenting appellant's personal property records would show he never owned any boots (PCR L.F. 52). Finally, he alleged that counsel should have presented photos of the shank to show that it was about 5½ inches long and had not been sharpened or modified into a weapon at the time it was found (PCR L.F. 52). He alleged that he was prejudiced by counsel's failure to offer all of this evidence (PCR L.F. 45-46).

At the evidentiary hearing, the plea transcript was admitted into evidence (PCR Tr. 47; Mov. Exh. 68). The plea transcript showed that appellant was entering an *Alford* plea (Mov. Exh. 68). The court explained during the plea that an *Alford* plea was when the defendant did not want to admit his guilt but believed that there was a good chance that he would be convicted if he went to trial (Mov. Exh. 68). The plea carried the same consequences as a guilty plea (Mov. Exh. 68). The prosecutor's explanation of the evidence included appellant's admission that he knew "the knife was" in the radio and his claim that another inmate put it there and told him that it was "in his best interest" to keep it there (Mov. Exh. 68). The court accepted the plea (Mov. Exh. 68).

Mitigation specialist Tami Miller testified that appellant told her that another inmate "basically threatened him if he didn't hide that shank" that appellant would "pay the consequences," so appellant felt like he had no choice but to do so (PCR L.F. 194). Miller told counsel Slusher about that conversation (PCR L.F. 194). Appellant's letter to the DOC providing a similar explanation was also admitted into evidence, along with photos of the boot shank (PCR Tr. 303-304; Mov. Exh. 15B, 70-72).

O'Hara testified that he was in prison with appellant in 2006 when appellant was charged with possessing the boot shank (PCR Tr. 222). When asked if he knew what happened regarding that boot shank, he started to testify that the "speculation is that Charles…Hurt put it there" (PCR Tr. 224). An objection to speculation was sustained (PCR Tr. 224). He then testified that it was "my belief" that Hurt put the shank in the radio; an objection regarding his belief was sustained (PCR Tr. 224). He then admitted that he had "no actual personal knowledge" of the boot shank (PCR Tr. 225). He also provided some testimony about Hurt's reputation for violence and setting people up (PCR Tr. 226-227). He testified that, after a boot shank is removed from the boot and hidden in a cell, the "idea is it's now a weapon; it's not a part of your boot" (PCR Tr. 231). Anyone with access to it could fashion it into a weapon (PCR Tr. 231).

Counsel Slusher testified that he had not requested a copy of the boot shank case plea transcript (Mov. Exh. 102 42). He acknowledged that the judge explained the nature of an *Alford* plea in the transcript (Mov. Exh. 102 43). He did not recall if the jury knew that it was an *Alford* plea and did not recall this being an issue he was "primarily dealing with" (Mov. Exh. 102 43-44). He did not believe the jury had "any guidance at all" as to what an *Alford* plea was (Mov. Exh. 102 44). He believed that counsel McBride was handling the boot shank issue (Mov. Exh. 102 45). Looking at the pictures, he did not believe that it looked like the shank had been sharpened at that time; he did not believe the photos were "as bad as I would have expected maybe" (Mov. Exh. 102 47-48, 62). He did not show the pictures to the jury and did not recall them being before the jury (Mov. Exh. 102 48). He recalled that there was an issue about a "cell mate" setting appellant up or "something like that" (Mov. Exh. 102 51). He did not review the records personally but believed counsel McBride did (Mov. Exh. 102 51-52). He did not investigate Hurt, appellant's property records, or read appellant's letter (Mov. Exh. 102 58-59). He believed that the limitation on the boot shank evidence was based on an agreement between the parties (Mov. Exh. 102 48-49). He remembered discussing with McBride how to handle the boot shank evidence, but did not specifically remember what they decided (Mov. Exh. 102 62).

McBride testified that he was aware that appellant entered an *Alford* plea to the boot shank charge and that the evidence of the plea would come in at trial (PCR Tr. 366). He did not recall if an *Alford* plea was explained to the jury; he knew that he did not explain it to the jury (PCR Tr. 367). He did not do any reinvestigation of the incident once appellant entered the plea (PCR Tr. 367). He was aware that appellant claimed that someone else put the shank in his radio (PCR Tr. 369). He testified that he did not believe trying to make a "mini trial" out of the incident "was going to advance the case," so they did not want to "make it into a bigger deal" (PCR Tr. 402-403).

The motion court denied this claim (PCR L.F. 346-347). First, the motion court concluded that the plea transcript and information about the nature of the *Alford* plea would have included negative details of the offense and would have supported the State's argument about appellant's lack of remorse for his conduct, which was one of the issues at trial, to his detriment (PCR L.F. 346). The court found that the remainder of the evidence, including appellant's statement about the offense, was inadmissible (PCR L.F. 347). The motion court found that counsel's decision to not dwell on the conviction and to prevent the jury from understanding the dangerous nature of a boot shank were reasonable to prevent the jury from placing additional weight on the conviction (PCR L.F. 347).

B. There was No Clear Error

The motion court's conclusions were not clearly erroneous. First, the evidence appellant claimed that counsel should have offered to show that Charles Hurt put the boot shank in the radio was inadmissible as hearsay. Out-of-court statements offered for the truth of the matter asserted are inadmissible even in the penalty phase of a capital trial. *See, e.g., State v. McFadden*, 369 S.W.3d 727, 752-53 (Mo. 2012). Self-serving statements blaming someone else for crimes are inadmissible hearsay. *See, e.g., State v. Marshall*, 410 S.W.3d 663, 669-70 (Mo. App., S.D. 2013). Appellant's statements in the Department of Corrections letter and to Miller blaming Hurt for the offense were self-serving hearsay and thus were not admissible. Likewise, O'Hara's speculation about Hurt was not admissible as it was not based on his own personal knowledge and thus was also hearsay. Testimony about matters of which the witness has no personal knowledge constitutes inadmissible hearsay. *State v. Taylor*, 466 S.W.3d 521, 530 (Mo. 2015).

Appellant argues that the statements should have been admissible under *Green v. Georgia*, 442 U.S. 97 (1979), which he argues held that the hearsay rule "cannot be rigidly applied to excluded relevant reliable mitigation" (App. Br. 54). Appellant's application of *Green* ignores the key word "reliable." *Green* did not declare that defense mitigation evidence is not

subject to the hearsay rule. Instead, it merely held that the hearsay rule would not apply in the "unique circumstances" similar to those found in *Chambers v. Mississippi*, 410 U.S. 284 (1973), where an inculpatory third-party made statements against interest tending to mitigate the defendant's involvement in the charged crime. *Green*, 442 U.S. at 96-97. As this Court has held, such statements are admissible because they are made "under circumstances providing considerable indicia of reliability." *McLaughlin v. State*, 378 S.W.3d 328, 347 (Mo. 2012). Appellant's self-serving statements attempting to minimize his own culpability for possessing the boot shank did not contain any indicia of reliability. Thus, the statements were not admissible under *Green*.

Appellant also argues that the statements may have been admitted even if they were not admissible because Slusher testified that the prosecutor had been "unusually loose" in letting the defense offer certain evidence (App. Br. 54; Mov. Exh. 102 15). Appellant's argument is speculative. There was no evidence that the State was willing to allow appellant's self-serving statements as to the boot shank into evidence. That the prosecutor was more cooperative regarding other evidence did not require the motion court to ignore the general rule that counsel is not ineffective for failing to offer inadmissible evidence. *McLaughlin*, 378 S.W.3d at 346. Thus, appellant

failed to prove that the evidence would have been admitted.

Appellant also claims that, had counsel conducted a reasonable investigation, they could have called appellant to testify about Hurt's involvement (App. Br. 54). But this claim also fails. First, counsel was aware that appellant claimed that another inmate had put the shank in the radio (PCR Tr. 369; Mov. Exh. 369). No further investigation of that claim was needed to know of appellant's claim. Second, appellant did not testify at trial and did not allege in his amended motion that he was willing to testify at trial about this claim (Tr. vi-vii; PCR L.F. 43-52). He did not even identify himself as a witness he would rely on to prove this claim (PCR L.F. 107-110). Appellant did not testify at the evidentiary hearing to prove what his testimony would be (PCR Tr. ii-iii, 412). Appellant cannot refine a claim on appeal that he did not raise below. *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014). Thus, appellant failed to prove his claim regarding the evidence of Charles Hurt's alleged involvement in the crime.

Second, introducing evidence of the boot shank itself, such as the pictures of it, would not have so aided the defense as to create a reasonable probability of a different result. It is true the photos and Slusher's testimony established that it did not appear the shank had yet been sharpened to a point so that it could be used as a stabbing weapon (Mov. Exh. 70-72, 102 47-

48). But the jury could have looked at the pictures and reasonably concluded that the thin piece of metal with sharp corners could have, in its present form, been used as a slashing weapon (Mov. Exh. 70-72). Further, that the shank had not been sharpened when it was found did not preclude the reasonable inference that it could be sharpened in the future. The evidence at trial established that that was what a shank was for (Tr. 1150).

Moreover, counsel had succeeded in preventing the State from presenting to the jury the portion of the charge that that boot shank "could be used in such manner as to endanger the life or limb of an offender or employee of a correctional center" (Tr. 886, 888-889). This was a particularly noteworthy accomplishment by counsel since that was an element of the crime that appellant was convicted of and had admitted that there was sufficient evidence to conviction him of. § 217.360.1(4), RSMo Cum. Supp. 2003. Had counsel decided to introduce evidence challenging the dangerous nature of the shank, the door would have been opened to the prosecutor being able to tell the jury that appellant admitted that the evidence of the crime showed that the boot shank was possessed in a manner as to endanger the life or limb of other inmates or jail employees. Thus, the failure to offer evidence of the nature of the shank was neither deficient performance nor prejudicial.

Finally, as to the plea transcript, while the jury was not particularly made aware of the nature of the *Alford* plea and the transcript also contained appellant's claim that the shank belonged to another inmate, the failure to present the transcript was still not prejudicial. First, as to appellant's claim that the transcript showed that the shank belonged to another inmate and not appellant, the jury heard similar evidence of appellant's claim through Dr. Taylor's testimony that appellant claimed that he was holding the "piece of metal" for another inmate (Tr. 1150-1151). Counsel is not ineffective for failing to offer cumulative evidence. *Johnson v. State*, 388 S.W.3d 159, 167 (Mo. 2012).

Second, admitting the transcript presented the same problem as presenting evidence of the nature of the boot shank; appellant admitted that the evidence would prove that the shank was "obviously" a "type of…weapon" that "could be used to endanger the security or safety of another inmate or staff at the correctional center" (Mov. Exh. 68). Offering the transcript would have contradicted counsel's strategy to keep that information away from the jury and would have shown that appellant knowingly possessed what he agreed could be proven to be a weapon. The failure to offer evidence that would not unqualifiedly support the defense is not ineffective assistance of counsel. *Worthington v. State*, 166 S.W.3d 566, 577-78 (Mo. 2005).

Third, appellant's claim overstates the beneficial impact of knowing the nature of an *Alford* plea versus a guilty plea. Appellant was found guilty of the crime of illegally and knowingly possessing an object that presented a danger to other inmates and prison employees, admitting that the evidence was sufficient to convict him of that crime. § 217.360, RSMo Cum. Supp. 2003. That conviction, and not the nature of how it was obtained, supported the prosecutor's future dangerousness argument. Further, notifying the jury that appellant attempted to deflect the blame for his crime even while entering a plea for it would have supported the prosecutor's theme that appellant had no remorse for his actions but instead made excuses for them (App. Br. 1140, 1146-1151). Thus, knowing the nature of the *Alford* plea would not necessarily have been mitigating but could have been seen by the jury as aggravating. Finally, even if the jury believed appellant's claim about another inmate's involvement in the crime, this evidence would have shown that appellant was willing to commit crimes in the Department of Corrections at the request of another inmate. As appellant's attempt to break out of the Randolph County Jail at the request of an older inmate led to his murder of two inmates, appellant's suggestion that his willingness to go along with another inmate's crimes showed he was not a future danger to anyone was not an inference the jury would have drawn. The jury could have easily

concluded that such evidence showed that he was still as much a danger to corrections personnel and inmates as he was to the victims of his murders. Therefore, he failed to prove that, but for counsel's failure to offer the plea transcript, there was a reasonable probability of a different result. The motion court did not clearly err in denying this claim.

II.

Appellant's claim regarding Dr. Peterson's proposed testimony about appellant's statement to a jailer is different than that raised in the motion court and thus cannot be considered on appeal and appellant failed to prove that counsel was ineffective for failing to offer evidence about what appellant's statements might have meant.

Appellant claims that counsel was ineffective for failing to present evidence, such as the testimony of Dr. Peterson, that appellant's statement to a Boone County jailer that he was the one who had killed two jailers may not have been bragging but made because he was eager to be transferred because he was frightened (App. Br. 59-68). But the claim appellant now raises is different than that raised below. Further, the proposed testimony would have been inadmissible at trial and evidence was presented about possible other meanings of appellant's statement. Appellant failed to prove that counsel was ineffective.

At trial, Boone County jailer Jacqueline Petri testified that appellant told her that he wanted to be moved out of Boone County Jail (Tr. 908). Petri told him he needed to complete a request form (Tr. 908). Appellant persisted, saying he "really" wanted to be moved that night (Tr. 908). Petri told him that the transport officers were gone for the weekend and that he had to put

in the request form (Tr. 908). Appellant made yet another statement about being moved; she told him if he wanted to fill out a form, she would take it to the "back up there" (PCR Tr. 909). Appellant said "Well, don't you know who I am?" (Tr. 909). Petri told him that she did not, to which he replied that he was the one who had killed those two jailers in Randolph County (Tr. 909).

On cross-examination, she described appellant as "anxious"; appellant told her that he had a court order to be moved (Tr. 909). Counsel pointed out that Petri "rolled her eyes" as she testified to appellant's statement (Tr. 910). She testified that she believed the tenor of the comment was "you know, Look at me. I'm the one that killed those two jailers" (Tr. 910). After that, she again told appellant she would get him the form (Tr. 910-911). It was "business as usual" after that for the rest of the evening (Tr. 911).

In his amended motion, appellant alleged that counsel was ineffective for failing to "investigate and rebut" this testimony (PCR L.F. 43-44, 55). He alleged that the original attorney file from appellant's first trial would have shown that he was scared of another inmate due to a disagreement they had and that he wanted to change jails because he thought the other man would hurt him (PCR L.F. 55). He alleged that counsel should have spoken to and called Dr. Peterson to testify that this was simply "adolescent-type behavior" related to appellant's PTSD which caused him to remain in the "latent stage

of adolescence"; it "meant nothing" regarding appellant's future dangerousness (PCR L.F. 56). He alleged that, had counsel presented such testimony to the jury, it would have mitigated Petri's testimony (PCR L.F. 56).

Dr. Peterson testified that "one could say maybe" appellant was bragging to Petri, but also speculated that "one could also say maybe he was frightened and trying to tell the listener why it was important for him to leave that place" (PCR Tr. 324). Because the accounts Dr. Peterson read "were really devoid of emotional content" and contained just the "specific words," appellant's statements were "open to interpretation" (PCR Tr. 324). Dr. Peterson noted that appellant used only words and did not use any actions to intimidate or frighten Petri (PCR Tr. 324).

Counsel McBride, who was responsible for cross-examining Petri, testified that he did not recall the information about the incident from the first trial attorney file (PCR Tr. 365-366). Appellant asked him no other questions about his investigation or evidentiary strategy regarding the Petri testimony (PCR Tr. 365-366). On cross-examination, counsel testified that Petri was a "very short witness[]" and that counsel saw no benefit to "lingering over" this evidence or trying to make a "mini trial" out of the issue (PCR Tr. 403). He remembered that Petri seemed "kind of nonplussed about

the whole event" and that it "kind of felt like a wash," so he did not want to make a "bigger deal" about it (PCR Tr. 403).

The motion court denied appellant's claim, finding that counsel did address the ambiguity of appellant's statement at trial and that there was no reasonable probability of a different result had the proposed evidence about the statement been elicited (PCR L.F. 347-348).

There was no clear error. First, appellant's claim on appeal is materially different than his claim below. In the amended motion, he alleged that counsel should have called Dr. Peterson to testify that the comment was merely "adolescent behavior" and the "first thing that [came] to mind" as the result of a mental disorder, essentially conceding the meaning of the statement but opining that it did not evidence future dangerousness, (PCR L.F. 56). But on appeal, he claims that counsel should have called Dr. Peterson to challenge the meaning of the statement altogether and opine that the statement was not bragging at all (App. Br. 59-68). Because the appellate claim was not included in the amended motion, appellant cannot receive relief on it. Claims not raised in a post-conviction motion are waived on appeal. *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. *Id.* There is no plain error review on appeal from the denial of a

post-conviction motion. *Id.*

Second, the proposed testimony by Dr. Peterson about possible meanings of appellant's statement was not admissible. Expert testimony is admissible if it clear that the testimony is one which the jurors, for want of experience and knowledge, would otherwise be incapable of drawing a proper conclusion from the evidence. *State v. Lawhorn*, 762 S.W.2d 820, 822 (Mo. 1988). Such testimony must inform the jury about affairs not within the full understanding of the average person. *Id.* Expert testimony is excluded if the subject is within the general realm of common experience. *See id.* Dr. Peterson's testimony about what appellant might have meant was this latter type of evidence. Average people can speculate about the possible meanings of a statement; an expert is not necessary to say what other meanings a certain sentence or phrase could have had.

Further, Dr. Peterson's testimony was clearly speculative; he stated that the statement was "open to interpretation" and that the record did not contain any emotional content to figure out the meaning (PCR Tr. 324). His opinion that "one could maybe say" appellant was bragging or "one could also maybe say he was frightened" was nothing but conjecture and not a conclusion based on evidence. Speculative "expert" testimony not based on and supported by sufficient facts is not admissible. *See, e.g., Vittengl v. Fox*,

967 S.W.2d 269, 280-81 (Mo. App., W.D. 1998). Counsel is not ineffective for failing to present evidence that is inadmissible. *McLaughlin v. State*, 378 S.W.3d 328, 346 (Mo. 2012).

Finally, counsel's performance was not deficient or prejudicial regarding alternate meanings for this statement because the jury was made aware that the statement could have other meanings. Defense expert Dr. Taylor testified that she did not believe the statement meant that appellant was bragging but could have been "an identification factor" (Tr. 1163). Counsel argued that the statement did not mean that appellant was bragging and pointed to Petri's casual, "business as usual" attitude about the statement to support that conclusion (Tr. 1195-1196). Because the issue that the statement was not necessarily bragging was put before the jury permitting the jury to draw an inference contrary to the State's proposed inference, counsel was not ineffective for failing to place such evidence before the jury.

III.

Appellant failed to prove ineffective assistance of counsel for failing to investigate and present evidence rebutting testimony regarding a gesture appellant made in the Chariton County Jail.

Appellant claims that counsel was ineffective for failing to investigate and present evidence regarding jailer Donna Harmon's ability to see a gesture that she claimed was appellant pointing his finger and mouthing a word to mimic the shooting of a gun to show that either her testimony was impossible or subject to misinterpretation (App. Br. 69-78). But appellant failed to prove that counsel's decision not to conduct further investigation of the jail incident was unreasonable, counsel impeached Harmon's testimony and called the jury's attention to the fact that she may have misinterpreted what she believed she saw, and appellant failed to prove that there was a reasonable probability of a different outcome.

At trial, Chariton County jailer Harmon testified that, after lights out one night, she saw appellant in his cell with his "hands raised as if he was holding a pistol and making motions with his mouth as if he was shooting at me" (Tr. 900). On cross-examination, counsel Slusher elicited that Harmon was "a distance away," that there was bulletproof and soundproof glass with metal running through it on the otherwise solid door, and that inmates would

attempt to communicate with inmates in other cells by making hand gestures to each other (Tr. 902). Counsel elicited that the lights went off at 11:00 and that that "influence[d] how you can see things there"; inmates would have trouble seeing out of the windows at first but that their eyes adjust to it as time goes on (Tr. 904). Counsel also elicited that in her report, Harmon said that she heard appellant making shooting noises but that she was wrong when she wrote that (Tr. 902-903).

In his amended motion, appellant alleged that counsel was ineffective for failing to "investigate and rebut" this testimony by presenting pictures of the booking area and appellant's cell (PCR L.F. 43-44, 53). He alleged that, had counsel investigated and presented such pictures, the jury "would have had a clearer picture of the set up inside of the jail and would have seen that Ms. Harmon could not have seen Michael's gestures clearly from behind the glass and across the hall with the lights out in the cell" (PCR L.F. 53-54).

At the evidentiary hearing, Attorney General's Office investigator Gerald Greene testified that he took photos from inside of the booking area of the jail showing appellant's cell and the hallway outside the cell with "different variations of lighting" (PCR Tr. 173-174; Mov. Exh. 76-78, 95). The photos "did come out a little darker" than how the area actually looked to his own eyes and were darker than what the deputy would have really seen (PCR

Tr. 174, 177-178). He testified that, in all of the lighting variations he used to simulate the conditions that existed when Harmon saw appellant's gestures, appellant would have been visible to Harmon (PCR Tr. 176-177).

Public Defender investigator Butch Johnson testified that he also took similar pictures in the jail (PCR Tr. 182-183; Mov. Exh. 74-75). He testified that the lighting conditions at night make "it more difficult to see into a dark cell" and that one "might not be able to see what the inmate is doing at night…if he's in there is a certain location and the door [is] closed" (PCR Tr. 188-190).

Counsel Slusher testified that he did not recall investigating the lighting conditions in the jail and did not believe anyone took pictures in the jail for the defense (Mov. Exh. 102 64). He did not recall any trial strategy relating to the investigation of the jail lighting (Mov. Exh. 102 64). Counsel McBride did not do any further investigation of the jail incident and did not think that anybody on the defense team did any other investigation (PCR Tr. 364-365). He testified that he did not believe attempting to make "more of a mini trial" out of this incident was going to advance the case, but believed that "trying to linger" on this evidence and attacking the witness would have made it into a "bigger deal than the witnesses had presented it" (PCR Tr. 403-404).

The motion court denied this claim, finding that counsel did address the evidence regarding visibility on cross-examination (PCR L.F. 347). The court also concluded that there was not a reasonable probability of a different result even if the proposed evidence had been offered as the additional evidence regarding the evidence was "inconclusive" on what was visible to Ms. Harmon and in light of the seriousness of the murders themselves (PCR L.F. 348).

There was no clear error. First, while Slusher could not recall the strategic reason for not obtaining pictures in an on-site investigation of the jail to present at trial, McBride's testimony established that counsel had a strategy to minimize the impact of the evidence of the jail incidents by not attempting to make "mini trials" out of them by fighting every detail (PCR Tr. 403-404). Counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary, and the decision to forgo investigation must be evaluated for reasonableness under the circumstances, giving great deference to counsel's judgment. *Crooks v. State*, 131 S.W.3d 407, 410 (Mo. App., S.D. 2004); *Childress v. State*, 778 S.W.2d 3 (Mo. App., E.D. 1989). Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Davis v. State*, 486 S.W.3d 898, 906 (Mo. 2016). Counsel's cross-

examination showed that counsel had obtained enough information from the investigation that was done to challenge Harmon's ability to see appellant, including questioning the distance she was from the cell, the obscuring nature of the glass, and the lighting conditions (Tr. 902-904). Appellant failed to prove that counsel's decision not to pursue further evidence about the incident, such as photographs, was unreasonable.

Second, counsel's cross-examination of Harmon showed that counsel had investigated the issue and was able to provide mitigating facts about the evidence. In addition to questioning the lighting and distance, counsel established that appellant may not have been able to see Harmon, calling into question the conclusion that he was trying to direct a threat towards her or any other jailer (Tr. 902-904). He established that inmates at the jail used hand signals to communicate with each other from their cells, establishing that Harmon could have misunderstood what appellant was trying to do (Tr. 902). And counsel was able to impeach Harmon's recollection of the incident with a prior inconsistent statement in which she said she could hear appellant speaking, calling her credibility into question (Tr. 902-903). Because the cross-examine showed that counsel was prepared to confront this evidence and effectively did so, appellant failed to prove that counsel was deficient for failing to present more evidence which could have led (as it did

in the post-conviction case) to the presentation of inconclusive photographs and multiple witnesses with different opinions about the visibility of appellant in the cell.

Finally, appellant failed to prove prejudice, as he failed to prove that the introduction of photographs would have had any effect on the jury's consideration of this issue or the death sentences. A review of the various photographs show that all of them had trouble fully replicating the visibility as it would have appeared to the naked eye, accustomed to the lighting conditions for about an hour, on that night (Mov. Exh. 74-78). Common experience would lead jurors to understand that photographs of things in darker conditions are often distorted by things such as flash and the cameras inability to fully capture what a person can actually see in the dark. In light of the lack of clarity in any of the photos proposed, appellant would have had to rely on testimony as to the photos. But the testimony appellant offered did not prove that it was impossible for Harmon to see appellant. In fact, it established the opposite; investigator Greene testified that Harmon would have able to see appellant making the gestures and that the photos made the scene look darker than it really was (PCR Tr. 174, 177-178). While investigator Johnson testified that he could not see the "inside" of the darkened cell, he acknowledged that appellant "might not" be visible only at

certain locations in the cell and that it was "difficult" to see into the dark cell (PCR Tr. 188-190). This testimony showed that presentation of the proposed evidence would have, at best, only established a battle of witnesses as to what Harmon could have seen. This shows how correct counsel was in concluding that conducting a "mini trial" would not have discredited Harmon's testimony and may have, in light of Greene's testimony, strengthened it. Thus, as the motion court concluded, the additional evidence was "inconclusive" on the issue of what Harmon could have seen (PCR L.F. 348). Thus, the evidence would not have been so contrary to Harmon's testimony that there was a reasonable probability that the evidence would have led the jury to reject Harmon's testimony or to decide that death was not the appropriate sentence.

Appellant argues that he did not have to "conclusively refute" Harmon's testimony but to only establish that the evidence created a reasonable probability of a different result (App. Br. 68). This Court rejected a similar argument in *Davis*. In that case, the movant argued that the motion court's credibility findings rejecting proposed expert testimony did not defeat his claim of prejudice because the motion court is not free to substitute its assessment of the evidence for the jury's. *Davis*, 486 S.W.3d at 905 n. 2. This Court held, however, that the rejection of evidence as non-credible went to

whether the defendant met his burden of proving his post-conviction claim, not whether the jury would have believed the evidence at trial. *Id.* Likewise, in this case it was not enough for appellant to simply present evidence to the motion court that he argues the jury could have believed. He had to prove to the motion court that the evidence would have presented a viable defense and created a reasonable probability of a different result at trial. See *id.* at 906, 909. Because the motion court did not find that the proposed evidence established that Harmon could not see appellant, appellant failed to prove to the motion court that counsel was ineffective for not producing that inconclusive evidence or that appellant was prejudiced by the failure to present the inconclusive evidence. There was no clear error.

IV.

Appellant's claim regarding counsel's preparation of Dr. Taylor is different than that raised in the motion court and thus cannot be considered on appeal and appellant failed to prove that counsel was ineffective for failing to "prepare" defense expert Dr. Taylor to testify about certain acts committed by appellant after he was incarcerated for the charged murders.

Appellant claims that counsel was ineffective for failing to properly prepare defense expert Dr. Taylor because they failed to tell her about appellant's shooting gesture to jailer Harmon in Chariton County or his statements to jailer Petri in Boone County about his being the man who had killed two jailers, which caused her testimony to be "attacked and rendered meaningless" (App. Br. 79-83). But appellant's claim on appeal is different than that raised below and thus cannot be considered on appeal. Further, appellant failed to prove that counsel failed to provide this information to Dr. Taylor or that he was prejudiced by this alleged failure.

On direct examination at trial, Dr. Taylor testified that she believed appellant was not "aggressive" and claimed that the murders were "out of character for him, given his history of passivity and no aggression that we know of" (Tr. 1108, 1118). On cross-examination, she testified that behaviors

appellant had displayed in his life, including starting fights with his brother, repeatedly getting thrown out of school for fighting, cursing at teachers, and sexually harassing someone resulting in expulsion from school "could be" considered "aggressive" behavior, but she was willing to accept appellant's alternative explanations for every one of those incidents and thus claimed she "didn't know of any aggressive behaviors" (Tr. 1147-1148).

Dr. Taylor was then asked if she was aware of his statements in the Boone County Jail about having killed two deputies (Tr. 1149). She testified that she had never heard of that, but that she would not consider it evidence of a lack of remorse without "know[ing] the context" of it (Tr. 1149). She also said she was unaware that appellant pointed a finger at a jailer and mouthed the word "boom" or "bang" (Tr. 1149). She would not consider that behavior "remorseful," but would want to know the context before she could determine if it was aggressive (Tr. 1149). She did testify that she knew about the boot shank incident, but accepted appellant's claim that it was a "piece of metal that he was holding for someone else" as it "rang true to [her]"(Tr. 1151).

On cross-examination, Dr. Taylor again stated that she did not know about the two jail incidents even though she had "an awful lot of information" about appellant (Tr. 1163). She dismissed the suggestion that his statement about killing two deputies was not bragging about a killing and "could have

been just an identification factor" (Tr. 1163). She stated she would have liked to see information about that incident, to which the prosecutor replied, "I've given it to them" (Tr. 1163-1164).

In his amended motion, appellant alleged that counsel was ineffective for failing to "adequately prepare" Dr. Taylor by giving her information about the two jail incidents (PCR L.F. 67). He alleged that, had she been aware of the incidents, she could have "mitigated the State's aggravating evidence by explaining how [appellant's] background and mental health affected his behavior in those situations" (PCR L.F. 67). He alleged that counsel should have been aware of the State's anticipated use of the evidence, yet failed to provide the information to Dr. Taylor, resulting in prejudice (PCR L.F. 67).

Appellant did not call Dr. Taylor to testify at the evidentiary hearing (PCR Tr. ii-iii). Counsel Slusher testified that, if Dr. Taylor did not have the information about the jail incidents, he was unaware of that fact because counsel McBride handled the preparation of Dr. Taylor's testimony (Mov. Exh. 102 75). McBride testified that he was responsible for contacting Dr. Taylor and providing her the necessary information (PCR Tr. 354). McBride was not asked about Dr. Taylor's opportunity to review the jail incident information (PCR Tr. 341-411).

The motion court denied appellant's claim, concluding that appellant

failed to prove the claim because he failed to present Dr. Taylor's testimony to establish that additional preparation on the issue would have changed her testimony "in such a way that would have create[d] a reasonable probability of a different result" (PCR L.F. 353).

There was no clear error. First, appellant's claim on appeal is materially different than his claim below. In the motion court, he alleged that, because of counsel's purported failure to provide the information to Dr. Taylor, she was unable to provide affirmative testimony to mitigate the specific aggravating nature of the testimony about the jail incidents (PCR L.F. 67). But on appeal, he argues that her credibility as to her other conclusions was unnecessarily impeached because she had not reviewed the documents counsel allegedly failed to give her (App. Br. 81-83). Thus, appellant's motion court claim was one of a failure to present evidence and the appellate claim was one of failing to prevent impeachment. These are different claims. Claims not raised in a post-conviction motion are waived on appeal. *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014). Pleading defects cannot be remedied by the refinement of a claim on appeal. *Id.* There is no plain error review on appeal from the denial of a post-conviction motion. *Id.* Because appellant's claim on appeal is different than his claim below, his appellate claim was never before the motion court and is therefore waived.

Further, appellant failed to prove that counsel was ineffective. First, appellant failed to prove that Dr. Taylor's failure to review the information about the jail incidents was due to counsel's alleged failure to provide the information. He did not ask McBride about the information even though McBride was the attorney who provided Dr. Taylor the information she needed (PCR Tr. 341-411). And he did not call Dr. Taylor at all (PCR Tr. ii-iii). While he relies on Dr. Taylor's testimony at trial that she did not review the information (Tr. 1149-1150, 1164), that does not mean that counsel did not provide it; it may have been that she simply missed it during her review of the records. Such an oversight by the expert, despite counsel's efforts to provide the records, would not have rendered counsel ineffective. The failure to present evidence at a hearing in support of post-conviction claims constitutes abandonment of the claim as the movant fails to meet his burden of proof. *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. 1998). Because appellant failed to present evidence that counsel actually failed to provide the jail incident information, he failed to prove counsel was ineffective.

Further, appellant's failure to call Dr. Taylor also failed to meet his burden of proving prejudice. To demonstrate that there was a reasonable probability of a different result but for counsel's failure to properly prepare the expert, he must prove that the subsequent testimony would have created

a reasonable probability of life sentences. *Johnson v. State*, 406 S.W.3d 892, 899 (Mo. 2013). Because appellant failed to present Dr. Taylor's testimony as to how the jail incident information would have affected her testimony, he did not demonstrate a reasonable probability of a different result from it. It was possible that the information may have led her to conclude that appellant had actually demonstrated the aggressive behavior and was not as passive as she had repeatedly insisted at trial. Without her testimony, the motion court had no evidence before it to prove prejudice.

Finally, even if Dr. Taylor had reviewed the information and dismissed any conclusion that they demonstrated aggression or lack of remorse, there was still not a reasonable probability of a different result. First, she essentially made those conclusions for the jury anyway by suggesting that the context of the situations may have shown appellant was still passive and remorseful and did not necessarily show that he was aggressive and bragging (Tr. 1149-1150, 1163). Second, the jury had already heard her dismiss numerous other examples of aggressive behavior as not being evidence of aggression based on her unyielding belief in appellant's statements about the incidents (including about the boot shank evidence) and yet still returned death sentences (Tr. 108, 1118, 1147-1148, 1151). In light of her refusal to recognize that aggressive behavior was not evidence of aggression in this

case, the fact that she would have also dismissed the other two incidents as being evidence of aggression would not have created a reasonable probability of a different result. Thus, appellant failed to prove ineffective assistance of counsel.

V.

Appellant failed to prove ineffective assistance of counsel for failing to include a claim of improper cross-examination in the motion for new trial.

Appellant claims that counsel was ineffective for failing include in the motion for new trial a claim that the State's cross-examination of defense expert Dr. Taylor regarding appellant's decision not to plead guilty, arguing that including the claim would have led to a reversal on direct appeal (App. Br. 84-88). But claims of failure to preserve are not cognizable and this Court concluded that the challenged cross-examination was not erroneous. Thus, appellant failed to prove that counsel was ineffective.

At trial, Dr. Taylor testified that appellant was "extremely sorrowful" and "almost in shock" about the murders, that he prayed for the souls of his victims, and that he wanted to say he was sorry to the victims' families (Tr. 1118). On cross-examination, she testified, "He didn't care if he was found guilty of murder. He knew he was guilty of murder" (Tr. 1140). The prosecutor asked, "But did he plead guilty? No. Right? He didn't plead guilty[?] (Tr. 1140). Before Dr. Taylor could answer that question, counsel objected to the relevance and argued the question was prejudicial because appellant "was never offered the chance to plead guilty" (Tr. 1140). The court

found that the prosecutor's final question was the result of the witness's refusal to answer the prosecutor's yes-or-no questions about a motivation to lie (Tr. 1141). The prosecutor offered to rephrase the question, at which point the court overruled the objection "with the understanding that I'm going to hear a different question now" (Tr. 1141). At that point, the prosecutor established with Dr. Taylor that appellant had not yet been found guilty or sentenced for any crime when she first encountered appellant and that she was hired because the prosecution was seeking death and the defense was seeking a life sentence (Tr. 1141-1142). Dr. Taylor continued to insist that the potential death sentence did not give appellant an incentive to lie because she did not believe appellant wanted "one sentence over the other" (Tr. 1142-1143).

Though counsel objected at trial, a claim regarding this cross-examination was not included in the motion for new trial (L.F. 212-221). On appeal, this Court found no plain error because the question was permissible to discredit Dr. Taylor's testimony about appellant's remorse and that it was not error for the jury to know that appellant had not pled guilty as the jury in a typical case deciding guilt and punishment would know that the defendant had not pled guilty. *Tisius*, 362 S.W.3d at 409.

In his amended motion, appellant alleged that counsel was ineffective

for failing to "properly object and preserve for appeal" regarding the prosecutor's questions about appellant not pleading guilty in the motion for new trial (PCR L.F. 67). He alleged that the question was "misleading" on the issue of remorse and whether or not appellant pled guilty violated his rights, was not relevant, and was prejudicial (PCR L.F. 67-68). He alleged that the "failure to preserve this issue for appeal" resulted in prejudice (PCR L.F. 68).

Counsel Slusher testified that he did not recall the specific reason he did not include the issue in the motion for new trial but noted that the record showed that, although the court overruled the objection, "in effect the question wasn't asked" because the prosecutor did not return to the question after the objection (PCR Tr. 77). Based on that record, counsel believed his decision not to include the issue was strategic (PCR L.F. 77).

The motion court denied this claim, concluding that claims of ineffective assistance of trial counsel must be based on the impact of the outcome of the trial and not the appeal and that the claim should be denied for the same reasons set out by this Court on direct appeal (PCR L.F. 352).

This was not clearly erroneous. First, appellant's claim was not cognizable. The mere failure to preserve an issue on appeal is not a cognizable ground for relief for ineffective assistance of counsel on a post-conviction motion; such a claim must allege a violation of the right to a fair

trial. *McLaughlin v. State*, 378 S.W.3d 328, 354 (Mo. 2012). Appellant's claim regarding the failure to include this issue in the motion for new trial only alleged that it resulted in his claim not being properly preserved for appeal; he did not allege that it would have changed the trial court's ruling on the motion (PCR L.F. 68). Further, on appeal, appellant only argues that counsel would have included the issue to not be subjected to the plain error standard on appeal and that there was a reasonable probability that this court would have reversed his sentences on direct appeal (App. Br. 88). Because this claim only went to the failure to preserve the issue for appeal and not to the failure to seek a ruling on the issue below, appellant's claim was not cognizable.

Further, as this Court concluded on direct appeal, the prosecutor's question was not erroneous. As this Court held:

> When a party inquires into part of an act, occurrence, or transaction they have 'opened the door' to testimony regarding that act, occurrence, or transaction, and the opposing party is entitled to inquire into other parts of it in order to rebut possible inferences that may be drawn from an incomplete version presented by the adversary or to prove the party's own version of events." [citation omitted].

> Here, Tisius sought testimony from Dr. Taylor demonstrating his remorse and sorrow for murdering two peace officers. The State's cross-examination of Dr. Taylor was an attempt to discredit the veracity of Tisius' feelings as he related them to Dr. Taylor.
>
> Further, had [the motion court] not reversed and remanded the penalty phase of Tisius' trial, this jury would have sat during the guilt and sentencing portions of his trial. Accordingly, the jury would have known Tisius did not plead guilty as it would have determined his guilt or innocence. The circuit court did not plainly err in allowing this cross-examination.

Tisius, 362 S.W.3d at 409. This holding was not a conclusion that appellant did not suffer a manifest injustice from the question, which would have permitted appellant to seek new review of this issue in the post-conviction proceeding. *See Deck v. State*, 68 S.W.3d 418, 426-27 (Mo. 2002) (direct appeal finding of no manifest injustice does not preclude an ineffective assistance counsel claim on the same issue because *Strickland* prejudice is a lower threshold than manifest injustice). Instead, this Court held that the question was not plain error because it was permissible, i.e., not erroneous.

Tisius, 362 S.W.3d at 409. Thus, appellant's claim that counsel should have included this claim in the motion for new trial was meritless. *See, e.g., Ringo v. State*, 120 S.W.3d 743, 746 (Mo. 2003) (a claim cannot be raised in a post-conviction motion where no error was found on direct appeal). There was no clear error.

VI.

Appellant failed to prove ineffective assistance of counsel for failing to present Dr. Peterson's testimony about his opinions of appellant's alleged "extreme mental or emotional disturbance" and "diminished capacity" to support the submission of those mitigating circumstances.[2]

Appellant claims that counsel was ineffective for failing to present portions of Dr. Peterson's prior testimony to support additional statutory mitigating factors that the murders occurred under the influence of extreme mental or emotional disturbance and that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of

[2]Appellant's point calls the "extreme mental or emotional disturbance" mitigating circumstance "diminished capacity," possibly based on Dr. Peterson's conflation of the two (App. Br. 89-98; Mov. Exh. 5 277-278). The "extreme mental or emotional disturbance" mitigating circumstance of § 565.032.3(2) is not the "diminished capacity" mitigating circumstance, which is found in § 565.032.3(6). § 565.032.3(2),(6), RSMo 2000; *see State v. Brown*, 902 S.W.2d 278, 298 (Mo. 1995) (noting that the two are different mitigating circumstances). Despite this confusion, appellant does raise the failure to support and submit both mitigating circumstances.

the law was substantially impaired (App. Br. 89). But counsel's decision not to present this testimony and seek those mitigating circumstances, made after substantial investigation of appellant's mental condition, was reasonable trial strategy and was not prejudicial. Appellant failed to prove that counsel was ineffective.

In appellant's previous post-conviction proceeding, Dr. Peterson testified that appellant suffered from major depressive disorder (severe without psychotic features), child-onset post-traumatic stress disorder as the result of emotional traumas, dysthymia, a history of alcohol and marijuana abuse and dependence, and traits consistent with passive/aggressive or compulsive personality disorder (Mov. Exh. 5 235). Dr. Peterson testified to much of appellant's past history, including his mother's instability, extreme abuse by his brother, and his father's abandonment (Mov. Exh. 5 239-249). He testified that appellant was "severally impaired" by depression, "developmentally at risk," and experienced "suicidality" (Mov. Exh. 5 252-267).

Dr. Peterson also testified that he believed that, due to his mental disorders, appellant was, "in fact, experiencing diminished capacity at the time of the – before the planning for the attempted breakout and during the breakout and subsequently" (Mov. Exh. 5 278). He also testified that he

believed that appellant was experiencing "extreme mental or emotional disturbance" at the time of the murders (Mov. Exh. 5 278). He concluded that these were due to appellant "never matur[ing] through," his "not [being] treated at all" for depression, PTSD, and dysthymia, and his "passive dependence on" Roy Vance (Mov. Exh. 5 278-279).

At trial, counsel read into evidence selections from Dr. Peterson's testimony, but did not present the portion with Dr. Peterson's conclusions regarding diminished capacity or extreme mental or emotional disturbance (Tr. 1067; Mov. Exh. 5). The defense also offered into evidence prior testimony by Dr. A.E. Daniel, who treated appellant in the jail for his mental disorders (Tr. 1077; Mov. Exh. 6), and presented the testimony of Dr. Shirley Taylor to explain the effect of appellant's upbringing, his mental disorders, and Vance's domination of appellant on the murders (Tr. 1101-1164).

The defense submitted statutory mitigating circumstances based on appellant's age at the time of the murders and appellant's lack of significant criminal history, as well as the circumstance that he acted under the substantial domination of another person (L.F. 195).

In his amended motion, appellant alleged that counsel was ineffective for failing to present Dr. Peterson's full testimony or call him at trial to present the testimony that appellant was suffering from diminished capacity

and extreme mental or emotional disturbance at the time of the murders (PCR L.F. 24-25, 32-33). He alleged that this prevented counsel from being able to request instruction for the two additional mitigating circumstances based on extreme mental or emotional disturbance and substantial impairment of capacity (PCR L.F. 33-34). He alleged that there was a reasonable probability that he would not have been sentenced to death had the jury heard Dr. Peterson's testimony (PCR L.F. 34).

At the evidentiary hearing, Dr. Peterson testified that, prior to the current post-conviction proceeding, he reviewed more records regarding appellant, but none of his opinions about the mitigating circumstances had changed (PCR Tr. 270-271, 292, 325). He testified that counsel never spoke to him about the case (PCR Tr. 239-240).

Counsel Slusher testified that the defense chose not to call Dr. Peterson to testify to all of his prior conclusions because he believed that Dr. Peterson's testimony "was something that you can maybe sell to a judge in a PCR process but that was, in my mind, an over-sell for the jury" (Mov. Exh. 102 14). He believed that the defense could not convince the jury of Dr. Peterson's conclusions (Mov. Exh. 102 15). Counsel was able to get an agreement from the prosecutor that he would be able to "pick and choose" beneficial information from Dr. Peterson's testimony (Mov. Exh. 102 15-16).

Counsel believed that Dr. Peterson's conclusions regarding extreme mental or emotional disturbance at the time of the offense were difficult to support in light of the facts of the case (Mov. Exh. 102 20).

Counsel McBride testified that the defense strategy was to show that appellant's involvement in the crime was because his will was overborne by the desire to please Vance (PCR Tr. 348). The team decided to use the live testimony of Dr. Taylor, who testified at the first trial, to provide the psychological evidence to support the defense case (PCR Tr. 353-354). He did not contact Dr. Peterson, but, having reviewed the prior testimony, counsel "felt confident" that presenting the portions of the transcript instead of live testimony was "the way to present it," as the prior testimony had all of the information they wanted to present (PCR Tr. 356-357). He deferred to counsel's Slusher analysis of the transcript, which he believed was the "core" of what the defense wanted to present" and "worked with" Dr. Taylor's testimony (PCR Tr. 358). While he did not recall the specific reasoning regarding the other mitigating circumstances Dr. Peterson testified about, counsel believed that they were able "to prove up the statutory mitigators that we wanted" (PCR Tr. 364).

The motion court denied appellant's claim, finding that the decision to rely on Dr. Taylor's live testimony instead of Dr. Peterson's was reasonable,

that several omitted portions of Dr. Peterson's testimony were cumulative to other testimony counsel did present, and that appellant failed to allege that counsel was ineffective for failing to offer the proposed mitigating circumstances (PCR L.F. 326-329).

There was no clear error in denying appellant's claim. First, counsel's decision not to present Dr. Peterson's full testimony to support an attempt to offer the two proposed mitigating circumstances was a choice of reasonable trial strategy. Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable. *Johnson v. State*, 333 S.W.3d 459, 463-64 (Mo. 2011). Counsel had before them the prior testimony of three different defense experts as to appellant's mental condition and fully reviewed all of that testimony, showing that appellant's mental condition had been fully investigated (Mov. Exh. 102 14; PCR Tr. 400). Counsel decided that, of the experts, Dr. Taylor's live testimony, with supporting portions of Dr. Peterson's and Dr. Daniel's prior testimony best fit the defense theory and needs (PCR Tr. 400-401). Counsel believed that, in light of the circumstances of the murder, Dr. Peterson's conclusions that appellant suffered from diminished capacity or extreme mental or emotional disturbance was not a defense that the jury would find credible (Mov. Exh. 102 14-15, 20). Counsel's decision not to call a certain

expert because he did not think the jury would believe the testimony or proposed defense was reasonable trial strategy. *See, e.g., Davis v. State*, 486 S.W.3d 898, 912 (Mo. 2016) (counsel reasonably decided not to present an expert to testify to a diminished capacity defense because he did not think the jury would believe it). Trial counsel is not ineffective for choosing to pursue one reasonable trial strategy to the exclusion of another. *Davis,* 486 S.W.3d at 912.

Moreover, appellant did not prove there was a reasonable probability of a different result because counsel did not present this testimony to support the mitigating circumstances counsel chose not to pursue. As counsel concluded, the facts surrounding appellant's murders did not lend themselves to a credible case that appellant was so under the influence of his mental disorders that he lacked control over his ability to appreciate the criminality of his actions and conform them to the law. The evidence demonstrated considerable planning of the crime by appellant, Vance, and Vance's girlfriend, which started while appellant was in the jail. *State v. Tisius*, 92 S.W.3d 751, 757-58 (Mo. 2002). After his release, appellant returned to the jail several times to provide Vance with secret communications about the plan, demonstrating a complexity to the plan. *Id.* at 758. Appellant obtained a gun in the days prior to the murders yet kept trying to obtain a larger one.

Id. Appellant test fired the gun prior to the murders and then listened to a song about murder to prepare himself for the crime. *Id.* His words that he was "going to go in and just start shooting and… do what he had to do" and that he was going "in with a blaze of glory" showed that appellant appreciated exactly what he was going to do. *Id.* This Court has found not only that the murders were with deliberation, but were "pre-meditated," "calculating," and "brazen." *Id.* at 764; *Tisius*, 362 S.W.3d at 414-15. In light of the evidence showing that appellant appreciated the wrongfulness of his actions and was able to control himself over the time necessary to plan and carry out the murders, there was no reasonable probability that the jury would have agreed with Dr. Peterson that appellant was "under the influence of extreme mental or emotional disturbance" or that his ability to appreciate the criminality of the murders and conform to the law due was diminished to his mental condition. Thus, appellant failed to prove prejudice. The motion court did not clearly err in denying this claim.

VII.

Appellant failed to prove ineffective assistance of counsel for counsel's decisions regarding the selection of penalty-phase background witnesses.

Appellant raises a multifarious claim that counsel was ineffective for failing to call five different witnesses to "highlight[] the severity of the adversity and deprivation" appellant suffered while living with his mother and brother and the consequences of those actions. But appellant failed to prove that counsel's selection of penalty-phase background witnesses was not reasonable trial strategy or that he suffered prejudice from counsel's decisions. The motion court did not clearly err in denying this claim.

A. Facts

At trial, the defense presented testimony from twelve different background witnesses detailing their interactions with and observations of appellant's life, including: appellant's mother, Patricia Lambert; appellant's half-brother Joseph Mertens; six friends and neighbors from various places appellant had lived or stayed; two former teachers; a youth program case manager; and a prison ministry volunteer who befriended appellant in prison (Tr. 920-1095). Counsel also presented testimony from Dr. Taylor and prior testimony from Dr. Peterson which set out in detail much of appellant's

biographical information (Tr. 1067, 1101-1165; Mov. Exh. 5). From that testimony, the jury learned: that appellant was generally a nice, friendly, and respectful child and young man but was shy and passive and often upset at how he was treated by his family (Tr. 931, 1014, 1025-1026, 1052, 1056, 1064, 1069-1070, 1074, 1095, 1116, 1158); that appellant was horribly treated by his brother, including being regularly and badly beaten (Tr. 934-935, 963-964, 979, 1006, 1062-1063, 1084-1086, 1111; Mov. Exh. 5 243, 258); that appellant's mother was unable to prove very good care of him to the extent that appellant needed help from other care providers and programs (Tr. 966, 977-978, 980, 995, 1031, 1034-1035, 1117; Mov. Exh. 239-241, 245); that appellant suffered from depression and had suicidal thoughts (Tr. 952-953, 956-957, 961-962, 1064-1065, 1116; Mov. Exh. 5 235-236, 248-249, 251-252, 256-257, 265-266); and that appellant suffered from repeated abandonment and rejection by his father, Chuck Tisius (Tr. 918, 920-925, 932, 942-943, 973, 976, 980-987, 996, 1009, 1022-1023, 1090, 1108-1110; Mov. Exh. 5 240, 243).

In his amended motion, appellant alleged that counsel was ineffective for failing to investigate and call childhood friends, including Jamey Baker and Deanna Guenther, who would have provided an "objective view" of appellant's relationship with his mother and brother, testified to the abuse of appellant by his brother, and to appellant's feelings of being unwanted and

lonely "which contributed greatly" to his mental health issues at the time of the murders (PCR L.F. 35-36).

He alleged that counsel was ineffective for failing to call GED teacher Lynn Silverman, who would have testified that appellant was in her class, was very depressed, and had written that he wanted to die on a notebook (PCR L.F. 38). She would have testified that appellant once told her he was homeless so she contacted someone at St. Louis Youth Services about him (PCR L.F. 38).

Finally, he alleged that counsel was ineffective for failing to investigate and call appellant's father and stepmother, Chuck and Leslie Tisius, who would have testified that Chuck wanted to spend more time with appellant but that, due to "distance and work schedules" as well as Lambert's interference with their relationship, Chuck was unable to do so (PCR L.F. 40-43). He also alleged that, when they saw appellant during the time appellant lived with his mother, he would be "dirty and smell like urine" and that appellant's mother once abandoned him at Chuck's house, claiming that she did not want appellant anymore (PCR L.F. 41-43).

At the evidentiary hearing, Baker testified that appellant was generally outgoing but sometimes quiet (PCR Tr. 93). He testified that appellant was "brutal[ly]" beaten by his brother often (PCR Tr. 94-95, 98-99).

He testified that appellant's mother was "kind of crabby" and that appellant's brother had better toys and other belongings than appellant (PCR Tr. 95). He "didn't know" that appellant had any relationship with his father (PCR Tr. 96).

Guenther testified that appellant often spent time at her house in the summer "[m]ostly because" his brother treated him "horribly" by punching, pushing, hitting, and kicking him, knocking him down, and cussing at appellant, including one time he knocked appellant unconscious (PCR Tr. 81-83).

Silverman testified by deposition that appellant was in her GED class (Mov. Exh. 82 7-8). One night appellant told her that he did not have a place to stay, so she contacted John Reichle with Youth Services to help appellant (Mov. Exh. 82 9). She also recalled seeing a picture of a tombstone appellant drew that said that he wanted to kill himself (Mov. Exh. 82 10).

Leslie Tisius testified that appellant was supposed to stay with her and Chuck every other weekend but it did not happen that often; Lambert would often not show up with him (PCR Tr. 58). Most of his time spent at his father's house was spent with Leslie (PCR Tr. 58). Appellant's parents did not get along (PCR Tr. 59). They often sent clothing home with him and bathed him because he was dirty and smelled like urine (PCR Tr. 60). On one

occasion, appellant caught Chuck having an affair, so Chuck took him home in the middle of the night so Leslie would not find out (PCR Tr. 66). Visitation "completely" dropped off when appellant's mother moved to Hillsboro (PCR Tr. 61). Leslie had to pay off Chuck's back child support (PCR Tr. 61-62). When appellant was about 12, Chuck got custody of appellant (PCR Tr. 62). One of the reasons Chuck wanted custody was because it was cheaper than paying child support (PCR Tr. 68). Soon after that, appellant got into trouble at school and for shoplifting (PCR Tr. 63). Appellant moved back with Lambert within a couple of months (PCR Tr. 63). When appellant was 14 or 15, Lambert brought him back to stay, but appellant soon left after he and Chuck "bumped heads a lot" (PCR Tr. 63).

Chuck Tisius testified that, when appellant was young, he went away for Army Reserve training and never returned because he claimed that Lambert was seeing other people (PCR Tr. 141). He did not get custody even though he believed Lambert was a bad mother who took appellant to bars (PCR Tr. 142). Visitation became a problem due to his work schedule, Lambert's alleged inflexibility regarding dates, and Lambert's failure to drop appellant off regularly (PCR Tr. 143-144, 147). When he did visit, appellant was very dirty, dressed in ragged clothing, and smelled of urine (PCR Tr. 145). They would send home good clothes but he would still wear "rags" when

he returned (PCR Tr. 146). When Lambert moved, visitation became harder (PCR Tr. 148-149). He got behind on his child support but did pay for appellant's health insurance per the divorce decree (PCR Tr. 150-151). He claimed he regularly tried to communicate with appellant but Lambert thwarted his attempts (PCR Tr. 154). When Lambert demanded more child support, Chuck filed for custody (PCR Tr. 156). Appellant's time in Chuck's home was "rough" because appellant did not want to follow rules, did not do homework, and got in trouble at school (PCR Tr. 159-161). At appellant's request, he took him back to live with Lambert (PCR Tr. 161). He only spoke to appellant "off and on" after that until Lambert brought appellant back when appellant was about 15 (PCR Tr. 162-164). Appellant only stayed a few weeks because he would not follow rules (PCR Tr. 164). Appellant was caught in a stolen car when he was 16 or 17 (PCR Tr. 165). He went to live with an aunt after that (PCR Tr. 165).

Counsel Slusher testified that the defense team went through boxes of information when they got the case, including depositions from the previous post-conviction proceeding (Mov. Exh. 102 14, 28). While he did not recall individual names, the depositions of Baker, Guenther, and Silverman were in those materials (Mov. Exh. 8, 9, 13). Either he or someone working with the defense would have reviewed those (Mov. Exh. 102 31-32, He went to

interview family and background witnesses (Mov. Exh. 102 25-26). He did not recall the specific testimony of the witnesses or the decisions not to call those three witnesses (Mov. Exh. 102 30-33, 35-36).

He did not believe that Chuck or Leslie Tisius were interviewed and did not recall the strategic reason for not investigating them (Mov. Exh. 102 36-37). He testified that the defense team accepted the "theme" that came from Lambert's statements and was used previously in the case that Chuck was absent from appellant's life, which was a "big factor" in appellant's life, including getting "thrown out" of Chuck's home (Mov. Exh. 102 38-39). They presented a defense to the jury that Chuck did not want to be involved in appellant's life (Mov. Exh. 102 39).

Counsel McBride testified that the defense team received depositions from the previous cases but did not specifically recall Baker's, Guenther's, or Silverman's (PCR Tr. 349-350). He did not recall specifically why they did not use those witnesses, but, in working up the case, he believed that they had selected "quality witnesses for the issues we wanted to present" (PCR Tr. 351). He seemed to recall that the defense team tried to contact Chuck Tisius but that they either could not reach him or that he was not interested in talking to the defense team (PCR Tr. 351-352).

The motion court denied this claim, finding that the defense called

multiple witnesses to discuss appellant's background, including Chuck's absence from appellant's life (placing "most of the blame" on Chuck) (PCR L.F. 329). As to Baker, Guenther, and Silverman, the motion court concluded that counsel was aware of the witnesses and chose to call other witnesses they considered to be better (PCR L.F. 330). Moreover, those three witnesses "presented a picture that was substantially similar to the picture" presented by the other witnesses called by counsel and thus would not have "dramatically altered" the picture presented by counsel (PCR L.F. 330). As for Chuck and Leslie, the motion court concluded that their testimony did not further appellant's defense based on abandonment by his father and that reasonable trial counsel would have concluded that there was "no significant reasons for counsel to want to" present their testimony as Chuck's version of events painted appellant in a more negative light than the evidence presented at trial (PCR L.F. 330-331).

B. There was No Clear Error

The motion court did not clearly err in denying these claims. Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable. *Johnson v. State*, 333 S.W.3d 459, 463-64 (Mo. 2011). To prevail on a claim of ineffective assistance of counsel for failing to call a witness, the movant must prove that counsel knew

or should have known about the witness, the witness could be located through reasonable investigation, the witness would testify, and the testimony would have produced a viable defense. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. 2008). The test for a "viable defense" in the penalty phase is essentially the same as the test for prejudice: whether the witness's testimony creates a reasonable probability that the defendant would not have been sentenced to death. *Barton v. State*, 432 S.W.3d 741, 757 (Mo. 2014).

Further, counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary, and the decision to forgo investigation must be evaluated for reasonableness under the circumstances, giving great deference to counsel's judgment. *Crooks v. State*, 131 S.W.3d 407, 410 (Mo. App., S.D. 2004); *Childress v. State*, 778 S.W.2d 3 (Mo. App., E.D. 1989). Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Davis v. State*, 486 S.W.3d 898, 906 (Mo. 2016). Demonstrating that an alternative strategy existed does not amount to proof that counsel's strategy was unreasonable. *Barton*, 432 S.W.3d at 758.

Appellant failed to prove that counsel was ineffective. First, as to Baker, Guenther, and Silverman, appellant failed to prove that counsel's decision not to call them was not a matter of reasonable trial strategy.

Counsel was aware of the content of these three witnesses' testimony because they had access to their depositions (Mov. Exh. 8, 9, 13, 102 14, 28). They testified that they selected whom they believed to be the best of the prior witnesses to present at trial (PCR Tr. 351). While counsel could not specifically remember the specific witnesses, this does not aid appellant, as it was appellant's burden to overcome the presumption of reasonable trial strategy; testimony that could not remember the trial strategy for a decision fails to satisfy this burden. *Rios v. State*, 368 S.W.3d 301, 311 (Mo. App., W.D. 2012); *see, e.g., Deck v. State*, 381 S.W.3d 339, 357 (Mo. 2012) (counsel could not remember the strategy but stated that he must have had a reason for not objecting).

Further, as to these three witnesses, appellant failed to prove prejudice. Counsel called numerous other witnesses who presented the same type of testimony Baker and Guenther presented about appellant's childhood and the abuse by his brother (Tr. 931, 934-935, 963-964, 979, 1006, 1014, 1025-1026, 1052, 1056, 1062-1064, 1069-1070, 1074, 1084-1086, 1095, 1111, 1116, 1158; Mov. Exh. 5 243, 258). Counsel also called other witness who established the same facts included in Silverman's testimony, including her putting appellant in contact with Youth Services to get someplace else to stay (Tr. 1031-1035) and that appellant was depressed and expressed suicidal

thoughts (Tr. 952-953, 956-957, 961-962, 1064-1065, 1116; Mov. Exh. 5 235-236, 248-249, 251-252, 256-257, 265-266). Counsel is not ineffective and appellant is not prejudiced from the failure to call cumulative "live lay witnesses" in the penalty phase to explain the defendant's background. *Deck*, 381 S.W.3d at 351-52.

As to the proposed testimony of Chuck and Leslie Tisius, appellant failed to prove that the witnesses could be located or that they were willing to testify at the time. McBride testified that he believed the defense team attempted to track down Chuck but that he either could not be located or was unwilling to testify (PCR Tr. 351-352). Further, counsel was not obliged to pursue this evidence. As Slusher testified, the defense decided to rely on a strategy that Chuck's abandonment of appellant was a big factor in appellant's life (Mov. Exh. 102 38-39). There was plentiful evidence, and not only from Lambert, showing Chuck's abandonment and its negative effects on appellant (Tr. 920-925, 932, 942-943, 973, 976, 980-987, 996, 1009, 1022-1023, 1090, 1108-1110; Mov. Exh. 5 240, 243). The abandonment evidence supported the defense theory that appellant's subsequent efforts to please accomplice Vance (because he wanted and needed a father figure due to his lack of a caring father) led to the murders (PCR Tr. 348). Calling appellant's father and stepmother to contradict much of the defense testimony about

Chuck's abandonment would have forced the jury to try to reconcile conflicts between different defense witnesses, which was more likely to have hurt, not helped, the defense. Counsel is not ineffective for failing to call witnesses who do not unqualifiedly support the defense. *Worthington v. State*, 166 S.W.3d 566, 577-78 (Mo. 2005). In light of the defense theory to cast Chuck in a negative light, it was not unreasonable for counsel to conclude that it was not in their best interests to investigate and call him and his wife. *Davis*, 486 S.W.3d at 906. (reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste).

Further, even if calling the Tisiuses to testify that appellant's perception of abandonment was Lambert's fault and not Chuck's fault, there was not a reasonable probability of a different result. As the motion court concluded, appellant failed to prove prejudice because who caused appellant to feel like his father abandoned him mattered less than what appellant perceived—that Chuck did abandon him (PCR L.F. 330-331). Only that sense of abandonment felt by appellant mattered to establish the Vance-as-"father figure" defense. Putting forth Chuck as the "bad guy" instead of Lambert was merely a choice of alternate trial strategy, which did not establish that counsel's strategy was unreasonable. *Barton*, 432 S.W.3d at 758. The jury heard about appellant's perceived rejection by his father and yet still

sentenced him to death. That the defense could have blamed appellant's mother and not appellant's father would still leave appellant in the same position. Thus, the proposed testimony was not reasonably likely to have changed appellant's sentence.

Finally, appellant's suggests that the jury would have sentenced appellant to life if the jury had not been led to believe that Lambert was a "stabilizing force in his life" but that she also contributed to his lack of stability, leaving him "no one to turn to" (App. Br. 106). But both Dr. Peterson and Dr. Taylor provided testimony that Lambert was neglectful, emotionally absent, and not a "solid, stable" person and that appellant had to flee to neighbors for food, safety, and a calm environment (Mov. Exh. 5 240-241, 245; Tr. 1117). It was reasonable to present such testimony about appellant's mother through experts than through appellant's father and stepmother. *Deck*, 381 S.W.3d at 352. Because the jury heard about the problems that appellant had due to his mother's instability, appellant failed to prove that more testimony on the issue from his father and stepmother would have made any difference at trial. Thus, appellant failed to prove prejudice. The motion court did not clearly err in denying this claim.

VIII.

Appellant failed to prove ineffective assistance of counsel for not objecting to closing arguments (responds to Points VIII and IX).

Appellant claims that trial counsel was ineffective for failing to object to the prosecutor's arguments that allegedly argued for a death sentence to satisfy the victims' families' wishes and that appellant did not have the right to ask for mercy (App. Br. 109-116). But, as this Court concluded on direct appeal, the arguments were neither improper nor prejudicial. Thus, appellant failed to prove that counsel was ineffective.

During closing arguments, the prosecutor argued, without objection, in response to appellant's mitigating evidence regarding his allegedly troubled childhood due in part to the lack of a father in the home, as follows:

> And you know, it's pretty audacious to come in here now, as this defendant is doing, and saying, "I didn't have a dad and, boy, look[] what happened. Do those Miller kids – do those Miller kids get to go kill somebody because their dad, their father figure is gone? If so, Mr. Tisius, write down the name. Tell me who they get to kill, because I bet your name would be on that piece of paper.

(Tr. 1184-1185). Later, the prosecutor argued, without objection, that the death penalty "is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case" (App. Br. 1219).

The prosecutor also argued, without objection, that appellant should reject appellant's arguments for mercy:

> Ladies and gentlemen, you can – and I told you during voir dire a couple of days ago, you can extend mercy for whatever reason to this man. You can do that. But the one thing he does not have the right to do is to ask for it. He forfeited that right on June 22nd when he committed these two murders.

(Tr. 1176-1177).

On direct appeal, this Court rejected claims that these arguments were plainly erroneous. *Tisius*, 362 S.W.3d at 409-11. This Court held that the argument about the Miller children saying that they would want to kill appellant was not a comment on the victims' survivors' wishes that appellant be executed, but a permissible comment on appellant's mitigating evidence. *Id.* at 410-11. It held that the argument saying appellant did not have the "right" to ask for mercy was not an argument that the jury was prohibited from extending mercy but was a permissible argument for the jury to reject

mercy for appellant because he did not extend mercy to the victims. *Id.* at 409-10. As to the argument regarding the "plea from the families" of the victim's, this Court concluded that the argument did not rise to a manifest injustice. *Id.* at 411.

In his amended motion, appellant alleged that counsel was ineffective for failing to object to these arguments, claiming that the argument about mercy "misstated the law" about mercy being a valid sentencing consideration and that the arguments about the victims' families implied that the family members believed death was the appropriate sentence (PCR L.F. 68-70). At the evidentiary hearing, counsel McBride, who was responsible for objections during arguments, did not recall a strategic reason for not objecting to the arguments (PCR Tr. 377, 380-382).

The motion court denied these claims, concluding that any objection to the arguments would have been meritless or that there was not a reasonable probability of a different result had counsel objected (PCR L.F. 351-352). This was not clear error. As this Court held on direct appeal, neither the argument regarding appellant's mitigation evidence and the Miller children nor the argument about appellant's pleas for mercy were erroneous at all. This Court concluded that the argument mentioning the Miller children was not an argument about the victims' desires for appellant's death, but was a

"sarcastic response to his belief he was less responsible for his actions because he was rejected by his father." *Tisius*, 362 S.W.3d at 411. This argument was permissible because the State is free to comment on the defendant's evidence and the credibility of the defense case, even belittling it to the point of improbability and untruthfulness. *Id.* This Court also found that the argument regarding mercy did not misstate the law regarding appellant's request for mercy, but was a permissible argument that mercy should not be extended in this case because appellant did not extend mercy to the victims. *Id.* at 410. Because this Court already held that these arguments were not erroneous, appellant's claims that counsel was ineffective for failing to object to them was meritless. *See, e.g., Ringo v. State*, 120 S.W.3d 743, 746 (Mo. 2003) (a claim cannot be raised in a post-conviction motion where no error was found on direct appeal).

Further, appellant did not suffer prejudice. As this Court noted on direct appeal, it is proper for a prosecutor to seek and request the most severe penalty. *Tisius*, 362 S.W.3d at 411. This Court also held that appellant provided "nothing other than speculation that the exclusion of these statements would have changed the outcome of his sentencing." *Id.* That holding is still true in this post-conviction case; appellant has not presented any compelling argument from the record demonstrating how there was a

reasonable probability that he would have been sentenced to life had counsel objected to these arguments (App. Br. 111-113, 115-116). Moreover, this Court has rejected a finding of prejudice in similar challenges to more aggressive arguments referencing the victims of the crime and calling for justice to be done. *See, e.g., Deck v. State,* 381 S.W.3d 339, 356-57 (Mo. 2012) (no *Strickland* prejudice from the failure to object to an improper argument weighing the defendant's life against the victim's lives). *State v. Deck*, 303 S.W.3d 527, 540-41 (Mo. 2010) (no reversal for challenge to argument that the prosecutor would have to tell the victims' family members if justice was done by the jury's verdict). Because appellant failed to prove a reasonable probability of a different result but for counsels' failure to object to these brief, isolated arguments, there was no clear error in the denial of appellant's claims.

IX.

Appellant failed to prove ineffective assistance of counsel due to an alleged conflict of interest due to counsel being paid a flat fee by the Public Defender system (responds to Point X).

Appellant claims that counsel had an actual conflict of interest due to their flat fee arrangement with the Public Defender system which led counsel to not devote sufficient resources to appellant's case (App. Br. 117-125). But appellant failed to prove that counsel had an actual conflict of interest leading counsel to forego any action on appellant's behalf.

In his amended motion, appellant alleged that counsel had an "inherent conflict of interest" due to being paid a flat fee of $10,000 each by the Public Defender system to represent appellant, creating a conflict between "counsel's economic self-interest" and appellant's interest in the "complete investigation of his case" (PCR L.F. 84). He alleged that the fee arrangement negatively impacted counsels' decisions to investigate the evidence, limiting that investigation and ultimately affecting the result of the trial (PCR L.F. 84-85, 68). He alleged that, had counsel not been operating under this conflict, there was a reasonable likelihood of a sentence less than death (PCR L.F. 85).

Counsel Slusher testified that he and counsel McBride, who were from different firms, each received a $10,000 flat fee for representing appellant (Mov. Exh. 102 9-10). That fee covered all aspects of representation (Mov. Exh. 102 104). There was no requirement to track hours or do other billing, although they did document and submit expense requests (Mov. Exh. 102 103). Slusher requested fees to hire a mitigation specialist; the system turned down the request but assigned Miller, a specialist employed by the system, to work with counsel (Mov. Exh. 102 24, 104-105). Slusher recalled that he personally conducted interviews of family and background mitigation witnesses; Miller worked with McBride to prepare expert testimony (Mov. Exh. 102 25-26). No investigator other than Miller worked on the case before Miller was assigned (Mov. Exh. 102 105).

Slusher later had a salaried investigator working for his firm who "probably [did] some" work on the case, but not a "tremendous amount" (Mov. Exh. 102 105-106). Slusher testified that he did not have his investigator do much work on the case because, generally, the flat fee did not cover the investigative expense and it would be "hard to afford to have him do too much," although it would not have shocked counsel to find the investigator did some things (Mov. Exh. 102 106-107). To the extent that counsel needed

an investigator, they could put in an expense request to the system; that was how Miller was assigned to the case (Mov. Exh. 102 107-108).

McBride testified that the flat fee covered the work that counsel did on the case, but that they had a "separate way of accessing additional fees" for other expenses, such as investigative resources, by sending requests for additional funding to the Public Defender system (PCR Tr. 343-345). He testified that there was nothing in the case that counsel did or did not do because they received a flat fee instead of an hourly fee (PCR Tr. 407).

The motion court denied this claim, concluding that there was no known authority dictating how counsel should be compensated, that any form of compensation could negatively affect counsels' actions in a case, and that the credible testimony from counsel established that the flat fee did not have an adverse impact on counsels' actions in the case (PCR L.F. 357-358).

This ruling was not clear error. This Court rejected an essentially identical claim (involving the same attorneys) in *Dorsey v. State*, 448 S.W.3d 276, 282, 300-01 (Mo. 2014). Dorsey alleged that a flat fee created a conflict of interest that gave counsel an incentive to "complete their representation in as little time and with as few expenses as possible." *Id.* at 300. This Court noted that a flat fee arrangement had never been found to create a conflict of interest and held that any alleged conflict was, at most, a potential conflict,

which was not sufficient to support a finding of ineffective assistance of counsel. *Id.* To prevail on a claim of conflict of interest, the movant must demonstrate an actual conflict of interest that adversely affected counsel's performance." *Id.* This Court held that, because counsel testified that they did not make any decisions in the case based on their compensation, counsel knew they could request funds for investigators and other resources, and the decisions not to investigate certain evidence was based on trial strategy, not lack of funding, Dorsey failed to establish an actual conflict of interest. *Id.* at 300-301.

Dorsey applies here. McBride testified that nothing was done or not done due to the flat fee counsel received (PCR Tr. 407). Both counsel testified that they could request investigative resources from the system, that they did so, and that the system provided a mitigation specialist to assist in the investigation (PCR Tr. 343-345, 351-354, 396; Mov. Exh. 102 23-26, 103-105, 107-108). Appellant presented no testimony from either counsel that their decisions regarding investigation of aggravating circumstances or potential other mitigation witnesses were made based on the perceived lack of investigative resources; counsel testified that investigation was made, that there were strategic reasons for decisions regarding the evidence, or counsel could not recall the reasons (PCR Tr. 351-370, 399-404; Mov. Exh. 102 14-65).

Because appellant failed to present evidence that counsel did not make decisions and carry out their investigation and litigation of the case based on receiving a flat fee, he failed to prove that there was an actual conflict of interest that adversely affected counsel's performance. Thus, as in *Dorsey*, there was no clear error in denying this claim.

Appellant claims *Dorsey* is distinguishable because counsel Slusher testified that he did not use his firm's investigator to do much work in this case because the flat fee did not cover the firm's investigator expense (App. Br. 123-124; Mov. Exh. 102 106-108). But that testimony does not distinguish this case from *Dorsey*. Appellant fails to explain why counsel had a duty to use his own firm's investigator to conduct investigation in this case. The evidence showed that counsel reviewed all of the prior records containing the potential evidence for this case, that Slusher personally interviewed witnesses regarding appellant's background, that counsel had access to a mitigation specialist who aided with the investigation and preparation of the case, including the expert testimony, and that counsel could request resources from the Public Defender system to pay for additional necessary investigative expenses (PCR Tr. 343-345, 351-353, 399-402; Mov. Exh. 102 25-26, 107-108). Because counsel was able to fully investigate the case themselves with the aid of the mitigation specialist and with access to

additional funding for investigative services, the fact that Slusher did not have his firm's investigator also do much work on the case does not establish that counsel failed to conduct any necessary investigation because of the flat fee arrangement.[3] Thus, *Dorsey* is indistinguishable from this case and shows that the motion court did not clearly err.

[3]It appears that Slusher's testimony about being able to use his own investigator in light of the flat fee is also factually consistent with *Dorsey*, as respondent's brief in that case cites to Slusher's essentially identical testimony regarding the use of his firm's investigator in that case. *Brian J. Dorsey v. State of Missouri*, SC93168, 2013 WL 6283672, resp. brief at 89 (Slusher testified that he "couldn't afford to pay" the investigator for him to work on the case for the flat fee, although the investigator did some work on the case).

X.

Appellant failed to prove ineffective assistance of counsel for not seeking to prohibit a death sentence based on appellant's alleged "mental age" (responds to Point XI).

Appellant claims that counsel was ineffective for failing to take measures to prohibit a death sentence because his "mental age" is less than 18, which he argues should make him ineligible for the death penalty (App. Br. 126-131). But the law was clear that the Eighth Amendment only prohibits the execution of those who are biologically under 18, not those whose alleged "mental age" was less than 18 at the time of the murder. Counsel was not ineffective for failing to raise a claim contrary to the existing law.

In his amended motion, appellant alleged that appellant's alleged "mental age" was less than 18 because his development was "damaged" due to "constant physical and mental abuse" (PCR L.F. 73). He alleged that Dr. Peterson would testify that appellant's "brain is [stuck] in an early adolescence stage of development" due to abuse from his family and thus was "for all intents and purposes…a child, mentally," rendering him "less responsible than a normal adult defendant (PCR L.F. 74). He alleged that counsel was ineffective for failing to move to prohibit a death sentence or for

a jury instruction that the jury had to find that appellant was "mentally" over 18 to impose a death sentence (PCR L.F. 75). He alleged that there was a reasonable probability that either the court or the jury would have refused to impose death had counsel taken these actions (PCR L.F. 76).

Counsel McBride testified that they would not have challenged the death penalty in this case because, based on the United States Supreme Court's holding in *Roper v. Simmons*, 543 U.S. 551 (2005), only a biological age of under 18 had been held to violate the Eighth Amendment and the case "precluded" a claim based on appellant's alleged "mental age" (PCR Tr. 388-389).

The motion court denied the claim, finding it meritless because *Roper* set a bright line rule based on biological age and counsel was not ineffective for failing to raise a challenge contrary to that rule (PCR L.F. 355-356).

There was no clear error. *Roper* makes clear that the prohibition against the death penalty for those under 18 is based on biological age, not on "mental age." The Court explicitly rejected the argument that offenders over 18 who do not possess an "adult" level of maturity cannot be executed due to their immaturity, instead setting a bright line rule based on biological age:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against

> categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. … The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574. By the time of the penalty phase trial, other federal and state courts had explicitly rejected the claim that the prohibition in *Roper* against the execution of those under 18 at the time of their crimes extends to the concept of "mental age." *See, e.g., In re Garner*, 612 F.3d 533, 535-46 (6th Cir. 2010); *State v. Campbell*, 983 So.2d 810, 830 (La. 2008); *Bevel v. State*, 983 So.2d 505, 525 (Fla. 2008); *Bowling v. Commonwealth*, 224 S.W.3d 577, 584 (Ky. 2006).

Counsel's conduct is measured by what the law is at the time of trial. *Zink v. State*, 278 S.W.3d 170, 190 (Mo. 2009). As counsel will not be held ineffective for failing to anticipate a change in the law that actually occurs,

id., counsel cannot be constitutionally ineffective for failing to seek such a change. Counsel was not ineffective for failing to seek to prohibit the death penalty based on a "mental age" theory.

XI.

Appellant's claim of ineffective assistance of counsel regarding instructions was not raised below and the claims of instructional error were meritless (responds to Point XII).

Appellant claims that counsel was ineffective for failing to offer various alternative non-MAI instructions to address "ABA identified problems with capital instructions (App. Br. 132-135). But appellant did not raise a claim of ineffective assistance of counsel regarding the instructions in the motion court and thus cannot raise it now. Further, the instructions given at trial were not erroneous or prejudicial.

In his amended motion, appellant alleged that Missouri's capital jury instructions violated his rights to due process, a fair and impartial jury, freedom from cruel and unusual punishment, and reliable sentencing (PCR L.F. 76). He alleged six different problems with the instructions he claimed were present in this case:

- Jurors are not told they do not need to find "the mitigation" beyond a reasonable doubt;
- Jurors are not told they are not to "simply count" mitigating circumstances and compare that number to the aggravating circumstances;

- Jurors are not instructed on non-statutory mitigating circumstances;
- Jurors are not told that life without parole means the defendant will die in prison;
- Judges do not direct jurors to the instructions which explain the answers to juror questions;
- Jurors are not told that evidence of a mental disorder cannot be considered evidence of future dangerousness in aggravation of the sentence

(PCR L.F. 76-84). Appellant did not allege that counsel was ineffective for failing to challenge these instructions, instead arguing that the Missouri instructions themselves were deficient (PCR L.F. 76-84).

Counsel Slusher testified that he did not see any reason to make any of these objections, recognizing that he was familiar with "a lot of the same objections," as he had made them in the past, but that "some of them have been consistently rejected by the courts" (Mov. Exh. 102 108-109). He believed the approved instructions were consistent with the law (Mov. Exh. 102 97-103). Counsel McBride testified that they did not make objections to the instructions because they complied with the approved instructions (PCR Tr. 389-393).

The motion court denied this claim, finding that it raised claims of trial

court error not cognizable in a post-conviction proceeding and the mandatory instructions did not conflict with any law and thus were not erroneous (PCR L.F. 356-357).

There was no clear error. First, appellant's claim on appeal is that counsel was ineffective regarding the instructions (App. Br. 38, 132-135). But appellant did not raise a claim of ineffective assistance of counsel in his amended motion, instead only alleging that the instructions themselves were constitutionally deficient (PCR L.F. 76-84). Claims not included in the amended motion are deemed waived and this Court does not recognize claims on appeal that were not raised in the amended motion. Rule 29.15(d); *Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. 2010). There is no "plain error" review for claims not included in the amended motion. *Hoskins*, 329 S.W.3d at 699. Because the amended motion did not include the allegation of ineffective assistance of counsel, it cannot be raised here.

Second, the claims of error with the instructions were meritless. This Court has rejected several of appellant's claims and upheld Missouri's approved instructions, including his claims that: the instructions did not require proof regarding mitigating factors beyond a reasonable doubt, *State v. Anderson*, 306 S.W.3d 529, 540 (Mo. 2010); the instructions did not properly instruct the jury how to weight aggravating and mitigating circumstances,

State v. Collings, 450 S.W.3d 741, 766 (Mo. 2014); the instructions did not inform the jury how to properly consider non-statutory mitigating circumstances, *State v. Clayton*, 995 S.W.2d 468, 478 (Mo. 1999); and the instructions did not sufficiently inform the jury that life without parole means that the defendant will spend his entire life (and thus die) in prison, *State v. Smith*, 32 S.W.3d 532, 545 (Mo. 2000). Appellant has presented no argument at all demonstrating that this Court's holdings in these and similar prior cases are incorrectly decided. Thus, he failed to prove any error at all in these instructions.

As to appellant's claim regarding the insufficiency of answers to juror questions, appellant fails to cite to any law that prevents a court from fully answering juror questions or specifically directing jurors to particular instructions (App. Br. 132-135). Responses to jury questions are within the trial court's sound discretion. *Roberts v. State*, 232 S.W.3d 581, 584 (Mo. App., E.D. 2007). While "exchanging communications between the judge and jury is not recommended" and "[n]eutral and generic responses about being guided by the evidence presented and to follow the instructions previously given" are the safest and thus favored responses, *id.,* such responses are not improper where the instructions given were correct, clear, and unambiguous. *Id.*

The trial court's generic responses to the questions challenged here were proper (PCR L.F. 82-83). The answers to the jury's two questions about wanting to see transcripts and verdicts from prior trials were proper (Tr. 1222-1224); the jury was not entitled to that information but was only to be guided by the evidence before it. MAI-CR 3d 302.01 ("this case must be decided only by the evidence presented in the proceedings in the courtroom and the instructions I give you"). The remaining question about seeking to choose a different foreman (Tr. 1225-1227) had nothing to do with the understanding of the law or evidence in the case and could not have had any effect on the verdict. Thus, the manner in which the court answered the jury's questions was not erroneous and could not have been subject to a meritorious objection.

Finally, appellant failed to prove that it would have been proper to instruct the jury that it could not consider evidence regarding appellant's mental health when assessing aggravating evidence of future dangerousness (PCR L.F. 84). The jury "is entitled to any evidence" that assists its decision pertaining to the defendant's character in determining whether non-statutory aggravating circumstances exist. *State v. Ervin*, 979 S.W.2d 149, 157 (Mo. 1998). The jury may consider the defendant's future dangerousness during the penalty phase of a capital trial. *Tisius*, 362 S.W.3d at 410. Appellant cites

no authority holding that a capital jury is required not to consider certain evidence as aggravating simply because it is offered under the guise of "mental health" evidence. Respondent is aware of none. Without authority holding that it is a constitutional error to fail to instruct the jury that it cannot consider some penalty phase evidence as aggravating, neither the trial court nor counsel could have erred in failing to propose such an instruction. Appellant failed to prove his claim. There was no clear error.

XII.

Appellant failed to prove appellate counsel was ineffective for failing to raise a claim regarding a statutory aggravating circumstance not found at appellant's earlier trial (responds to Point XIII).

Appellant claims that appellant counsel was ineffective for failing to raise a claim that the jury's failure to find the statutory aggravating circumstance that victim Acton's murder was committed while appellant was committing the murder of victim Egley precluded the State from submitting that aggravating circumstance in this trial (App. Br. 136-140). But this Court has repeatedly rejected such claims because a lack of a finding of one aggravating circumstance when multiple circumstances are alleged is not a finding that the jury considered and rejected the circumstance. Thus, the claim was meritless and counsel was not ineffective.

To prevail on a claim that appellate counsel was ineffective, the movant must establish that counsel failed to raise a claim so obvious that a competent, effective lawyer would have raised it and that there was a reasonable probability of a different result on appeal had counsel raised it. *Mallow v. State*, 439 S.W.3d 764, 770 (Mo. 2014). Appellate counsel has no duty to raise every possible issue in the motion for new trial and may

strategically winnow out arguments in favor of other claims. *Storey v. State*, 175 S.W.3d 116, 148 (Mo. 2005).

At trial, trial counsel objected to the submission of the aggravating factor regarding the murder of Deputy Acton that appellant was engaged in the murder of Deputy Egley at the time he killed Acton because the jury in appellant's first trial had not found that aggravating factor, returning a finding of a different aggravating circumstance that Acton was a law enforcement officer (Tr. 880; PCR Tr. 206). Counsel argued that the submission of that aggravating circumstance violated his right to be free from double jeopardy (Tr. 880). That objection was overruled (Tr. 881). Counsel included the claim in his motion for new trial (L.F. 220). Appellate counsel did not raise the claim in her brief. *Tisius*, 362 S.W.3d at 404-15.

In his amended motion, appellant alleged that appellate counsel was ineffective for failing to raise a claim that the court was estopped from submitting that aggravating circumstance (PCR L.F. 57-61). He alleged that the first jury's failure to find that aggravating circumstance constituted an acquittal and therefore the circumstance could not be submitted to a different jury (PCR L.F. 57-60).

Appellate counsel testified that she researched the issue and found that the case law was unfavorable (PCR L.F. 209). She considered raising the

issue "to preserve it," but only if she had enough room in the brief, which she wound up not having (PCR L.F. 209-210).

The motion court denied this claim, concluding that the claim was meritless because, pursuant to United States Supreme Court's and this Court's precedents, the failure to find a particular aggravating circumstance when at least one other is found did not constitute an acquittal and thus did not bar the submission of that circumstance in a subsequent trial (PCR L.F. 349).

There was no clear error. This Court has repeatedly rejected the claim that an earlier jury's failure to find one particular aggravating circumstance barred consideration of that circumstance at a subsequent trial. *See, e.g. State v. McFadden*, 391 S.W.3d 408, 426-27 (Mo. 2013); *State v. Storey*, 40 S.W.3d 898, 914-15 (Mo. 2001); *State v. Simmons*, 955 S.W.2d 752, 759-60 (Mo. 1997). This is because the failure to find a particular aggravating circumstance does not constitute an acquittal unless there was a failure to find any aggravating circumstances at all. *Simmons*, 955 S.W.3d at 760. Where the jury fails to find one of several aggravating circumstances but finds at least one other, the failure to find that circumstances is "in essence, no finding at all." *Id.* Because there is no finding in an unfound aggravating circumstance, neither double jeopardy protections nor collateral estoppel

apply. *Id.* Thus, the claim appellant alleged should have been raised was meritless and did not warrant relief. Therefore, appellate counsel was not ineffective.

CONCLUSION

In view of the foregoing, the denial of appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 20,142 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 13th day of July, 2016, to:

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