No. SC91746

In the
# Supreme Court of Missouri

**CARMAN L. DECK,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

**Appeal from Jefferson County Circuit Court**
**Twenty-Third Judicial Circuit**
**The Honorable Gary P. Kramer, Judge**

## RESPONDENT'S BRIEF

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## JURISDICTIONAL STATEMENT

Appellant (Defendant) appeals from a Jefferson County Circuit Court judgment overruling his Rule 29.15 motion for post-conviction relief alleging that trial counsel provided ineffective assistance during Defendant's third penalty-phase retrial in this capital case. Defendant's convictions for first-degree murder and two previous death sentences were affirmed by this Court in *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999) ("*Deck I*"). In Defendant's first post-conviction appeal, this Court reversed the death sentences for ineffective assistance during the penalty phase. *See Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002) ("*Deck II*"). After a second penalty-phase proceeding, another jury recommended—and the circuit court imposed—two more death sentences. Although these sentences were affirmed by this Court on direct appeal in *State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004) ("*Deck III*"), that judgment was later reversed by the United States Supreme Court. *See Deck v. Missouri*, 544 U.S. 622 (2005). After a third penalty-phase proceeding, still another jury recommended—and the circuit court again imposed—two more death sentences, which this Court affirmed on direct appeal. *See State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010) ("*Deck IV*"). Since this appeal involves Defendant's sentences of death, this Court has exclusive appellate jurisdiction. MO. CONST. art. V, § 3.

## STATEMENT OF FACTS

### A. Procedural History.

Defendant was charged as a persistent offender in Jefferson County Circuit Court with two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary for the 1996 robbery and shooting deaths of James and Zelma Long in their rural Jefferson County home. (3rdL.F. 62-64).[1] In February 1998, Judge Gary P. Kramer presided over a trial in which the jury

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[1] The abbreviation "1stTr." refers to the transcript in Defendant's first trial, Case No. SC80821 (*Deck I*), the abbreviation "2ndTr." refers to the transcript in Defendant's second penalty-phase retrial, Case No. SC85443 (*Deck III*), and the abbreviations "3rdTr." and "3rdL.F." refer to the transcript and legal file in Defendant's third penalty-phase retrial, Case No. SC89830 (*Deck IV*). The abbreviations "PCR-L.F.," "PCR-Tr.-I," and "PCR-Tr.-II" refer to the legal file and two-volume evidentiary-hearing transcript in this appeal regarding Defendant's second post-conviction proceeding. The abbreviations "1stPCR-L.F." and "1stPCR Tr." refer to the legal file and evidentiary-hearing transcript in Defendant's first post-conviction proceeding, Case No. SC83237 (*Deck II*). This Court has taken judicial notice of the records filed in all four of these previous appeals.

found Defendant guilty on all charges (3rdL.F. 28-30). Defendant was given two death sentences for the murder convictions as recommended by the jury and two concurrent sentences of life imprisonment for armed criminal action, 30 years for robbery, and 15 years for burglary. (3rdL.F. 30-31; 1stTr. 1073-75). The sentences for the armed criminal action convictions were ordered to be served concurrently with each other, but consecutively to the other convictions, all of which were ordered to run consecutively. (3rdL.F. 31; 1stTr. 1073-75). Those death sentences were set aside by this Court during Defendant's post-conviction appeal in *Deck II*, and the two death sentences imposed following Defendant's second penalty-phase proceeding were set aside by this Court after it recalled its mandate in the wake of the United States Supreme Court's decision in *Deck v. Missouri*. (3rdL.F. 40). The jury in Defendant's third penalty-phase proceeding recommended death sentences on both murder counts, which the trial court later imposed. (3rdTr. 989-90; 3rdL.F. 673-74,717-18).

The juries in all three of Defendant's penalty-phase proceedings found the same six statutory aggravating circumstances:

1. Each murder was committed while the defendant was engaged in the commission of another unlawful homicide, § 565.032.2(2).

2. The murders were committed for the purpose of receiving money or any other thing of monetary value, § 565.032.2(4).

3. The murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, § 565.032.2(7).

4. The murders were committed for the purpose of avoiding a lawful arrest, § 565.032.2(10).

5. The murders were committed while defendant was engaged in the perpetration of burglary, § 565.032.2(11).

6. The murders were committed while defendant was engaged in the perpetration of robbery, § 565.032.2(11).

(3rdL.F. 30,38,673,674). *See Deck I*, 994 S.W.2d at 545; *Deck III*, 136 S.W.3d at 489-90; *Deck IV*, 303 S.W.3d at 550. In all three previous direct appeals, this Court held that its review of the record showed that the evidence "amply supports the statutory aggravators found by the jury." *Id.*

**B. The facts pertaining to Defendant's crimes.**

Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

In June 1996, Defendant and his mother's boyfriend, Jim Boliek, devised a plan to obtain money that Mr. Boliek needed for a trip to Oklahoma. (3rdTr. 644; Exhibits 53,54).[2] Defendant planned to steal the

[2] State's Exhibits 53 and 54 (deposited in Case No. SC89830) contain Defendant's tape-recorded confession to police that was played to the juries in

money from James and Zelma Long because, while living in De Soto, Missouri, several years earlier, he had gone to the Longs' house with their grandson, who then stole money from his grandparent's safe and gave it to Defendant. (3rdTr. 497-503; 1stTr. 695-699,704,762; Exhibits 53,54).

Defendant had planned to break into the Longs' house on a Sunday, while they were at church, and take money from their safe. (3rdTr. 644-45; 1stTr. 603,762; Exhibits 53,54). He drove to DeSoto several times with Mr. Boliek to canvass the area. (3rdTr. 644-45; 1stTr. 762; Exhibits 53,54). Defendant bragged to a woman he met during this time that he knew some people with money and that he was prepared to do "anything it took" to take it. (1stTr. 603-04). He urged this woman to accompany him, but when she refused, Defendant told her that she was "ruining the night." (1stTr. 604-05).

Several Sundays passed without Defendant carrying out his plan. (3rdTr. 644-45; 1stTr. 763; Exhibits 53,54). On Monday, July 8, 1996, Mr. Boliek told Defendant that he and Defendant's mother wanted to leave for Oklahoma that Friday. (3rdTr. 645; 1st Tr. 763; Exhibits 53,54). Mr. Boliek

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all three penalty-phase proceedings. (3rdTr. 649-54; 2ndTr. 446-47; 1stTr. 769-70). Exhibit 53 is the audio-cassette recording of that confession, and Exhibit 54 is a CD recording of it made for preservation purposes. (3rdTr. 651).

then gave Defendant his .22 caliber High Standard automatic pistol. (3rdTr. 439; 1stTr. 725, 763; Exhibits 53,54).

Defendant waited for his sister, Tonia Cummings, to return to her St. Louis County apartment; he and his sister then drove in her car to rural Jefferson County, near DeSoto, where they parked on a back road and waited for dark. (3rdTr. 646; 1stTr. 763; Exhibits 53,54). At nine o'clock, they drove closer to the Longs' house and pulled into their driveway. (3rdTr. 646; 1stTr. 763-64; Exhibits 53,54).

Defendant and his sister knocked on the door and when Zelma Long answered, they asked for directions. (3rdTr. 646; 1stTr. 764; State's Exhibits 53,54). Mrs. Long then invited them into the house. (3rdTr. 646; 1stTr. 764; Exhibits 53,54).

Mrs. Long explained the directions and Mr. Long wrote them down (3rdTr. 646; 1stTr. 764; Exhibits 53,54). As Defendant walked toward the front door he pulled the concealed pistol from his waistband, pointed the gun at the Longs, and ordered them to go to their bedroom and lie face down on the bed. (3rdTr. 647; 1stTr. 764; Exhibits 53,54). They complied without a struggle and pleaded with Defendant not to hurt them. (3rdTr. 647; 1stTr. 764; Exhibits 53,54).

Defendant ordered Mr. Long to open the safe, but Mr. Long did not know the combination. (3rdTr. 647; 1stTr. 765; Exhibits 53,54). Mrs. Long

knew the combination and opened the safe for Defendant. (3rdTr. 647; 1stTr. 765; Exhibits 53,54). Mrs. Long took papers and jewelry out of the safe. (1stTr. 563,596,765; Exhibits 53,54). She also told Defendant that she had $200 in her purse which was in the kitchen. (3rdTr. 647; 1stTr. 765; Exhibits 53,54). Defendant sent Mrs. Long into the kitchen and she brought the money back to him (3rdTr. 647; 1stTr. 765; Exhibits 53,54). Mr. Long told Defendant that there was about two hundred dollars in a canister on top of the television set, and Defendant took that also. (1stTr. 765; Exhibits 53,54). Mr. Long also offered to write Defendant a check. (3rdTr. 648; 1stTr. 765). In later describing this offer, Defendant said, "That's just how nice he was." (3rdTr. 648; 1stTr. 765).

Defendant ordered the Longs to lie on the bed on their stomachs with their faces to the side. (1stTr. 765; Exhibits 53,54). Defendant stood at the foot of the Longs' bed for ten minutes deciding what to do with them. (3rdTr. 648; 1stTr. 765-66; Exhibits 53,54). He later said that he was thinking, "If I leave 'em, I'm fucked. If I shoot 'em, I'm fucked." (3rdTr. 648; 1stTr. 766). As he stood there, the Longs begged him to take anything he wanted and said to him "just don't hurt us." (Exhibits 53,54).

Defendant's sister, Tonia Cummings, who had been watching at the front door, came down the hallway and called, "Let's get out of here." (1stTr. 765; Exhibits 53,54). She then ran out the door to the car. (Exhibits 53,54).

Defendant put the gun to James Long's head and fired twice into Mr. Long's temple, above his ear and just behind his forehead. (3rdTr. 600-01, 648; 1stTr. 708-09,766; Exhibits 13-15,20-22,53,54). Both wounds were contact wounds, meaning that the gun muzzle was touching his head when Defendant shot him. (3rdTr. 600-01).

Defendant then either reached across or walked around the bed and put the gun to Zelma Long's head. (3rdTr. 648; 1stTr. 714,766; Exhibits 53,54). He shot her twice—once in the back of the head and once above the ear. (3rdTr. 603; 1stTr. 714,766; Exhibit 24). Both of her wounds were also contact wounds. (3rdTr. 604). Mrs. Long's hands were clenching the pillow so tightly that officers could not remove them. (3rdTr. 518; Exhibit 23).

Defendant grabbed the money and left. (3rdTr. 648; 1stTr. 766; Exhibits 53,54). On the drive back, Defendant's sister complained of stomach pains and Defendant dropped her off at a hospital. (3rdTr. 648; 1stTr. 766; Exhibits 53,54). Defendant gave his sister about two hundred fifty dollars of the Longs' money, kept the quarters in the decorative tin he took from the Longs, and drove back to his sister's apartment in St. Louis County. (1stTr. 766; Exhibits 53,54).

Meanwhile, the Jefferson County Sheriff's Office had received information earlier in the day about the potential crime and had asked St. Louis County Police to assist them in locating Defendant and his sister.

(3rdTr. 508-09; 1stTr. 554-55,565). The sheriff's office also began a house-to-house search in rural Jefferson County in an effort to either thwart the crimes or find the crime scene. (3rdTr. 520-21).

Defendant was arrested in front of his sister's apartment. (3rdTr. 554; 1stTr. 566). Inside the car police found the .22 caliber gun and the decorative tin filled with quarters. (3rdTr. 558-60; 1stTr. 572-573, 653-654,664,720,722, 727,732). Defendant was also wearing a "fanny pack" containing two hundred forty-two dollars in cash. (3rdTr. 555-56; 1stTr. 571,578,673-74).

Defendant was given the *Miranda* warnings and agreed to speak with detectives from the Jefferson County Sheriff's Department. (3rdTr. 627-29; 1stTr. 743-745; Exhibit 43). At first, Defendant said that he and his sister had been in Jefferson County looking for cars to buy. (3rdTr. 631-32; 1stTr. 748). Four hours later, Defendant changed his story said that his mother's boyfriend, Jim Boliek, asked Defendant and his sister to follow him to DeSoto. (3rdTr. 634-40; 1stTr. 752). Defendant said he parked on a back road and about fifteen minutes later Mr. Boliek returned and handed him the .22 caliber pistol and the canister full of coins through the car window. (3rdTr. 636-40; 1stTr. 753). After being informed that Mr. Boliek had an alibi, Defendant finally confessed to the murders and made a tape-recorded statement. (3rdTr. 641-42; 1stTr. 761-66,769; Exhibits 53,54).

Defendant did not testify at the first trial, or at either the second or third penalty-phase retrials. (3rdTr. 889; 2ndTr. 533-34; 1stTr. 792,798).

During the third penalty-phase proceeding, the State presented several witnesses and exhibits from the guilt-phase of the first trial to acquaint the jurors with the nature of the murders Defendant committed. (3rdTr. 506-680, 708-10). In addition, three of the Longs' children and a grandchild testified about the impact the murders had on them and their family. (3rdTr. 480-505, 682-708). Finally, the State presented evidence of Defendant's numerous prior convictions from 1985 until 1992. (3rdTr. 677-82; Exhibits 55-63).

Defendant offered the testimony of several family members, a former foster parent, a child psychiatrist (Dr. Surratt), and a child-development expert (Dr. Draper) concerning his difficult childhood. (3rdTr. 721-888).

In three separate appeals, this Court has determined that: (1) Defendant's death sentences were not a product of passion, prejudice, or other arbitrary factor; (2) that the six statutory aggravating circumstances found by each jury were supported by the record; and, (3) that imposition of the death penalty in Defendant's case, which involved the execution-style murder of an elderly couple after a home-invasion robbery, was not excessive or disproportionate. *See Deck I*, 994 S.W.2d at 545; *Deck III*, 136 S.W.3d at 489-90; *Deck IV*, 303 S.W.3d at 550. In Defendant's previous appeals this Court held that the previously imposed death sentences were not excessive or

disproportionate. *See Deck I*, 994 S.W.2d at 545 ("[I]mposition of the death penalty in this case is clearly not excessive or disproportionate. The strength of the evidence and the circumstances of the crime far outweigh any mitigating factors in Deck's favor."); *Deck III*, 136 S.W.3d at 490 ("The death sentences in this case are neither excessive nor disproportionate . . . considering the crime, the strength of the evidence, and the defendant."); *Deck IV*, 303 S.W.3d at 552 ("[T]he sentence of death is not excessive or disproportionate. The retrial of the penalty phase in this case involves virtually the same evidence as prior trials.").

**C. The post-conviction proceedings.**

Defendant filed a pro se Rule 29.15 motion for post-conviction relief and appointed counsel later filed an amended motion. (PCR-L.F. 5-10,20-140). Among the claims raised in his amended motion, Defendant alleged that trial counsel were ineffective: (1) for not adequately questioning the veniremembers; (2) for not calling several additional witnesses to testify about Defendant's bad childhood; (3) for not obtaining neuropsychological testing on Defendant; (4) for failing to object to a question the prosecutor asked during cross-examination of a defense expert; and (5) for failing to object to a statement the prosecutor made in closing argument. (PCR-L.F. 22-24,29-66,75-97).

The motion court held an evidentiary hearing during which the following witnesses testified: the neuropsychologist, Dr. Gelbort, who performed a post-conviction neuropsychological examination of Defendant; Defendant's trial counsel, John Tucci and Stephen Reynolds; and several other witnesses who talked about Defendant's difficult childhood. (PCR-Tr.-I 23-156; PCR-Tr.-II 6-286).

Defendant's trial counsel during his third penalty-phase proceeding, John Tucci, who was in private practice doing criminal-defense work almost exclusively when he represented Defendant at the third retrial, had been an assistant prosecutor in the St. Louis Circuit Attorney's office for seven years (1991-1998), during which time he had 60 to 70 felony trials and second-chaired two or three capital trials. (PCR-Tr.-II 163,169,177). From 1998 to 2003, Mr. Tucci was in the public defender's capital post-conviction unit for eastern Missouri, during which time he received "a lot" of training at numerous in-state and out-of-state conferences; he described himself as "well-trained" in doing death-penalty work. (PCR-Tr.-II 171-72).

Mr. Tucci had also represented Defendant during his first post-conviction case, which later became *Deck II* on appeal to this Court. (PCR-Tr.-II 173-74). During that first post-conviction case, Mr. Tucci took depositions, personally investigated and gathered mitigation information, consulted with a mitigation specialist, supplied information to the defense

experts, and represented Defendant together with another attorney (Tony Manansala) during the evidentiary hearing. (PCR-Tr.-II 51,114,129-30,138-39,140-41, 174; 1stPCR Tr. 1).

After the public defender's office contracted Defendant's third penalty-phase case to Mr. Tucci, he reacquainted himself with the information he had gathered for Defendant's first post-conviction case, as well as the information contained in Defendant's other cases. (PCR-Tr.-II 49-50,174-75,177-78). He described the gathering of this information as "groundwork" or a "roadmap" for later attorneys who might become involved in Defendant's retrials; one of those attorneys, as it so happened, turned out to be him. (PCR-Tr.-II 174-75, 180).

Mr. Tucci and co-counsel Steven Reynolds devised an "overall" trial strategy premised on Defendant's difficult childhood. (PCR-Tr.-II 180). They wanted to avoid presenting it as an excuse, but simply to show the jury how the abuse and neglect Defendant suffered as a child affected him later in life. (PCR Tr. 180).

Mr. Tucci's past experiences with the witnesses during Defendant's first post-conviction case, including how they previously testified, was factored into his decision on who would testify during Defendant's third penalty phase. (PCR-Tr.-II 181-83). He described his efforts to get family members to talk to Dr. Surratt, a child psychiatrist who testified during

Defendant's first post-conviction case and in his second and third penalty-phase proceedings, as a "monumental task." (PCR-Tr.-II 178-79). Some witnesses who had been cooperative in the past, such as Defendant's stepmother, Rita Deck, were uncooperative during the most recent penalty-phase case. (PCR-Tr.-II 182). This created uncertainty on how they would testify during the third penalty phase and a fear that they could be seen as unfavorable by the jury. (PCR-Tr.-II 182). Because of this, Mr. Tucci would have never sought a writ of body attachment against an uncooperative witness even if that person had been subpoenaed. (PCR-Tr.-II 184-85).

In Defendant's case, Mr. Tucci believed that having experts such as Dr. Surratt, a child psychiatrist, and Dr. Draper, a child-development specialist, provide most of the testimony about Defendant's bad childhood worked better because it showed the jury that Defendant's family's neglect was still ongoing. (PCR-Tr.-II 185-86). The absence of family witnesses, especially those who had not been cooperative or made themselves unavailable, only reinforced the point of how awful Defendant's family was. (PCR-Tr.-II 186).

The motion court later entered a judgment overruling Defendant's post-conviction motion. (PCR-L.F. 277-308).

## STANDARD OF REVIEW

This appeal relates solely to the motion court's judgment overruling Defendant's post-conviction motion. Appellate review of a judgment overruling a post-conviction motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in post-conviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822.

To establish ineffective assistance of counsel, the defendant must show both (1) that his counsel's performance failed to conform to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances; and (2) that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Barnett*; 103 S.W.3d at 768.

To prove deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at

687. In other words, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In proving that counsel's performance did not conform to this standard, the defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

To prove prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* The movant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would

have had a reasonable doubt respecting guilt." *Id.* at 695. "When a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*

The post-conviction court is not required to address both components of the inquiry if the defendant makes an insufficient showing on one. *Id.* at 697. "The movant has the burden of proving the . . . claims for relief by a preponderance of the evidence." Rule 29.15(i). "Deference is given to the motion court's superior opportunity to judge the credibility of the witnesses." *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991).

## ARGUMENT

### I (jury selection).

**The motion court did not clearly err in rejecting Defendant's claim that counsel was ineffective during jury selection for failing to specifically ask jurors whether they could meaningfully consider mitigation evidence of Defendant's childhood experience because Defendant failed to carry his burden of proving this claim in that: (1) Defendant's post-conviction allegations are insufficient since they do not allege facts, but only mere conclusions with no factual basis; (2) the record shows trial counsel had valid trial-strategy reasons for failing to ask this question; (3) questions seeking comments on the underlying facts of the case are inappropriate during jury selection; and (4) Defendant presented no evidence showing that a biased juror served on his jury; instead, he relies on a presumption of prejudice that was rejected by this Court in *Strong v. State*.**

**A. The record pertaining to this claim.**

Defendant's amended post-conviction motion alleged that trial counsel were ineffective for failing to ask the veniremembers "whether they could look at [Defendant]'s childhood experience and give that meaningful consideration as a reason to vote against the death penalty, (or, alternatively, ask the venire members whether [they] would automatically not consider

child abuse and neglect as mitigation."). (PCR-L.F. 92). Defendant further alleged that because of trial counsel's failure to ask this question, "one or more biased juror[s] served on [Defendant's] jury." (PCR-L.F. 76). Defendant supported this claim of prejudice by alleging that if he was allowed to contact the jurors in his case, "one or more of the jurors would have provided a response that would have supported a strike for cause, or that would have caused [Defendant]'s attorneys enough concern that the attorneys would have used a peremptory strike to remove the venire member from the panel." (PCR-L.F. 77).

During general voir dire at Defendant's third penalty-phase retrial, the jury panel was asked whether hearing evidence about child abuse or neglect would affect their ability to be fair to either side; no one indicated that it would:

> And I guess the question I want to ask you is that you'll hear—I anticipate you'll hear some evidence concerning [Defendant]'s childhood, his upbringing.
>
> * * * *
>
> Is there anybody here that if you start hearing evidence about troubled childhoods, things like that, it's going to [a]ffect your ability to be fair in this case, one way or the other? I don't see any hands.

(3rdTr. 197-98). The court sustained Defendant's "improper-commitment" objection to the prosecutor asking the venire whether "anybody here . . . believes that having a poor childhood, or maybe even suffering some sort of child abuse is an excuse for having committed some sort of crime?" (3rdTr. 200).

None of the veniremembers said they would be unable or unwilling to consider the testimony of an expert witness, (3rdTr. 235-37); Defendant called two experts to testify about his troubled childhood, (3rdTr. 721-851).

During death qualification, all the jurors who ultimately served on Defendant's jury were given a detailed explanation of the difference between aggravating and mitigating evidence as it relates to punishment and were told that before deciding on the appropriate sentence, they must consider any mitigating evidence, which was described as evidence or circumstances to spare someone's life. (3rdTr. 262-68,306-13,340,369-78). All the jurors in Defendant's trial stated that they could consider any mitigating circumstances and give equal consideration to imposing a life-without-parole sentence and a death sentence. (3rdTr. 283-84,291-93,296-97,316-18,324-25, 326-27,336,347,357-58,362-63,381-87).

Defendant's counsel Mr. Tucci told at least one death-qualification panel that mitigating circumstances were reasons to vote for a life sentence,

but that he was not going to "list the mitigating circumstances in this case" because it would be "inappropriate" to do that during voir dire:

> And I'm not gonna list the mitigating circumstances in this case. That's not appropriate. I'm not here to argue the case at this point. There's an appropriate time for that.

(3rdTr. 345).

When Mr. Tucci was asked at the post-conviction evidentiary hearing why he did not ask the panel members whether they "would give meaningful consideration to child abuse and neglect as a mitigator," he responded that the panel was "certainly asked whether they could consider mitigation," but that he did not use that specific wording. (PCR-Tr.-II 165-66). He said his failure to use this precise wording was not trial strategy. (PCR-Tr.-II 166). Co-counsel Mr. Reynolds was asked a similar question, and he responded that while a voir dire question specifically referring to Defendant's childhood was not asked, "more generalized versions" of it were. (PCR-Tr.-II 268). He said that based on a "new case" of which he was aware, they could have "pushed it" in phrasing the question in this manner. (PCR-Tr.-II 268).

The motion court rejected this claim on the ground that there was "no reason to believe that any juror was unable to follow the law as given to the jury or held any bias or prejudice that made that juror unfit to serve in this case." (PCR-L.F. 307).

**B. Defendant's post-conviction allegations are insufficient to state a claim for relief.**

Defendant alleged in his amended motion that one or more biased jurors sat on his case as a result of counsel's failure to specifically ask about childhood abuse and neglect. But he made this allegation without pleading the existence of any facts or circumstances warranting this conclusion. Defendant essentially admits this pleading deficiency by his further allegation that if he had been allowed to contact the jurors in his underlying case, one or more of them would have given a response warranting either a strike for cause or the use of peremptory strike.[3] The motion court did not clearly err in rejecting this claim because Defendant's post-conviction allegations are insufficient to warrant relief in that they allege mere conclusions, not facts.

A postconviction motion must plead specific facts, not mere conclusions, supporting the claim for relief:

> In sum, pleading requirements are not merely technicalities. The purpose of a Rule 29.15 motion is to provide the motion court with allegations sufficient to enable the court to decide whether relief is

[3] Defendant's claim that the post-conviction court erred in refusing to allow him contact with jurors is discussed in Point II.

> warranted. Where the pleadings consist only of bare assertions and conclusions, a motion court cannot meaningfully apply the *Strickland* standard for ineffective assistance of counsel.

*Morrow*, 21 S.W.3d at 824. "As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." *Morrow*, 21 S.W.3d at 822. The requirement to plead specific facts is found in the rule itself:

> (e) When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether *sufficient facts* supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert *sufficient facts* or include all claims known to the movant, counsel shall file an amended motion that *sufficiently alleges the additional facts* and claims.

Rule 29.15(e). "The redundant requirement to plead facts [contained in Rule 29.15(e)] makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief." *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997). This pleading requirement advances the twin policies of the need to bring finality to the criminal process and to preserve scarce judicial resources

that would otherwise be wasted on speculative claims unsupported by any factual basis:

> A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings.

*Id.* (citation omitted). *See also Dorris v. State*, --- S.W.3d ---, 2012 WL 135392, slip op. at 6 (Mo. banc Jan. 17, 2012).

Defendant's motion consists of a bare conclusion: that one or more biased jurors *might* have sat on the jury because a particular question that *might* have revealed bias was not asked. This speculative allegation provides no basis for post-conviction relief. *See Williams v. State*, 168 S.W.3d at 433, 442 (Mo. banc 2005) (holding that post-conviction allegations containing "speculative conclusions" of prejudice are insufficient to warrant even an

evidentiary hearing); *Nunley v. State*, 56 S.W.3d 468, 469 (Mo. App. S.D. 2001) ("Conclusionary speculations in motion for post-conviction relief are not substantive evidence that trial counsel was ineffective."); *State v. Patterson*, 824 S.W.2d 117, 123 (Mo. App. E.D. 1992) (holding that "[c]onjecture or speculation is not sufficient to establish the required prejudice" for post-conviction relief).

The motion court thus cannot be found to have clearly erred in rejecting this claim considering the inadequacy of Defendant's post-conviction allegations. Under the law, Defendant's speculative allegations of prejudice fail to state a claim for relief under Rule 29.15.

**C. Defendant failed to rebut the strong presumption that counsel's actions constituted reasonable trial strategy.**

The record also shows that trial counsel strategically chose not to specifically ask the jury panel about their views on potential childhood-abuse-and-neglect evidence during jury selection. When the prosecutor asked the jury panel whether anyone thought that having a bad childhood or suffering child abuse is an excuse to commit a crime, the trial court sustained defense counsel's objection to that question. During death-qualification voir dire, defense counsel told the venire that he was not going to list or argue the mitigating circumstances at that time because it would be "inappropriate." He told them that there would be another appropriate time for that. Co-

counsel Mr. Reynolds suggested that specifically asking a question about potential evidence regarding Defendant's childhood during jury selection might have been "push[ing] it."

"Rarely will a strategic decision of trial counsel be declared so unsound that it constitutes ineffective assistance of counsel." *Malady v. State*, 748 S.W.2d 69, 72 (Mo. App. S.D. 1988). "The method of conducting a voir dire examination is usually a matter of trial strategy lying within the sound discretion of trial counsel." *Id.* *See also Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) and *Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997) (holding that an attorney's actions during voir dire are considered to be matters of trial strategy). Missouri courts presume that attorneys act "professionally" in making decisions during jury selection and that "any challenged action was a part of counsel's sound trial strategy." *Strong v. State*, 263 S.W.3d 636, 644 n.3 (Mo. banc 2008). The failure to inquire about various mitigating factors during voir dire does not constitute ineffective assistance of counsel. *State v. Goodwin*, 703 N.E.2d 1251, 1256 (Ohio 1999). Asking jurors their views on mitigation is "not essential to competent representation." *Id.* .

Although counsel did not offer a trial strategy for not asking a question about childhood-mitigation evidence, the record suggest that counsel might have avoided it because it could have revealed potential jurors who either

had experience with childhood abuse or neglect or were willing to consider such evidence as an excuse for murder. The prosecutor could then later target these veniremembers for peremptory strikes. The fact that trial counsel testified at the post-conviction hearing that he did not have a trial-strategy reason for not asking a specific question is not sufficient to find that the motion court clearly erred. This is especially true when the record suggests that counsel consciously chose not to specifically address the mitigating circumstances present in Defendant's case during jury selection. *See Clark v. State*, 94 S.W.3d 455, 460 (Mo. App. S.D. 2003) (holding that when "trial counsel does not remember the reasons for making a strategic decision, there is a failure to overcome the 'strong presumption' that the decision was made as part of a reasonable trial strategy").

Defendant suggests that counsel was under a duty to ask a specific question about Defendant's mitigating circumstances under *State v. Clark*, 981 S.W.2d 143 (Mo. banc 1998). But Defendant's reliance on *Clark* for this proposition is entirely misplaced. *Clark* did not pertain to ineffective assistance, but involved a direct-appeal claim that the trial court had erred in completely prohibiting any questions during voir dire relating to the young age of the murder victims, including one who was only three years old, which this Court referred to as a "critical fact." *Id.* at 146-47. This Court held that a defendant is entitled to divulge "critical facts" to the jury in exploring

whether veniremembers have potentially biased views. *Id.* at 147-48. But just because a defendant is entitled to ask about critical facts during jury selection, it does not follow that counsel is constitutionally ineffective for not asking about them, especially when the record suggests a trial-strategy reason for not doing so.

Moreover, in reaching its holding in *Clark*, this Court warned that "[o]nly critical facts—facts with substantial potential for disqualifying bias—must be divulged to the venire." *Id.* at 147. "[T]he trial judge is in the best position 'to judge whether a disclosure of facts on *voir dire* sufficiently assures the defendant of an impartial jury without at the same time amounting to a prejudicial presentation of the evidence.'" *Id.* (quoting *State v. Leisure*, 749 S.W.2d 366, 373 (Mo. banc 1988)).

The question Defendant suggests trial counsel should have asked did not involve a "critical fact" under *Clark*. A critical fact is one with a "substantial potential for disqualifying bias." *Id.* at 147. In *Clark*, this Court held that a veniremember's potential sympathy for a murdered child qualifies as a critical fact. This Court later explained that a substantial potential for disqualifying bias among veniremembers may exist in cases where the murder victim is a child because of the "prevalent perception among society that the killing of an innocent child is never justified, regardless of any extenuating circumstances." *State v. Oates*, 12 S.W.3d 307, 311 (Mo. banc

2000). Adding to this explanation of the critical-fact inquiry, the *Oates* court cautioned that "not every fact should be disclosed to the venire. Only critical facts, those with a substantial potential for disqualifying bias, need be revealed." *Id.* (footnote omitted).

Trial counsel in Defendant's case was obviously aware that the law discourages disclosure of facts during jury selection. He admitted as much by stating to the jury panel that it would be inappropriate to "list" the mitigating circumstances during jury selection. This could also explain why counsel objected when the prosecutor attempted to question the jury panel about their views on Defendant's troubled childhood. Co-counsel's post-conviction testimony in which he suggested that asking specific questions about Defendant's mitigation evidence might have been "push[ing] it" also makes sense when viewed against this backdrop. Counsel should not be found ineffective for failing to ask potentially objectionable questions during jury selection.

Defendant has failed to rebut the presumption that counsel's decision not to ask fact-specific questions during jury selection was not reasonable trial strategy.

**D. Defendant failed to prove prejudice.**

What remains, if anything, to Defendant's claim falls completely apart from his failure to present any evidence showing that he was prejudiced from

counsel's failure to ask about childhood-mitigation evidence. Nothing in the record remotely suggests that either a biased juror or a juror who was unwilling to follow the court's instructions and consider mitigation evidence served on Defendant's jury.

"[T]here is generally no basis for finding a Sixth Amendment violation [for ineffective assistance of counsel] unless the accused can show how specific errors of counsel undermined the reliability of the [verdict]." *United States v. Cronic*, 466 U.S. 648, 659 n.26 (1984). Here, Defendant alleges that counsel should have asked a specific question about childhood abuse and neglect during jury selection, but he does not allege a single fact showing either that the failure to ask this question undermined the reliability of the jury's verdict or that any biased juror sat on his jury. He only speculates that a biased juror might have been revealed if the question were asked. But the mere failure to ask a particular question during jury selection does not establish a Sixth Amendment violation; the defendant must plead and prove prejudice.

In a similar context, this Court noted in *Strong v. State*, 263 S.W.3d 636 (Mo. banc 2008), that even if trial counsel acted incompetently in failing to raise a *Batson* challenge to the State's peremptory strikes, prejudice must still be shown:

> Demonstrating that the alleged error had some conceivable effect on the outcome of the trial is not sufficient. Rather, [the defendant] must show that, absent the alleged error, there is a reasonable probability that he would have been found not guilty.

*Id.* at 647.

In *Glass v. State*, 227 S.W.3d 463 (Mo. banc 2007), the motion court rejected a capital defendant's claim that counsel was ineffective for failing to ask the jury panel "whether they would consider age, *family background*, alcohol addiction, drinking on the night of the murder, good character, and lack of significant criminal history as mitigating circumstances," notwithstanding trial counsel's post-conviction testimony "that it was a mistake not to question the venire panel regarding these matters." *Id.* at 474 (emphasis added). This Court held that this finding was not clearly erroneous because the defendant "cannot establish prejudice" since he "made no showing at the evidentiary hearing that the jurors were unable or unwilling to consider the evidence presented," especially considering that "[a]ll of the jurors stated that they were willing to follow the court's legal instructions." *Id.*

In *Morrow*, this Court held that the motion court did not clearly err in refusing to grant an evidentiary hearing on a capital defendant's claim that counsel was ineffective for failing to ask questions about specific mitigation

issues during jury selection because the "contention rests upon speculation," since the record provided "no basis upon which to conclude" that the jurors would have responded that they would not consider mitigation evidence under those circumstances. *Morrow*, 21 S.W.3d at 827. *See also Hultz v. State*, 24 S.W.3d 723, 726 (Mo. App. E.D. 2000) (holding that to prove prejudice "resulting from defense counsel's ineffective assistance during the jury selection process, a post-conviction movant must show that a biased venireperson ultimately served as a juror").

Although Defendant speculates that a biased juror might have sat on his jury, the record shows that this premise is, in fact, contrary to what the record actually shows. The record shows that Defendant suffered no prejudice from trial counsel's failure to ask a specific question about childhood abuse and neglect because the jury panel was otherwise examined about this matter. The prosecutor specifically asked the jury panel whether evidence about childhood abuse or neglect would affect anyone's ability to be fair to either side; no one responded that it would. No one again responded when the panel was further asked if they would be unable or unwilling to consider expert testimony; Defendant called two experts who testified about his troubled childhood. All jurors who sat on Defendant's case agreed they would consider any mitigating circumstances in determining the appropriate punishment. The record thus provides no basis for Defendant's speculative

assertion that a biased juror may have sat on his juror based only on trial counsel's failure to ask a specific question about Defendant's troubled childhood.

Defendant relies on several cases suggesting that prejudice may be presumed in certain circumstances involving alleged errors committed by counsel during jury selection. But the United States Supreme Court has held that even if a defendant proves deficient performance, courts may not presume prejudice; it must be proved. *See Florida v. Nixon*, 543 U.S. 175, 178 (2004). A presumption of prejudice is reserved only for those rare cases in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[4] *Id.* at 190. This circumstance, along with the complete denial of counsel or being represented by counsel with a conflict of interest, is the only time that prejudice may be presumed. *See Cronic*, 466 U.S. at 659, 662 n.31. "Apart from circumstances of that magnitude, however, there is

[4] In *United States v. Cronic*, 466 U.S. 648 (1984), the Court "illustrated just how infrequently the 'surrounding circumstances [will] justify a presumption of ineffectiveness[.]'" *Nixon*, 543 U.S. at 190 (quoting *Cronic*, 466 U.S. at 662). There, the Court "reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial." *Nixon*, 543 U.S. at 190.

generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n.26. Defendant's presumption-of-prejudice principle is inconsistent with the United States Supreme Court holdings mentioned above.

The earliest case on which Defendant relies for this principle is *Presley v. State*, 750 S.W.2d 602 (Mo. App. S.D. 1988), in which the court held that *Strickland* prejudice could be presumed in a case in which trial counsel failed to move to strike for cause an allegedly biased veniremember. *Id.* at 607. This Court later interpreted *Presley* as holding that a separate showing of prejudice is not required when the circumstances show that prejudice was so likely that a case-by-case inquiry is unnecessary. *Moss v. State*, 10 S.W.3d 508, 514 (Mo. banc 2000). Both *Presley* and *Moss* were handed down years before the Supreme Court's decision in *Nixon*. The Southern District later described *Presley* as a case in which a potential juror expressly said that he would be prejudiced toward the defendant. *Tripp v. State*, 58 S.W.3d 108, 111 (Mo. App. S.D. 1998). *Presley* was also later described as a case in which the record showed that "the accused's lawyer became confused about which venire member gave responses indicating prejudice against the accused." *State v. Eastburn*, 950 S.W.2d 595, 607 (Mo. App. S.D. 1997).

Another factor that makes *Presley* inapposite here is that *Presley* involved the State's appeal from a motion court's judgment granting the defendant a new trial because counsel was ineffective for failing to make a motion to strike a potential juror for cause. *Presley*, 750 S.W.2d 603-04. Thus, the opinion in *Presley* can be simply read as the appellate court's determination that the State had failed to carry its burden of showing that the motion court clearly erred in granting post-conviction relief. *See Ogle v. State*, 807 S.W.2d 538, 545 (Mo. App. S.D. 1991).

The presumption-of-prejudice principle enunciated in *Presley* was unfortunately relied on by the Western District in *State v. McKee*, 826 S.W.2d 26 (Mo. App. W.D. 1992), another ineffective-assistance-of-counsel case in which counsel failed to strike for cause two allegedly biased veniremembers. *Id.* at 28-29. In *McKee*, like *Presley*, the record showed that trial counsel became confused about which veniremember made certain statements. *Id.* at 28.

Ten years later, in *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002), a death-sentenced defendant claimed that trial counsel had been ineffective for failing to read juror questionnaires from two veniremembers who expressed a bias in favor of the death penalty. *Id.* at 631-32. In one questionnaire, the jury-panel member, who later became the jury foreman, stated that the "laws are 'way too soft' on criminals, that "more jails" should be built," and to "give

out longer sentences and fewer paroles." *Id.* at 632. His comments about the death penalty were: "make executions public. If a criminal knew he was being executed in a public square in front of thousands of people, he might [think] twice about committing a murder." *Id.* Another juror stated in his questionnaire that he disfavored "endless appeals," "parole boards," "good time," and "clergy to pamper a killer," and wrote: "if he is found guilty, do it." *Id.* Defendant's trial counsel testified that he "about vomited" and was "flabbergasted" after he later realized that he had completely overlooked the two questionnaires. *Id.* at 632. He said that there is no chance that he would have left these veniremembers on the panel and that this was "the most egregious mistake I've ever made in the trial of a case." *Id.*

Although this Court's opinion stated that the "complete failure in jury selection is structural error," it still went on to find that counsel's failure to read the questionnaires and question the veniremembers during jury selection sufficiently undermined the outcome of the defendant's case, especially in the death penalty context, and that the defendant had proved *Strickland* prejudice by a preponderance of the evidence. *Id.* at 633. Nothing in the opinion suggested that prejudice may be presumed in these types of cases.

Four years later, this Court found in *Anderson v. State*, 196 S.W.3d 28 (Mo. banc 2006), that counsel was ineffective for failing to strike a

veniremember who said that the defense would have to convince him that the capital defendant was not deserving of capital punishment. *Id.* at 39-40. The record showed that counsel's failure resulted from a note-taking error. *Id.* at 40 n.7. Relying on *Knese*, this Court reiterated that the failure to strike a juror in a capital case who expresses a predisposition to impose or reject the death penalty constitutes "structural error" in a capital case and a death sentence imposed by a jury infected with such error must be vacated. *Id.* at 40. The opinion contains no specific statements suggesting that prejudice was presumed; this Court simply found ineffective assistance of counsel and remanded the case for a new penalty-phase proceeding. *Id.* at 42.

In *James v. State*, 222 S.W.3d 302 (Mo. App. W.D. 2007), the court found that counsel was ineffective for failing to strike a veniremember who said that she would want the defendant to testify and would have trouble following an instruction telling her that she could not take his failure to testify into consideration. *Id.* at 305. The *James* court, relying solely on *McKee*, simply presumed prejudice from counsel's failure to strike this veniremember.

In *Strong v. State*, this Court expressly rejected the principle that *Strickland* prejudice may be presumed or that errors occurring during jury selection should be deemed "structural error": "[T]his Court holds that counsel's failure to raise a *Batson* objection, absent any attempt by [the

defendant] to demonstrate that unqualified persons served on the jury, does not amount to a structural defect that entitles him to a presumption of prejudice. *Strong*, 263 S.W.3d at 648. The court in *Strong* also rejected a claim of presumed prejudice based on the holdings in *Knese* and *Anderson*:

> Both *Knese* and *Anderson* are distinguishable from the case at bar. In those cases, defendants showed by a preponderance of the evidence that counsel's errors resulted in the empanelling of biased jurors, depriving the defendants of their right to a fair and impartial jury. In this case, however, [the defendant] has not made such a showing. At most, [the defendant] can only demonstrate that qualified venirepersons were excluded from the jury.

*Strong*, 263 S.W.3d at 647-48.

Defendant's reliance on *Presley*, *McKee*, *James*, *Knese*, *Anderson*, and *White v. State*, 290 S.W.3d 162 (Mo. App. E.D. 2009), as authority to excuse him from proving *Strickland* prejudice is misplaced. *See Pearson v. State*, 280 S.W.3d 640, 645-46 (Mo. App. W.D. 2009) (noting that *Presley*, *James*, and *McKee* "hold that where a venireperson has admitted significant bias and has not been rehabilitated, counsel's failure to challenge the biased juror overcomes the presumption of effectiveness because of the magnitude of the threat to the defendant's right to a fair trial"); *White*, 290 S.W.3d at 163-67 (holding that counsel was ineffective when the record showed that an

admittedly biased juror served on the defendant's jury). To the extent these cases suggest that prejudice may be presumed on claims of ineffective assistance of counsel with respect to jury selection, they are inconsistent with United States Supreme Court holdings indicating that prejudice must be shown in all but the rarest of cases and with this Court's most recent holding in *Strong*. Here, Defendant only speculatively asserts that if a particular question about mitigation had been asked, it *might have* revealed some bias, despite the fact that the record suggests just the opposite.

Defendant would, of course, claim that he was prevented from demonstrating prejudice because the motion court prohibited him from contacting the jurors who sat in his third retrial. But, as explained in Point II, the law did not allow Defendant to contact jurors to prove *Strickland* prejudice by impeaching the jury's verdict. Based on the record before it, the motion court did not clearly err in finding that Defendant failed to carry his burden of proving that trial counsel was ineffective during jury selection.

**II (post-conviction juror contact).**

**The motion court did not err in refusing to give Defendant's post-conviction attorneys permission to contact the jurors from Defendant's third penalty-phase retrial because this Court expressly held in *Strong v. State* that post-conviction defendants have no right to contact jurors and that their testimony cannot be used to prove *Strickland* prejudice.**

**Moreover, Defendant sought contact with jurors after the time for filing an amended motion had expired; and the law precludes a post-conviction defendant from amending the amended motion after this deadline to include additional factual allegations.**

**A. The record pertaining to this claim.**

After Defendant filed his pro se motion for post-conviction relief, the motion court granted Defendant's post-conviction counsel's request for the one-time 30-day extension to file the amended motion allowed under Rule 29.15. (PCR-L.F. 15-19). The amended post-conviction motion was filed on August 30, 2010. (PCR-L.F. 1-2,20).

On September 2, 2010, three days after the amended motion for post-conviction relief was filed, Defendant's post-conviction counsel filed a motion seeking permission to contact the 12 jurors who sat on Defendant's third penalty-phase retrial on the ground that the testimonies of those jurors were

needed to prove Defendant's post-conviction claim that trial counsel were ineffective for failing to ask panel members during jury selection whether they could consider Defendant's childhood experiences as mitigation evidence. (PCR-L.F. 145-47). Defendant asserted in his motion that the only way to prove this claim was by asking the jurors selected for trial the question Defendant's motion alleged trial counsel should have asked. (PCR-L.F. 146). During an October 12, 2010 hearing, the motion court overruled Defendant's motion to permit contact with the jurors. (PCR-L.F. 153; PCR-Tr.-I 6,9-10).

On February 18, 2011, two weeks before Defendant's post-conviction evidentiary hearing started, Defendant's post-conviction counsel asked the motion court to reconsider its order preventing contact with the jurors. (PCR-L.F. 155-60). Counsel sought this contact "for the limited purposed of asking them" the questions Defendant's post-conviction motion alleged should have been asked by trial counsel during jury selection. (PCR-L.F. 6). Defendant reasserted that he would be unable to prove this post-conviction claim without contacting the jurors. (PCR-L.F. 156-59). The motion court denied Defendant's request to contact the jurors. (PCR-L.F. 208).

**B. The law does not allow post-conviction defendants to contact jurors in an effort to prove *Strickland* prejudice.**

Defendant's claim that the motion court erred in refusing to allow him to contact the jurors is foreclosed by this Court's decision in *Strong v. State*.

There, the post-conviction capital defendant sought contact with jurors so he could prove prejudice on his claim that trial counsel rendered ineffective assistance by failing "to question the panel during voir dire regarding their ability to remain fair and impartial after viewing gruesome photographs." *Strong*, 263 S.W.3d at 643. Similar to what occurred in Defendant's case, the circuit court in *Strong* precluded the defendant from contacting jurors pursuant to a local rule that "prohibit[ed] an attorney or a party from contacting petit jurors without court permission." *Id.* This Court unequivocally held that Missouri law prohibits a post-conviction defendant from contacting jurors in the underlying case for the purpose of proving *Strickland* prejudice because this would be tantamount to impeaching the verdict:

> [Defendant] has no inherent right to contact and interview jurors. Courts have discretionary power to grant permission for contact with jurors after a trial. Additionally, his use of any information obtained from the jurors is limited, in that Missouri courts exclude juror testimony from consideration on post-judgment matters:
>
> > The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that

> transpired there, nor speak of the motives which induced or operated to produce the verdict.
>
> A post-conviction relief movant may not use the testimony of a juror to prove prejudice from his attorney's alleged incompetence because this would be permitting the juror to impeach the verdict, which is impermissible.

*Id.* (quoting *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984)) (other citations omitted).[5] *See also Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81 (Mo. banc 2010) ("[J]uror testimony is improper if it merely alleges that jurors acted on improper motives, reasoning, beliefs, or mental operations, also known as 'matters inherent in the verdict.'"); *Joy v. Morrison*, 254 S.W.3d 885, 889 (Mo. banc 2008) ("The general rule in Missouri is that a juror's testimony about jury misconduct allegedly affecting deliberations may not be used to impeach the jury's verdict."); *State v. Merritt*, 750 S.W.2d 516, 518-19 (Mo. App. W.D. 1988) (holding that the trial court correctly refused an offer of proof as evidence of juror misconduct in failing to disclose information

[5] Defendant's case also does not fall under the one limited exception to the prohibition on contacting jurors, which permits admission of juror testimony only for allegations of juror misconduct occurring outside the jury room. *Id.* at 643-44.

when that offer involved only the testimony of other jurors regarding statements made during deliberations). *But compare State v. Williams*, 747 S.W.2d 635 (Mo. App. W.D. 1988) (considering evidence of a juror's statements made before being summoned as a juror in determining whether misconduct occurred in his allegedly failing to disclose information sought during jury selection).

The policy concerns supporting the prohibition against impeaching the verdict are to prevent endless litigation over jurors' mental processes and the lack of a legitimate method to corroborate or refute how a particular juror decided the case:

> There are two major policy considerations for this rule. First, there would be no end to litigation if verdicts could be set aside because one juror reportedly did not correctly understand the law or accurately weigh the evidence. Second, there is no legitimate way to corroborate or refute the mental process of a particular juror.

*Fleshner*, 304 S.W.3d at 87-88 (citation omitted).

The policy announced by this Court in *Strong* is consistent with *Strickland*, which held that testimony from either the jurors or judge who decided the post-conviction defendant's underlying criminal case is irrelevant in determining whether the defendant was prejudiced. In *Strickland*, the trial judge who sentenced the defendant to death testified that even if he had

seen the evidence trial counsel failed to admit, it would not have changed his decision. *Strickland*, 466 U.S. at 677, 700. The Supreme Court held that its "conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony . . . ." *Id.* at 700. Although it did not expressly "consider the general admissibility of that testimony," it held that the factfinder's "testimony is irrelevant to the prejudice inquiry" in deciding a claim of ineffective assistance of counsel. *Id.* Thus, the Court's observation in *Strickland* resolves any perceived tension between the policy against impeachment of the jury's verdict and the need to adduce testimony or evidence to prove *Strickland* prejudice. The testimony of jurors in the underlying criminal case is "irrelevant" in determining *Strickland* prejudice.

Thus, if the underlying record contains no facts supporting a claim of *Strickland* prejudice, a post-conviction defendant may not harass jurors in an effort to prove an entirely speculative claim of prejudice, which is exactly what Defendant is attempting in this case. This policy promotes finality, avoids endless litigation, prevents juror harassment, and preserves the integrity and dignity of the jury's deliberations against endless collateral attacks. No imagination is needed to see that without this policy, the harassment of jurors to prove speculative claims of post-conviction prejudice would be commonplace.

Moreover, Defendant's request to contact the jurors came after the filing of his amended motion for post-conviction relief, which is much too late to develop facts to support allegations of ineffective assistance. Defendant had already been granted the only 30-day extension provided under Rule 29.15(g) when he filed his amended motion. Even if Defendant obtained consent to contact jurors after the filing of his amended motion, the law does not allow the amended motion to be amended beyond the deadline set by Rule 29.15 to include new or additional allegations. *See State v. Six*, 805 S.W.2d 159, 169-70 (Mo. banc 1991) (holding that Rule 29.15 does not permit the filing of a second- or third-amended post-conviction motion after the timely-filed initial amended motion); *State v. Brooks*, 960 S.W.2d 479, 498-99 (Mo. banc 1997) (holding that "[s]upplementary Rule 29.15 pleadings" filed after the filing of an amended motion and "that are filed outside of the valid and mandatory time limits will not be reviewed"). In addition, Defendant could not supplement his speculative allegations of prejudice through the presentation of evidence at the post-conviction evidentiary hearing. *Id.* at 497 ("[A]n evidentiary hearing is not a means by which to provide [a] movant with an opportunity to produce facts not alleged in the motion.").

The motion court did not err in prohibiting Defendant from contacting the jurors.

**III (witness competency).**

**The motion court did not abuse its discretion in determining that Defendant's sister, Latisha Deck, who had been adjudicated incapacitated by a probate court and who was under the care of a court-appointed guardian, was incompetent to testify at the post-conviction evidentiary hearing.**

**Alternatively, Defendant suffered no prejudice from the motion court's determination of incompetency because, as explained in Point IV, trial counsel's failure to call Latisha Deck as a witness was reasonable trial strategy and her testimony would not have provided a viable defense or changed the outcome of Defendant's trial.**

**A. The record pertaining to this claim.**

Before the post-conviction evidentiary hearing began, the St. Francois County Public Administrator filed a motion to quash the subpoena that had been served on Defendant's youngest sister, Latisha Deck. (PCR-L.F. 174-77; PCR-Tr.-I 14). The public administrator was appointed guardian over Latisha after a 1998 probate-court judgment of incapacity and disability had been entered. (PCR-L.F. 175,179; PCR-Tr.-I 15). The motion to quash asserted that Latisha was incompetent to testify. (PCR-L.F. 176).

Appearing with Latisha before the motion court, the public administrator told the court that Latisha had problems understanding when

he talked to her about the case. (PCR-Tr.-I 16). He also said Latisha had expressed concern about personal discomfort if she testified. (PCR-Tr.-I 22-23). Defendant's post-conviction counsel spoke to Latisha in a separate room and then returned to open court and announced that she wanted Latisha to testify. (PCR-Tr.-I 21). During Latisha's testimony, post-conviction counsel had to occasionally ask leading questions to get a response.[6] (PCR-Tr.-I 23-29).

The motion court found that Latisha is "presumed incompetent to testify based on a" December 14, 1998 judgment entered by the St. Francois County Probate Court. (PCR-L.F. 207). It further found that during her testimony, Latisha "had difficulty following directions, including knowing which hand to raise for the oath." (PCR-L.F. 207). The court found that it was "[t]hrough leading questions" that Latisha was able to testify "to some of the events during childhood that the trial jury heard." (PCR-L.F. 207). The motion court ultimately determined that Latisha was "not competent to testify" because "[h]er mental limitations were eviden[t] when she testified." (PCR-L.F. 207).

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[6] The content of Latisha's testimony is described in Point IV, which addresses Defendant's claim that trial counsel were ineffective for failing to call Latisha as a witness.

**B. The motion court did not abuse its discretion in finding that Latisha was incompetent to testify.**

A person "adjudicated incapacitated" under Missouri's guardianship laws is "presumed to be incompetent":

> A person who has been adjudicated incapacitated or disabled or both shall be presumed to be incompetent. . . . . The court at any time after a hearing on the question may determine that an incapacitated, disabled, or partially incapacitated or partially disabled person is incompetent for some purposes and competent for other purposes.

Section 475.078.3, RSMo 2000. Missouri law further provides that a "mentally incapacitated" person is "incompetent to testify." Section 491.060, RSMo 2000. "A person . . . adjudicated as mentally ill is generally presumed to be incompetent as a witness." *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo. App. W.D. 1993). "This presumption may be overcome, however, by extrinsic evidence that the witness both (1) understands the obligation of the oath, and (2) has sufficient mind and memory to notice, recollect, and communicate the events." *Id.* "The burden to rebut the presumption rests on the party who offers the witness." *Id.* "The determination of a witness's competency to testify is for the trial court, whose decision will not be disturbed absent an abuse of discretion, while the credibility of the witness's testimony is for the fact finder to determine." *Id.* (citation omitted).

Defendant has failed to demonstrate that the motion court, which actually saw Latisha, abused its discretion in determining that she was incompetent to testify. Before she answered any questions, Latisha's guardian described Latisha's limitations to the motion court. The motion court apparently saw these limitations firsthand when it observed Defendant's counsel ask Latisha questions. In addition to observing that Latisha's testimony had to be prompted by leading questions, which is evident from the transcript, the motion court observed that Latisha had difficulty following directions and found that her mental limitations were evident. Defendant has not shown that these findings amounted to an abuse of discretion.

In any event, Defendant was not prejudiced by the motion court's ruling because, as he admits in his brief, Latisha's testimony was corroborated by other witnesses (App. Br. 61); and counsel cannot be held ineffective for failing to present cumulative evidence. *See Winfield v. State*, 93 S.W.3d 732, 740 (Mo. banc 2002) ("Failing to present cumulative evidence is not ineffective assistance of counsel."). Moreover, as explained in Point IV, counsel had reasonable trial-strategy reasons for not calling Latisha as a witness and her testimony would not have changed the trial's result.

**IV (failure to call witnesses).**

**The motion court did not clearly err in rejecting Defendant's claim that trial counsel were ineffective for failing to call numerous witnesses whose testimony would have allegedly provided "additional detail" about Defendant's troubled childhood in the form of "live lay witnesses" because Defendant failed to prove that counsel acted incompetently or that he was prejudiced in that: (1) counsel had investigated these witnesses and had reasonable trial-strategy reasons for not calling them; (2) their testimony was merely cumulative to evidence already presented at trial; (3) their testimony, which was similar to that presented in Defendant's two previous trials, would not have provided Defendant with a viable defense or demonstrated a reasonable probability of a different result; and (4) other aspects of their testimony would have contradicted the defense strategy or presented Defendant in an unfavorable light.**

No attorney knew more about the evidence and witnesses available for Defendant's mitigation case than John Tucci, Defendant's trial counsel in the third penalty-phase retrial. Tucci had handled Defendant's first post-conviction proceeding (*Deck II*) and had either interviewed, deposed, or was

otherwise intimately familiar with the information known by each of the witnesses Defendant now alleges should have been called at his third trial.

In fact, when he was acting as post-conviction counsel in Defendant's first post-conviction proceeding, Tucci asserted nearly identical claims regarding counsel's failure to call nearly all the witnesses listed in Defendant's current post-conviction motion.[7] Tucci relied on this knowledge when deciding which witnesses to call at Defendant's third penalty-phase retrial. A stronger case reflecting the exercise of reasonable trial strategy is difficult to imagine.

Defendant's point relied on effectively concedes that this claim lacks merit because it provides that these witnesses' testimony would have provided "additional detail" regarding Defendant's troubled childhood. But counsel's failure to present cumulative evidence is not ineffective assistance. In addition, some of these witnesses were not cooperative or made themselves unavailable despite counsel's best efforts to locate them. Other witnesses had little or no contact with Defendant. Moreover, these witnesses' testimony, explained in detail below, contains information that would have been damaging to Defendant's case and contradictory to the defense strategy. This

[7] This Court did not reach those issues in *Deck II* because it reversed Defendant's sentences on other grounds.

information included bad character evidence about Defendant or testimony that portrayed Defendant's parents in a favorable light or excused their behavior, which was contrary to the defense strategy of showing extreme abuse and neglect. Finally, any testimony from these witnesses is practically identical to testimony offered by witnesses in Defendant's first and second penalty-phase proceedings, both of which resulted in two death sentences against Defendant.

**A. The record regarding this claim.**

In his amended motion for post-conviction relief, Defendant alleged that trial counsel were ineffective for failing to call several witness during the third penalty-phase proceeding who would have testified about Defendant's troubled childhood, including Michael Johnson (stepbrother), Latisha Deck (sister), Elvina Deck (aunt), Wilma Laird (aunt), Carol and Art Misserocchi (foster parents), Stacey Tesreau-Bryant (ex-fiancee), Tonia Cummings (sister and accomplice), Rita Deck (stepmother), Pete Deck (father), and D.L. Hood (mother's ex-boyfriend). (PCR-L.F. 29-66).

**1. Michael Johnson.**

Michael Johnson, whose mother, Marietta, was married to Defendant's father, Pete Deck, was Defendant's stepbrother. (PCR-Tr.-II 97). He was 14 or 15 years old when he lived with the Deck children for "maybe a year" after his mother married Defendant's father. (PCR-Tr.-II 97-98,109). He said that

they lived in a wooden shack without running water and that his mother and Defendant's father were drinkers who left the children to go to bars. (PCR-Tr.-II 99-100,102-03,107). He described his mother as "outspoken" and a strict disciplinarian. (PCR-Tr.-II 101). Defendant's younger sister, Latisha, wet the bed and Marietta beat her, which the other children witnessed. (PCR-Tr.-II 101-02).

Johnson also said that the family was poor and did not have enough food to eat except for beans and potatoes. (PCR-Tr.-II 102). He said that he continued to live with his mother Marietta after the Deck children left and that while he had been issued a few tickets, he had never been to prison. (PCR-Tr.-II 110). Johnson was interviewed by Defendant's attorneys in 1997, (PCR-Tr.-II 105-06), but was not called as a witness during Defendant's first trial in 1998, (1stTr. 878-922).[8]

Mr. Tucci testified that he learned about Michael Johnson in 2000 when he was representing Defendant in his first post-conviction proceeding.

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[8] Defendant's sister, Tonia Cummings, testified in this proceeding that Johnson sexually abused her when she was a child. (2011-Cummings Depo. 32-33). Cumming's 2011 deposition ("2011-Cummings Depo.") was admitted into evidence as Movant's Exhibit 9 in this post-conviction proceeding. (PCR-Tr.-II 95).

(PCR-Tr.-II 135). He was not aware of what efforts were made to locate Johnson before the third penalty phase. (PCR-Tr.-II 136-38). Co-counsel, Stephen Reynolds, testified that no effort was made to locate Johnson. (PCR-Tr.-II 250).

The motion court found that Johnson's testimony was inconsequential." (PCR-L.F. 303).

**2. Latisha Deck.**

Latisha Deck is Defendant's youngest sister and was 41 years old and living in a boarding home during this post-conviction proceeding. (PCR-Tr.-I 23-24,28-29). She said that her mom took off and left her, but that Defendant took care of her, including feeding and bathing her. (PCR-Tr.-I 25). In response to a leading question from Defendant's post-conviction attorney, Latisha said that Defendant also played games with her. (PCR-Tr.-I 25-26).

Latisha said in response to another leading question that she had lived with her father and his wife Marietta. (PCR-Tr.-I 26). She said that she was hungry and that Marietta was mean to them and made them sit on broomsticks. (PCR-Tr.-I 27). She also agreed, in response to a leading question, that Marietta had locked them out of the house. (PCR-Tr.-I 27). She also related the story about Marietta rubbing feces in Defendant's face after he had defecated in his pants. (PCR-Tr.-I 27-28).

Counsel Tucci was aware of Latisha from having approached Latisha's guardian during the first post-conviction case. (PCR-Tr.-II 140-41). Tucci met with Latisha at that time, but did not think she could adequately verbalize what had happened to her as a child. (PCR-Tr.-II 140-41). Based on his previous experience with her, Tucci did not try to contact Latisha in this case. (PCR-Tr.-II 142).

Co-counsel Reynolds testified that they did not want to call Latisha as a witness because of her disabilities. (PCR-Tr.-II 252-53). He said that whenever a disabled person is called as a witness, it could be perceived by the jury as being manipulative. (PCR-Tr.-II 252-53). He said that this decision was not influenced by Latisha's competency to testify, only that it might look manipulative to the jury if the defense called her as a witness. (PCR-Tr.-II 253).

The motion court found that Latisha offered no testimony "that was different from what the jury heard." (PCR-L.F. 207-08). Moreover, it found that counsel's observation that Latisha could not effectively communicate and their decision not to call her as a witness was "accurate" based on the motion court's observation of her testimony during the post-conviction evidentiary hearing. (PCR-L.F. 214).

### 3. Elvina Deck.

Elvina Deck was Defendant's aunt by her marriage to Defendant's father's brother, Norman. (PCR-Tr.-II 21-22). She described Defendant's mother, Kathy, as a "whore" who prostituted herself. (PCR-Tr.-II 24). She saw Kathy beat Defendant with a belt once and throw him into a corner. (PCR-Tr.-II 26-27). Elvina was at work most of the time so she did not see Kathy interact with the children very often. (PCR-Tr.-II 27). When Defendant was 11, Kathy left the children at home alone; Kathy also left the children with Defendant's father's mentally-retarded brother, Donnie. (PCR-Tr.-II 28-29). In 1974 or 1975, Kathy left for three days to be with a truck driver, and the police called Defendant's father to come pick up the children. (PCR-Tr.-II 29-30). When the children got to the house, they were dirty and starving. (PCR-Tr.-II 30-31).

Elvina described Marietta as a mean alcoholic who made the children kneel on broomsticks and locked them outside in the summer. (PCR-Tr.-II 33-34). She also testified that after Marietta rubbed feces on Defendant's face for messing his pants, Defendant was in the bathtub smiling. (PCR-Tr.-

II 35). Finally, she said that Marietta asked Defendant and his sister Tonia to steal cigarettes for her.[9] (PCR-Tr.-II 35-36).

Elvina testified by deposition during Defendant's first post-conviction proceeding in 2000, and she testified at his second penalty-phase retrial in 2003. (PCR-Tr.-II 37; 2nd Tr. 466). She lived in Washington state in 2008. (PCR-Tr.-II 38).

Tucci testified that he knew about Elvina Deck from his work in Defendant's first post-conviction case. (PCR-Tr.-II 121-22). Although he would have liked to have had Elvina testify based on her past testimony, he would have wanted to talk to her beforehand to make sure she was still cooperative. (PCR-Tr.-II 122). But the defense team was never able to contact her despite their repeated efforts, which included hiring an investigator and contacting other family members. (PCR-Tr.-II 122-23,244). The investigator traced Elvina to Washington and left a message at Elvina's

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[9] Tonia testified in this proceeding that she, her sister Latisha, and her brother Michael lived with Elvina and Norman Deck after being separated from Defendant and that Elvina and Norman were abusive to them. (2011-Cummings Depo. 45). Tonia described Elvina and Norman as alcoholics who called the Deck children "bastards," told them their mother was a whore, and who beat and pushed them. (2011 Cummings Depo. 45).

phone number, but Elvina never contacted the defense team. (PCR-Tr.-II 124-25, 244). When told that Elvina testified during this post-conviction case, Tucci said that Defendant's family "was so fond of playing hide and seek." (PCR-Tr.-II 125-26). Elvina was not called as a witness during Defendant's first trial because she did not respond to trial counsel's attempts to contact her. (1stPCR Tr. 139).

The motion court found that counsel were not ineffective for failing to call Elvina as a witness because counsel made reasonable efforts to locate her and she ignored them. (PCR-L.F. 212-13). Moreover, her testimony was duplicative "to many of the same type of events that the jury heard about at trial" from Dr. Draper, who prepared a "lengthy, detailed litany of [Defendant]'s childhood." (PCR-L.F. 210). Finally, the court noted that Elvina testified at Defendant's 2003 retrial and yet the jury recommended a death sentence; thus, her "testimony would not have been persuasive or changed the outcome of the case." (PCR-L.F. 210).

**4. Wilma Laird.**

Wilma Laird is Defendant's father's sister.[10] (2011-Laird Depo. 6). She said that she was not around Defendant or his siblings very much when they

[10] Laird's deposition (Movant's Ex. 43), admitted into evidence at the post-conviction hearing, (PCR-Tr.-II 95), is referred to as "2011-Laird Depo."

were children. (2011-Laird Depo. 10,24). She did not know what had taken place between Defendant and his mother, Kathy. (2011-Laird Depo. 26-27). Ms. Laird testified that Kathy could be a "good mother" when she wanted to be, but that she was simply too young. (2011-Laird Depo. 10-11,23-24). She refused to say that Kathy abused the children, only that she was not a good mother. (2011-Laird Depo. 11). She said the children had clothes and that they were not "ragged or anything." (2011-Laird Depo. 21). She never saw Kathy drink. (2011-Laird Depo. 14).

Laird knew of only one time Kathy left the children alone, which she was told was for three days, but Ms. Laird was not present when her brother (Defendant's father) brought the children to the house. (2011-Laird Depo. 13-14). She acknowledged that Kathy let her mentally retarded brother-in-law watch the children. (2011-Laird Depo. 8,15). Ms. Laird described an incident in which Kathy hit Defendant in the head with a "spongy" flip-flop when he was one or two years old, but that it was "nothing drastic" and Defendant was not knocked down. (2011-Laird Depo. 16,34-35).

Ms. Laird described her brother, Defendant's father, Pete Deck, as being a good father to Defendant and the other children. (2011-Laird Depo. 27). She said that Defendant's father tried to do the best he could for Defendant and his siblings. (2011-Laird Depo. 27).

Although she acknowledged that she had testified at a deposition in 2000, Laird said that she would not have wanted to come to court to testify in Defendant's third penalty-phase retrial. (2011-Laird Depo. 32).

During Defendant's first post-conviction case, his trial counsel in *Deck I* testified that she interviewed Laird as a potential witness for the penalty phase, but Laird did not want to talk about the family (1stPCR Tr. 129).

Tucci was familiar with Laird from his work on Defendant's first post-conviction case, but he made the decision not to call her because her testimony did not add anything new to what the experts already knew and what she had to say was cumulative to other witnesses. (PCR-Tr.-II 126). Co-counsel Reynolds testified that they did not talk to Laird most likely because she would not call them back. (PCR-Tr.-II 245-46).

The motion court found that trial counsel were not ineffective for failing to call Laird as a witness because her "testimony would have contravened the defense theory that [Defendant]'s mother was a horrible parent" and that she also testified that Defendant's father was a "good father who worked hard." (PCR-L.F. 207). The court also found that trial counsel's decision not to call Laird was reasonable trial strategy. (PCR-L.F. 213).

**5. Carol and Art Misserocchi.**

Art Misserocchi testified that Defendant was his foster child for only six or seven months when Defendant was nine or ten years old.[11] (2011-A.Misserocchi Depo. 12-15). He said that no one ever visited Defendant and that Defendant was always talking about his sister. (2011-A.Misserocchi Depo. 17-19). Mr. Misserocchi said that even if he had been subpoenaed, he would not have wanted to testify at the third retrial because he had "mixed feelings" about this case. (2011-A.Misserocchi Depo. 27-29).

Carol Misserocchi testified that Defendant was a foster child of hers for six or eight months when he was ten or eleven years old. (2011-C.Misserocchi Depo. 8-10). She could not remember the information they received about Defendant, and she did not remember Defendant talking about his family. (2011-C.Misserocchi Depo. 10,14). Defendant did not show emotion and was "detached," and no one came to visit him while he stayed there. (2011-C.Misserocchi Depo. 12-13,16). She remembered Defendant telling some of the other foster children that he wanted to have sex with one of the farm pigs or a vacuum cleaner. (2011-C.Misserocchi Depo. 22-23). Mrs. Misserocchi

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[11] The depositions of Art and Carol Misserocchi ("2011-A.Misserocchi Depo." and "2011-C.Misserocchi Depo.") were admitted into evidence as Movant's Exhibits 28 and 29 at the post-conviction evidentiary hearing, (PCR-Tr.-I 38).

would not have been willing to testify for Defendant during the third retrial because her heart "just bleeds for the family" of the victims in this case. (2011-C.Misserocchi Depo. 19-20).

Tucci, knew about Carol and Art Misserocchi from his calling them as witnesses during Defendant's first post-conviction case. (PCR-Tr.-II 129). He did not consider calling them during the third retrial because their information was "tangential" and could be brought out through the experts. (PCR-Tr.-II 129). Co-counsel Reynolds said that the Misserocchis were not called as witnesses because they were not supportive of Defendant "in any way." (PCR-Tr.-II 248-49).

In their depositions taken in Defendant's first post-conviction case, the Miserocchis testified that Defendant was distant, had a smart mouth, and the other children did not like him. (2000 A. Miserocchi Depo., pp. 14,18; 2000 C. Misserocchi Depo., pp. 11-12,23).[12] The Miserocchis also said that Defendant attempted to have sex with a pig and with their vacuum cleaner. (2000-A.Misserocchi Depo. 15; 2000-C.Misserocchi Depo. 16-17,22).

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[12] The Miserocchis' (so spelled in that case) testimony from their 2000 depositions "2000-A.Miserocchi Depo." and "2000-C.Miserocchi Depo.") was admitted into evidence during Defendant's first post-conviction proceeding (*Deck II*, No. SC83237) and filed with this Court.

The motion court found that trial counsel were not ineffective for failing to call the Misserocchis as witnesses because their testimony was not compelling and the decision not to call them was "sound and reasonable." (PCR-L.F. 206). It also found that "the Misserocchis' testimony would not have . . . changed the outcome of the trial." (PCR-L.F. 213).

**6. Stacey Tesreau-Bryant.**

Trsreau testified during this post-conviction proceeding that she had been engaged to Defendant and lived with him for about a year. (PCR-Tr.-II 200-01). Tesreau said that Defendant treated her son from a prior relationship like he was his father. (PCR-Tr.-II 201). She said that Defendant hated his mother. (PCR-Tr.-II 205). Defendant told Tesreau that he had been molested by some of his mother's boyfriends and that he was raped in jail. (PCR-Tr.-II 204). Tesreau also said that her husband was totally against her testifying in Defendant's third retrial. (PCR-Tr.-II 207). She had moved out of the marital home when the third retrial was held, and the defense team would have had to ask her husband where she lived. (PCR-Tr.-II 206-09). She confirmed that she had testified by deposition during Defendant's first post-conviction proceeding and would have testified similar to what she had previously stated. (PCR-Tr.-II 206).

Tucci deposed Tesreau during Defendant's first post-conviction case, but he chose not to call her as a witness during trial because of problems with

her current husband, who did not want her involved in the case and was hostile to the defense team. (PCR-Tr.-II 131-33). Tucci considered Tesreau's testimony to be "tangential" and that it was better to bring it out through the experts' testimony. (PCR-Tr.-II 132-33). Co-counsel Reynolds testified that the defense team tried to contact Tesreau before trial but was unable to do so. (PCR-Tr.-II 249-50).

During the first post-conviction proceeding, Defendant's trial counsel in his first trial testified that she decided not to call Tesreau for various reasons, including that an attorney-friend of Tesreau's had called Defendant's counsel to ask if she would tell Defendant to stop harassing Tesreau with repeated calls to her office. (1stPCR Tr. 216-17). Defendant was apparently making collect calls to Tesreau's office while he was in jail awaiting his first trial. (1stPCR Tr. 216-17; 2000 Tesreau Depo. 36).[13] Trial counsel was told that Tesreau wanted to handle the matter informally as opposed to filing legal action to stop the harassment. (1stPCR Tr. 217). In addition, counsel did not want the jury to hear that Defendant might have

[13] Tesreau's testimony from her 2000 deposition ("2000-Tesreau Depo.") was admitted into evidence during Defendant's first post-conviction proceeding (*Deck II*, No. SC83237) and filed with this Court.

been stealing money from one girlfriend and giving it to Tesreau. (1stPCR Tr. 217).

Tesreau's 2000 deposition included other matters that counsel would not have wanted the jury to hear in his third retrial, such as: Defendant was molested in prison; Defendant had stolen Tesreau's child support money and used her credit cards to obtain money to gamble with; Defendant wrote bad checks; and Defendant let guys "give him head" when he was in prison. (2000-Tesreau Depo. 17-18,19,31-32,41). Finally, similar to the circumstances that prevented counsel from calling Tesreau during Defendant's most recent retrial, Tesreau testified in 2000 that she was seeing another man when Defendant's first trial occurred and that he would not have liked her testifying for Defendant. (2000-Tesreau Depo. 43).

The motion court found that counsel's decision not to call Tesreau as a witness was reasonable trial strategy and that her testimony would not have changed the outcome of the trial. (PCR-L.F. 213-14). In addition, the court found that Defendant failed to prove that Tesreau was available and willing to testify based on her husband's opposition to her testifying and his being the person the defense would have had to go through to contact her. (PCR-L.F. 214).

**7. Tonia Cummings.**

Cummings is Defendant's sister and grew up with Defendant and their younger siblings, Latisha and Mike. (2011-Cummings Depo. 5-8). When her deposition was taken, Cummings had been in prison for the previous 15 years serving a sentence for her convictions on two counts of second-degree murder and armed criminal action, first-degree robbery, and first-degree burglary for her participation in the crime for which Defendant was sentenced to death. (2011-Cummings Depo. 4-5).

Cummings described the house in which she and Defendant lived with their parents, who were never married, as "dirty" and without food. (2011-Cummings Depo. 7-8,14-15). Her parents did not get along and constantly argued, though her father (Pete Deck), whom she said was an alcoholic, was not home very often. (2011-Cummings Depo. 8-10). Her mother (Kathy) physically and verbally abused the children, especially Defendant. (2011-Cummings Depo. 10-11,21). When their mother would leave them alone at home, Defendant, who was 9 or 10 years old, would take care of his siblings by stealing food or asking neighbors for it. (2011-Cummings Depo. 13-14,23). After their father left, the children could see and hear their mother having sex with various men in her bedroom. (2011-Cummings Depo. 18-21). Cummings said that their mother taught Defendant how to steal from stores. (2011-Cummings Depo. 50-51).

When Defendant was 11 or 12, their father married a woman named Marietta, whom Cummings described as an alcoholic who was hateful and abusive, both physically and emotionally, toward the Deck children. (2011 Cummings Depo. 27-28). She said that the four Deck children lived in one bedroom and Marietta woud give them one hot dog each at 5 p.m to eat. (2011-Cummings Depo. 29). The children were constantly hungry and Defendant and Cummings would sneak food out of the kitchen at night to eat and give to their younger siblings. (2011-Cummings Depo. 30). One time she and Defendant ate dry dog food they found in a shed. (2011-Cummings Depo. 40). Marietta disciplined Tonia and Defendant by making them kneel on broomsticks. (2011-Cummings Depo. 29-30). Cummings said that Marietta treated Defendant the worst. (2011-Cummings Depo. 35-36).

Cummings testified about the "Thanksgiving incident" in which the children were taken from their mother's house and were so hungry that their younger brother, Michael, ate so fast that he threw up in his plate, which was taken away from him so he could not eat what he threw up. (2011-Cummings Depo. 23-24). She also described the incident in which Defendant defecated in his pants while waiting in the car for Marietta. (2011-Cummings Depo. 33-34). After returning to the house, Marietta spanked Defendant, smeared feces on his face, and took a picture of him after it had dried. (2011-Cummings Depo. 33-34).

Cummings also described an incident that occurred when the children were living with Marietta during which she and Defendant had sexual contact. (2011-Cummings Depo. 31-32). While she, Defendant, and their younger brother and sister were playing in the bedroom, Defendant asked Cummings to take her clothes off and then he began "fondling," "touching," and "kissing" her. (2011-Cummings Depo. 32). Defendant also taught Cummings how to drink beer. (2011-Cummings Depo. 59-60).

Cummings described another incident that occurred when Defendant was 15 years old, skipped school, started drinking, and then was driving a car when he decided to pass in between two school buses and drove off an embankment. (2011-Cummings Depo. 59-60). Cummings also said that Defendant abused drugs and alcohol and told her that he had been raped and stabbed in prison. (2011-Cummings Depo. 55-56,60-61).

In describing the crime she participated in with Defendant, Cummings said that it was Defendant's idea to rob the victims and that Defendant drove her car to the Longs' house. (2011-Cummings Depo. 72).

Tucci took Tonia's deposition during the first post-conviction proceeding. (PCR-Tr.-II 138-39). He did not call her as a witness at trial because the prosecutor could have focused on guilt-phase issues since she was Defendant's accomplice. (PCR-Tr.-II 139-40). Tucci believed that the potential harm from this testimony far outweighed any mitigation testimony

she could have offered. (PCR-Tr.-II 139-40). Another downside to calling her as a witness was the fact that she was in custody. (PCR-Tr.-II 139-40). Co-counsel Reynolds testified that the defense had no intention of calling Cummings as a witness because she could be perceived by the jury as another one of Defendant's victims since her life was altered by being sent to prison as a result of Defendant's conduct in this case. (PCR-Tr.-II 251-52).

Tucci would have also been aware that trial counsel from Defendant's first trial chose not to call Cummings as a witness because Defendant had had an incestuous relationship with his sister, which trial counsel did not want the jury to hear. (1stPCR Tr. 221-22). Defendant's brother, Michael Deck, testified during the first post-conviction case that he knew about the incest because Defendant and Cummings admitted it to him, and he believed that she and Defendant were still engaged in such a relationship while they were living together in 1996, just before Defendant murdered the Longs. (2000-M.Deck Depo. 32-33). [14] During her deposition in Defendant's first post-conviction case, Cummings confirmed that Defendant had sex with her when she was five years old and testified that Defendant made frequent

[14] Michael Deck's 2000 deposition ("2000-M.Deck Depo.") was admitted into evidence during Defendant's first post-conviction proceeding (*Deck II*, No. SC83237) and filed with this Court.

sexual advances toward her and laughed about it. (2000-Cummings Depo. 71,81-82, 92-93,172,174).[15]

Cummings also had other information detrimental to Defendant that could have been brought out from her 2000 deposition if she had testified, including that: Defendant drank 12-18 beers a night; that he smoked marijuana daily and snorted cocaine three or four times a week; that he had sex with his cousins and his stepfather's daughter when he was a teenager; that he was still having sex with one cousin, who was married, even as late as 1996; that he expressed a desire to have sex with his Aunt Beverly (Dulinski); that he was a male stripper and escort; that he was raped in prison; that he used drugs heavier after he was raped; that he did not care if he went back to prison; that he owned a gun; that he bought people presents with stolen money; and that he wrote bad checks to buy things. (2000-Cummings Depo. 69-72,74-78,81-82,84-85,88,92-93,166,172-76,178).

The motion court found that trial counsel were not ineffective for failing to call Cummings as a witness because it was a "wise" trial-strategy decision, Tonia was interviewed by a defense expert (Surratt), who testified at trial,

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[15] Cummings 2000 deposition ("2000-Cummings Depo.") was admitted into evidence during Defendant's first post-conviction proceeding (*Deck II*, No. SC83237) and filed with this Court.

and Cummings's testimony was not "persuasive or helpful." (PCR-L.F. 204-05). Moreover, the court found that counsel reasonably chose not to call her to avoid the prosecution's inevitable cross-examination of her about the circumstances surrounding the murders, rather than the mitigation evidence she might adduce. (PCR-L.F. 213).

**8. Rita Deck.**

Rita Deck lived with Defendant's father (Carman "Pete" Deck, Sr.), whom she first met in 1975 when Defendant was 10 years old. (PCR-Tr.-II 6-9). She never saw Kathy around the children. (PCR-Tr.-II 8). Rita also described the Thanksgiving incident when Defendant's father brought the children home and they were dirty and hungry. (PCR-Tr.-II 9-10). She said Defendant's youngest brother, Michael, ate so much that he got sick. (PCR-Tr.-II 9-10). She lost contact with the Deck children when they were taken away after Defendant's father left her and went to live with Marietta. (PCR-Tr.-II 11-12).

She said that Defendant was a "good kid" who gave her no problems, and that he did everything that was asked of him. (PCR-Tr.-II 12). Defendant would get up for school and dress himself, and she never saw Defendant become violent. (PCR-Tr.-II 14).

Rita said that she testified on Defendant's behalf in 1998, 2000, and 2003. (PCR-Tr.-II 17-18,117-18). Although Tucci subpoenaed Rita, she was

not cooperative and did not show up to court. (PCR-Tr.-II 118-21). Co-counsel Reynolds confirmed that Rita wanted no involvement in the third retrial or to testify in court. (PCR-Tr.-II 243).

The motion court found that counsel were not ineffective in failing to call Rita as a witness because her "testimony did not provide any new or different information about [Defendant]'s upbringing or the poor care he received from his caretakers." (PCR-L.F. 210). It found Rita's testimony "completely unpersuasive and not credible." (PCR-L.F. 210). Finally, the court noted that Rita had "testified in a previous trial, with no benefit to [Defendant]." (PCR-L.F. 210).

**9. Pete Deck.**

Defendant's father, Pete Deck, whose testimony consisted of a deposition he gave in 2000 during Defendant's first post-conviction proceeding, offered little firsthand information about Defendant's childhood, since much of what he knew was told to him by others.[16] (2000-P.Deck Depo. 20-22, 32, 39). At one point he testified that it was hard for him to remember these things and to remember that far back. (2000-P.Deck Depo. 20). Pete

[16] Pete Deck's 2000 deposition ("2000-P.Deck Depo.") was admitted into evidence in lieu of his live testimony during the post-conviction evidentiary hearing. (PCR-Tr.-I 38-39; Movant's Ex. 31).

did not remember the foster homes that Defendant had been placed in, nor why Defendant had been put in these homes. (2000-P.Deck Depo. 43). Pete worked long hours and was frequently away from home. (2000-P.Deck Depo. 25-26). Pete knew about Marietta's treatment of the children only from what others told him. (2000-P.Deck Depo. 31-32). Pete also testified that he never witnessed Defendant being abused. (2000-P.Deck Depo. 55). He did describe the "Thanksgiving incident" in which he picked up the children after they were left alone and that they were so hungry that the youngest one (Michael) threw up in his plate from eating so fast. (2000-P.Deck Depo. 34).

Pete confirmed that he had bad health, including bad nerves, and that he almost passed out one day while he was at court for Defendant's first trial. (2000-P.Deck Depo. 68-70). He claimed to drink only one or two beers a day. (2000-P.Deck Depo. 40). He said Defendant's mother, Kathy, did not drink, but that Marietta drank all the time. (2000-P.Deck Depo. 40,44).

Pete described his relationship with Defendant as being "good" and that he was always there for Defendant. (2000-P.Deck Depo. 52-53). He said he did his best to be a good father to Defendant. (2000-P.Deck Depo. 55).

Defendant's first trial counsel testified during the first post-conviction case that she did not call Defendant's father as a witness because he was "very unhelpful" in that he could not remember many events in Defendant's

childhood. (1stPCR Tr. 118,137,199). Pete also did not recognize that his ex-wife Marietta had been abusing his children. (1stPCR Tr. 119).

Tucci testified that after he subpoenaed Pete Deck, he claimed that he was sick. (PCR-Tr.-II 114). In 2007 and 2008, Pete's wife, Rita, told Tucci that Pete was not in good health. (PCR-Tr.-II 18). Tucci later received a letter from a doctor saying that if Pete testified at trial, it would be hazardous to Pete's health. (PCR-Tr.-II 114-15). Rita then called Tucci asking that Pete be released from the subpoena. (PCR-Tr.-II 115). Tucci was suspicious about Pete's claim of illness. (PCR-Tr.-II 115). Although Tucci considered admitting Pete's deposition in lieu of his live testimony, he ultimately decided against doing that and instead chose to portray Pete's absence at trial as showing that he was never there for his son; Pete's absence could also be relied on by the defense experts as further support for their opinions. (PCR-Tr.-II 116-17).

Co-counsel Reynolds testified that the defense team contacted Pete twice and that he was very resistant to testifying. (PCR-Tr.-II 242-43). Pete's wife Rita later contacted the defense team and said that he was too ill to testify at trial. (PCR-Tr.-II 242-43).

**10. D.L. Hood.**

Hood died before Defendant's third retrial, but his deposition was taken by Mr. Tucci during Defendant's first post-conviction case. (Movant's

Exhibits 4 and 5; PCR-Tr.-I 37).[17] Hood testified that he knew Defendant's mother when Defendant was seven or eight years old. (2000-Hood Depo. 6-7). He did not know what Defendant's mother did with the children when she was signing with his band in bars because he "never had much to do with the children." (2000-Hood Depo. 11-12). He said that he never had any dealings with the children and could not even remember the younger ones names. (2000-Hood Depo. 19). He had a relationship with Defendant's mother for only a year. (2000-Hood Depo. 12). When Hood lived with Defendant's mother, the children, including Defendant, did not live with her at all. (2000-Hood Depo. 13).

Hood had heard that Defendant's mother was having sex with lots of men and prostituting herself. (2000-Hood Depo. 14-15). Hood hesitated saying very much about Defendant's mother because what he had heard was "hearsay." (2000-Hood Depo. 15-18). He did say that Defendant's mother tried to stab him once. (2000-Hood Depo. 21).

Tucci was unaware that Hood had died, but he would not have considered using Hood's deposition at trial because Hood was not in Defendant's life for very long and any information he could have added came

[17] Hood's deposition ("2000-Hood Depo.") was taken by Tucci in the first post-conviction case.

in through the experts. (PCR-Tr.-II 127-29). This was confirmed by Reynolds, who said that the defense did not look for Hood and that any information he might have had could be introduced through defense expert Draper. (PCR-Tr.-II 247).

The motion court found that trial counsel's decision not to call Hood was reasonable trial strategy and any information he had could be brought out by the defense expert Draper. (PCR-L.F. 213,215).

**11. The third penalty-phase retrial.**

During jury selection, Defendant's counsel explained to the venire that not all witnesses would be available to testify "live" before the jury, but that their testimony, whether in the form of a videotaped or transcribed deposition, is no different than that of live witnesses. (3rdTr. 237-38). No one indicated that they would be unable or unwilling to consider the videotaped or transcribed testimony of a witness. (3rdTr. 237-39).

The mitigating evidence Defendant offered during this retrial was nearly identical to that offered in his previous cases. The same witnesses who testified during the first two penalty-phase proceedings (Bev Dulinsky (video-deposition), Major Puckett (video-deposition), and Michael Deck (video-deposition)) testified during this retrial. (3rdTr. 854,874,876,888; 2ndTr. 454-532; 1stTr. 878-922). Their testimony, again similar to that presented at the first trial, was that Defendant had a difficult childhood. Also, during this

retrial Defendant called a family member (Mary Banks by video-deposition) who had not testified previously and who also told the jury about Defendant's bad childhood. (3rdTr. 874).

These witnesses testified about Defendant's abusive treatment at the hands of his mother and her lack of parenting skills; that he was dehydrated when he was an infant; that his parents left him and his siblings alone in the house; that Defendant cared for his siblings, including feeding and bathing them; that on one occasion ("Thanksgiving incident") the children were left alone for days by their mother and were so hungry that the youngest ate so fast he threw up and tried to eat that as well; that Defendant's stepmother Marietta mistreated the children by not feeding them and making them sit on broom handles; that after Defendant accidentally defecated in his pants, Marietta smeared feces on Defendant's face and took a picture of it; that Marietta eventually left the children with Family Services; and that Defendant spent time in a string of foster homes. (3rdTr. 733-51,757-59,856, 807-12,858,861-63,880; Banks Depo. 8-24,34).[18]

[18] Mary Banks's video-deposition was admitted into evidence as Exhibit C and played for the jury, (3rdTr. 874-75); it was filed with this Court in *Deck IV*, No. SC89830.

In addition to the child psychiatrist (Eleatha Surratt) who testified during Defendant's second penalty-phase retrial, (3rdTr. 797-850; 2ndTr. 466-525), Defendant also called a child-development expert (Wanda Draper) during the third penalty-phase retrial, (3rdTr. 721-96). The child psychiatrist and child-development expert offered testimony concerning events in Defendant's childhood, which they described for the jury in detail, and offered their opinions that Defendant's childhood experiences had an adverse effect on his development. (3rdTr. 725-70,800-27). These witnesses also conceded that similar experiences were shared by Defendant's siblings, including his brother, Michael Deck, who joined the military and later became a police officer. (3rdTr. 784-85,822-23).

Defendant's direct-appeal brief in *Deck IV* (No. SC89830) stated that "just as much, if not more, mitigating evidence was presented at" the third penalty-phase retrial as in the first two trials. (App. Br. 134). In *Deck IV*, this Court found that Defendant's death sentences were not disproportionate because the "retrial of the penalty phase in this case involves virtually the same evidence as prior trials." *Deck IV*, 303 S.W.3d at 552. Moreover, this Court's opinion noted that the "mitigating evidence offered was similar to that offered in the previous trials." *Id.* at 553. Judge Stith's concurrence noted that the "facts of [Defendant]'s case are chilling," and then described how Defendant brutally executed the victims after they begged for their lives.

*Id.* at 561 (Stith, J. concurring). After describing the mitigation evidence, including the effect of Defendant's difficult childhood, offered in the third penalty-phase retrial, the concurrence noted that this was "evidence which the jury heard and considered before deciding to impose the death penalty, as had the 24 jurors in his two prior penalty-phase trials." *Id.*

**B. The motion court did not clearly err in finding that counsel was not ineffective for failing to call these witnesses.**

The motion court did not clearly err in rejecting this claim because the record shows both that trial counsel had valid trial-strategy reasons for not calling these witnesses and that the failure to call these witnesses to provide "additional detail" about Defendant's difficult childhood did not prejudice Defendant.

To prove a claim of ineffective assistance for failing to call a witness, the movant must show that: "(1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). "[N]either the failure to call a witness nor the failure to impeach a witness will constitute ineffective assistance of counsel unless such action would have provided a viable defense or changed

the outcome of the trial." *State v. Ferguson*, 20 S.W.3d 485, 506 (Mo. banc 2000).

"Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise." *Id.* "As a matter of trial strategy, the determination to not call a witness is *virtually unchallengeable*." *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005) (emphasis added); *see also Williams*, 168 S.W.3d at 443 ("The selection of witnesses and evidence are matters of trial strategy, virtually unchallengable in an ineffective assistance claim."); *State v. Kenley*, 952 S.W.2d 250, 266 (Mo. banc 1997) ("Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable."). "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *State v. Jones*, 885 S.W.2d 57, 58 (Mo. App. W.D. 1994).

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable." *Strickland*, 466 U.S. at 690. "Trial counsel is given great discretion in which evidence to present to the jury." *Coleman v. State*, 256 S.W.3d 151, 156 (Mo. App. W.D. 2008). "If a decision to forego the presentation of evidence is based on reasonable trial strategy, then it cannot support the finding of

ineffectiveness." *Id.* "When defense counsel believes a witness' testimony would not unqualifiedly support his client's position, it is a matter of trial strategy not to call him to the stand, and the failure to call such witness does not constitute ineffectiveness of counsel." *Rousan v. State*, 48 S.W.3d 576, 587 (Mo. banc 2001).

Missouri courts have held that "[i]neffective assistance will not lie . . . where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy." *State v. Heslop*, 842 S.W.2d 72, 77 (Mo. banc 1992). "It is only the exceptional case where a court will hold a strategic choice unsound." *Heslop*, 842 S.W.2d at 77.

"Counsel is vested with wide latitude in defending his client and should use his best judgment in matters requiring trial strategy." *State v. Jones*, 863 S.W.2d 353, 360 (Mo.App. W.D. 1993). Appellate courts should avoid applying "hindsight" when examining such claims. *Id.* "The decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the movant clearly establishes otherwise." *State v. Miller*, 981 S.W.2d 623, 634 (Mo. App. W.D. 1998).

The record shows that trial counsel Tucci and Reynolds employed reasonable trial strategy in deciding which witnesses to call at trial. Tucci was intimately familiar with these witnesses' testimonies and determined on

a case-by-case basis whether the proposed testimony would be beneficial to the defense. Several witnesses Defendant now claims should have been called were uncooperative (Pete and Rita Deck), resistant to testifying (Laird, Misserocchis), made themselves unavailable (Elvina Deck, Tesreau), or could not effectively communicate (Latisha). In many instances, the witness could have been cross-examined and forced to divulge information that would have shown Defendant in an unfavorable light or would have contradicted the defense theory of the case (Tesreau, Tonia). In other instances, the witness simply had little relevant testimony or had limited contact with Defendant or his parents (Johnson, Laird, Pete Deck, Hood). Counsel wisely chose not to waste the jury's time and indulge its patience by calling such witnesses.

Defendant also failed to carry his burden of proving that he was prejudiced by counsel's failure to call these witnesses. Defendant's practically concedes this point by describing the proposed testimony from these witnesses as providing "additional detail" to what the jury already heard. But counsel is not ineffective for failing to present cumulative evidence of a defendant's background during the penalty phase. *See Storey v. State*, 175 S.W.3d 116, 137-38 (Mo. banc 2005) (holding that trial counsel in a capital case was not ineffective for failing to present "additional" mitigation testimony from family friends that was merely cumulative from that presented through other witnesses).

Thirty-six jurors in three different trials have now recommended that Defendant be sentenced to death for his crimes. It strains credulity to believe there exists a reasonable probability that the result of this retrial would have been any different if "additional" evidence about his troubled childhood would have been offered. This is especially true considering that many, if not all, the witnesses in question harbored testimony that would have diminished the defense case concerning the difficulty of Defendant's childhood or that could have been effectively used by the prosecution to portray Defendant in a bad light. The presentation of these witnesses would not have changed the outcome of Defendant's retrial, and, in some respects, the unfavorable testimony that could have been adduced from them might have reinforced the jury's decision to recommend death.

The simple fact is that a bad or difficult childhood is not sufficient grounds on which to set aside a death penalty, especially in a case as heinous as this one. *See Brooks*, 960 S.W.2d at 503 (refusing to find death sentence disproportionate on the ground that the defendant had an "extremely difficult childhood"); *Storey v. State*, 175 S.W.3d 116, 138 (Mo. banc 2005) (holding that "additional" mitigation testimony would not "have presented a viable defense to the sickening photographs and evidence of [the defendant]'s crime"); *Deck IV*, 303 S.W.3d at 552-53, 561. Defendant failed to carry his burden of proving that the result of his proceeding would have been different

if the jury would have heard repetitive testimony about his difficult childhood. The motion court did not clearly err in rejecting this claim.

**V (failure to call neuropsychologist).**

**The motion court did not clearly err in overruling Defendant's post-conviction claim that trial counsel were ineffective for failing to call a neuropsychologist, Dr. Gelbort, to testify at trial because Defendant failed to carry his burden of proving that counsel acted incompetently or that he was prejudiced in that: (1) trial counsel had no reasonable basis to seek a neuropsychological examination since Defendant exhibited no behaviors suggesting any cognitive impairment; (2) Dr. Gelbort's opinions were not supported by his examination findings and trial counsel and the motion court found them not credible; and (3) Dr. Gelbort's examination showed Defendant had average scores on most of the testing and a full-scale IQ of 91, which was within the normal range.**

**A. The record pertaining to this claim.**

Defendant amended post-conviction motion alleged that trial counsel were ineffective for failing to have a neuropsychologist "conduct a comprehensive neuropsychological evaluation of [Defendant] and to testify at trial" about the results, which Defendant alleged would have shown that he suffers from "organic brain damage which impairs his cognitive functioning." (PCR-L.F. 22).

During the post-conviction evidentiary hearing, Dr. Michael Gelbort, a clinical neuropsychologist, testified that he performed a five-hour post-conviction neuropsychological evaluation on Defendant. (PCR-Tr.-I 42,46). Defendant was also interviewed during the evaluation, and Gelbort noted that Defendant's answers appeared forthcoming. (PCR-Tr.-I 55).

Defendant reported that he had never been knocked out or lost consciousness. (PCR-Tr.-I 56). Gelbort found no confirmation of brain injury in any of the documents he reviewed. (PCR-Tr.-I 126-27). Defendant also said that he had completed the 11th grade, but later earned a GED and then enrolled in college for two and one-half years, attaining a 3.2 grade point average in his last semester. (PCR-Tr.-I 64-65,151). Defendant had also worked in construction and done some carpentry work. (PCR-Tr.-I 65). He even operated a small business designing and building "hot-rod" cars. (PCR-Tr.-I 65).

Gelbort testified that a normal IQ is between 90 and 110, and that he measured Defendant's full-scale IQ as 91, which was derived from a performance score of 87 and a verbal score of 95. (PCR-Tr.-I 88-89). Defendant's scores on the other various tests Gelbort gave him were, in the doctor's words, "grossly . . . within the normal range." (PCR-Tr.-I 105). In

fact, Defendant did not have "significant impairment or even moderate impairment on any of these tests."[19] (PCR-Tr.-I 105).

Gelbort said that Defendant had a "thought deficit" and that his "cognition was impaired." (PCR-Tr.-I 120,145). He described Defendant's impairment in various ways during his testimony as one in which Defendant did not "juggle information well," (PCR-Tr.-I 107), and had trouble in situations involving complex, abstract problem solving:

> [T]here is a thread that runs through all of his low scores where you can say he has trouble with these more complex abstract reasoning skills.
>
> * * * *
>
> [Defendant] has a little trouble with the more complex-staying-in-focus-type of information processing.

(PCR-Tr.-I 108,115).

When he was directly asked whether Defendant was capable of conforming his conduct to the law, Gelbort avoided a direct answer and replied only that Defendant was "less able to demonstrate normal judgment, problem solving reasoning, and display appropriate 'defeaters' [than] the

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[19] Gelbort described Defendant's score on the "Catergory Test" as being in the "borderline defective range." (PCR-Tr.-I 106-07).

average individual. (PCR-Tr.-I 143). When asked if Defendant had the capacity to decide whether to murder or not, Gelbort was again evasive and said only that Defendant was "less able than a normal individual to make as adept, sound, reasonable, [and] insightful decision[s] as a normal person could." (PCR-Tr.-I 143). Gelbort conceded, however, that the decision to kill is not an abstract problem-solving issue. (PCR-Tr.-I 144). He suggested that in making the decision to murder, Defendant relied on "impaired cognitive abilities," but that this "wouldn't rise to the level of excusing him." (PCR-Tr.-I 145-46). He conceded that most people with neuropsychological impairments are non-violent and do not commit murder:

> Most people with neuropsychological impairments or neurological disease, for that matter, don't kill anyone. Most of them are not violent. But people with these problems have a greater propensity than the normal individual to have aberrant behaviors.

(PCR-Tr.-I 147).

In making these opinions, Gelbort said that he knew nothing about the facts of the case and that he received no information from the experts who testified on Defendant's behalf at trial. (PCR-Tr.-I 144,148-49). All he did was perform a neuropsychological evaluation of Defendant. (PCR-Tr.-I 148-49).

Tucci testified that he had no information nor made any observations to justify seeking neuropsychological testing of Defendant. (PCR-Tr.-II 41). Based on his completion of a social history on Defendant, Tucci was fully aware of his history of head injuries and information suggesting that Defendant had been malnourished as a child. (PCR-Tr.-II 41-46,52-58). None of the experts called at trial suggested to him that Defendant might have problems with his brain. (PCR-Tr.-II 61-62). Tucci did not believe any of the malnourishment stories rose to the level of seeking a neuropsychological examination. (PCR-Tr.-II 54-55).

Tucci was also aware that Defendant's mother may have physically abused Defendant and might have struck him in the head with a "flip-flop." (PCR-Tr.-II 56-58). He was also aware that Defendant had been in a car accident, but the records clearly showed Defendant suffered no loss of consciousness and nothing Tucci saw suggested the need to explore it further. (PCR-Tr.-II 65-66). Tucci also knew about a report that Defendant might have had a mild concussion as a teenager and that while Defendant was as an inmate he slipped on one occasion and fell off his bunk on another. (PCR-Tr.-II 73-80). But when Tucci asked Defendant whether he had lost consciousness during any of the incidents, Defendant denied that he had. (PCR-Tr.-II 65-70). None of the information Tucci obtained or reviewed suggested that Defendant had lost consciousness during any of these

episodes. (PCR-Tr.-II 59,72-73,77-78). Tucci's review of IQ scores and Defendant's other behaviors revealed nothing suggesting the need for a neuropsychological evaluation. (PCR-Tr.-II 81-83).

Tucci also explained that the public defender system did not have unlimited funds to pay for these types of evaluations and that he would have had to justify any request for funds to perform this testing. (PCR-Tr.-II 62-63). In Defendant's case, he had no information that would have justified a request to have neuropsychological testing performed. (PCR-Tr.-II 63,82-83).

Tucci reviewed Gelbort's report before the post-conviction evidentiary hearing and flatly stated that even after reviewing the report, he would not have called Gelbort as a witness. (PCR-Tr.-II 91). Tucci found that Gelbort's report was not helpful to the defense and that it offered a number of favorable things for the prosecution, including that Defendant had an average IQ and that most of his scores on the tests Gelbort administered fell within the average range. (PCR-Tr.-II 86-88,90). According to Tucci, the test results on which Gelbort's conclusion was based were "problematic" because they did not seemingly support Gelbort's opinion about Defendant suffering from a cognitive deficit. (PCR-Tr.-II 89-90).

Co-counsel Reynolds testified that he never personally observed anything in Defendant's demeanor suggesting that he had any neurological deficits. (PCR-Tr.-II 278-79). Like Tucci, he had also reviewed Gelbort's

report and said that it would not have withstood the prosecution's potential cross-examination at trial. (PCR-Tr.-II 256-57). Reynolds would not have felt comfortable relying on Gelbort's report at trial because there was nothing to back up Gelbort's opinions. (PCR-Tr.-II 257). Reynolds also added that Gelbort is frequently used in public-defender cases and that opinions on Gelbort's reputation vary. (PCR-Tr.-II 277). Reynolds would not have hired Gelbort as an expert even if he had concerns that Defendant suffered from some sort of neurological impairment because his knowledge of Gelbort's work in other cases led him to the opinion that Gelbort was not a credible or reliable witness. (PCR-Tr.-II 277-78).

The motion court found that Gelbort "came across as not having much of a command on [Defendant]'s history." (PCR-L.F. 208). It further found that Gelbort's testimony was uninteresting and not credible:

> Dr. Gelbort's presentation was dry, uninteresting and not compelling at all. In fact, he does not come across as particularly credible and his explanations were difficult to comprehend. His demeanor on the stand would not, this Court believes, be well received by a jury.

(PCR-L.F. 209). It also determined that Gelbort's opinion about Defendant suffering "some traumatic brain damage" was "not credible." (PCR-L.F. 209). According to the court, Gelbort's ignorance of Defendant's history, especially

"the events on the night of the murder" would diminish his credibility before a jury:

> Thus, a jury would not find any credibility or value in Dr. Gelbort's conclusion that [Defendant's] "neurological deficits" played any role in his decision to murder the Longs. In fact, the jury would be very unimpressed by the fact that Dr. Gelbort did not know any of the circumstances of the murder and could not relate his findings to [Defendant]'s crime. In addition, Dr. Gelbort's testimony about [Defendant] having any neurological deficits was so utterly speculative and inexact that no juror would find it persuasive or credible.

(PCR-L.F. 209).

The motion court found that trial counsel was not ineffective in failing to conduct neurological testing on Defendant because nothing in their observation of Defendant, review of his records, or consultation with their experts suggested any need for such an examination. (PCR-L.F. 218). It found that counsel were not ineffective for failing to call Gelbort as a witness because it did "not find Dr. Gelbort in the least bit credible" and trial counsel acted reasonably in not calling an expert who counsel did not believe was credible. (PCR-L.F. 217). Moreover, the court found that Gelbort's demeanor would not be "well-received by a jury" because he "could not offer any cogent or clean explanation" connecting Defendant's purported deficits to his

decision to murder the Longs. (PCR-L.F. 217-18). Because the results of Gelbort's testing showed that Defendant was "normal or average," any claim of "brain damage of unknown origin . . . would be persuasive to no one." (PCR-L.F. 218).

**B. Defendant did not prove ineffective assistance of counsel.**

Defendant failed to carry his burden of proving either that counsel acted incompetently in not calling a neuropsychological expert witness or that the failure to do so prejudiced Defendant. "When a movant claims ineffective assistance of counsel for failure to locate and present expert witnesses, he must show that such experts existed at the time of trial, that they could have been located through reasonable investigation, and that the testimony of these witnesses would have benefited movant's defense." *State v. Davis*, 814 S.W.2d 593, 603-04 (Mo. banc 1991). "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *State v. Jones*, 885 S.W.2d 57, 58 (Mo. App. W.D. 1994).

**1. Defendant did not prove that counsel's failure to hire a neuropsychologist was incompetent.**

Defendant did not carry his burden of proving that counsel acted incompetently in not having Defendant examined by a neuropsychologist such as Dr. Gelbort. Nothing in counsel's investigation suggested the need to

have such testing performed and Defendant denied having had any head trauma resulting in unconsciousness. Neither counsel nor the experts they hired (a child psychiatrist and child-development expert) observed anything in Defendant's demeanor or actions suggesting the need to have him examined by a neuropsychologist.

Defendant's post-conviction claim that counsel should have had Defendant examined by a neuropsychologist involves the type of second-guessing that *Strickland* cautions against in considering claims of ineffective assistance. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The reasonableness of counsel's actions must be viewed as of the time counsel's conduct occurred, taking into consideration the circumstances of the particular case. *Id.* at 690. The proper standard is to "determine, whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* "Counsel has limited time and resources, and if there is a strategy that does not look promising, he may 'cho[o]se not to expend his limited resources to that end. This is a reasonable strategic decision.'" *Zink v. State*, 278 S.W.3d 170, 181 (Mo. banc 2009) (quoting *State v. Brown*, 902 S.W.2d 278, 298 (Mo. banc 1995)).

In addition, counsel testified that to obtain funding for such an examination, he would have had to justify it. But he could point to nothing justifying the need to obtain one. "[I]t is not ineffective to consider cost in deciding what type of investigation to do and how to do it, so long as the resulting investigation is adequate." *Worthington*, 166 S.W.3d at 575. *See also Yohey v. Collins*, 985 F.2d 222 (5th Cir. 1993) (noting that "[c]ounsel's decision not to hire experts falls within the realm of trial strategy" and rejecting a claim of ineffective assistance based on trial counsel's failure to use his own funds to hire experts).

Finally, trial counsel reviewed Gelbort's report before they testified at the post-conviction evidentiary hearing, and they still would have chosen not to call Gelbort as a witness after seeing the conclusions in his report. Counsel believed that Gelbort's opinions were not supported by the testing he performed. Moreover, there were many findings that were unfavorable to Defendant, such as his IQ score and attending college, that the prosecution could have exploited and that might have diminished his mitigation case with the jury. Co-counsel Reynolds expressly said that he did not find Gelbort to be a reliable or credible witness. The decision not to call a witness at trial due to credibility problems amounts to trial strategy and is not a basis for finding ineffective assistance of counsel. *State v. Shum*, 877 S.W.2d 477 (Mo. banc 1993).

**2. Defendant failed to prove prejudice.**

Defendant also failed to carry his burden of proving that he suffered any prejudice from counsel's failure to call neuropsychologist.

The motion court determined that Gelbort's testimony that Defendant suffered from cognitive deficits was not only uninteresting, but that it was also not credible. *See Rousan*, 48 S.W.3d at 589 (holding that "a witness' credibility is the motion court's responsibility in a post-conviction matter"); *see also Worthington*, 166 S.W.3d at 574 ("The motion court was not required to believe these doctors' diagnoses, which were not otherwise supported by prior medical opinions . . . ."). Gelbort's conclusion that Defendant suffered from cognitive deficits when Defendant obtained average scores on the neuropsychological testing was purely speculative, especially considering that Gelbort knew nothing about the facts of Defendant's crimes nor could he articulate how the cognitive deficits Defendant allegedly suffered resulted in his committing a double homicide. *See Kenley*, 952 S.W.2d 250, 266-268 (Mo. banc 1997) (the defendant was not prejudiced by counsel's failure to call experts in part because the expert's testimony was speculative); *State v. Clark*, 925 S.W.2d 872, 878-879 (Mo. App. W.D. 1996) (expert's testimony would not have been determinative on any issue).

The most Gelbort could say was that Defendant does not make good decisions in complex situations. This testimony falls woefully short of being

mitigation evidence, and, in fact, could have had the opposite effect on the jury when considered against the weight of the evidence showing that Defendant was reasonably intelligent, went to college, held jobs, and even operated a small business. Moreover, a person's decision to murder robbery victims so they cannot identify you to the police does not involve complex or abstract reasoning skills, especially when the murderer takes as much as 10 minutes to consider the matter before pulling the trigger, which is what occurred in this case. Defendant even admitted in his confession to police that he was essentially weighing his options and decided to take his chances on killing his victims so they could not identify him. Although Defendant's decision was incomprehensible and irrational when viewed from a moral perspective, it made sense and was perhaps logical to someone like Defendant who operated with depraved indifference to his victims and others. The jury most likely would have found that it was not the decision of someone who had impaired cognitive abilities, but one made by a cold, callous murderer hoping to avoid being apprehended by killing the witnesses to his crimes.

The motion court did not clearly err in concluding that Defendant failed to prove that trial counsel were ineffective for failing to hire Dr. Gelbort to perform a neuropsychological examination of Defendant.

**VI (juror questionnaires).**

**The motion court did not err in overruling Defendant's motion to set aside his death sentences and order a fourth penalty-phase retrial based solely on the fact that the juror questionnaires from his third retrial were unavailable for post-conviction inspection since they had apparently been discarded by the circuit court after trial in accordance with its policy because Rule 27.09, which requires circuit courts to retain juror questionnaires under seal "as required to create the record on appeal or for post-conviction litigation," does not apply in that nothing in the record suggested that the questionnaires were needed for appeal or for post-conviction litigation and Defendant did not ask the circuit court to retain the questionnaires or seek to review them until after his post-conviction case had commenced and the questionnaires had been apparently discarded.**

**Alternatively, the provisions of Rule 27.09 are merely directory, not mandatory, since the rule provides no penalty for non-compliance. Moreover, Defendant seeks the windfall of a new trial without having made any showing whatsoever that the questionnaires contained, or even sought, any information relevant to his post-conviction jury-selection claim in Point I.**

**A. The record pertaining to this claim.**

On September 2, 2010, three days after he had filed his amended motion for post-conviction relief, Defendant filed a motion seeking disclosure of the juror questionnaires for the jurors in his third penalty-phase retrial on the ground that those questionnaires were needed to prove prejudice with respect to Defendant's post-conviction claim that trial counsel were ineffective for failing to ask the veniremembers whether they could consider Defendant's childhood experiences as mitigation evidence. (PCR-L.F. 145-47). Defendant asserted in his motion that this claim could only be proved by asking the jurors selected for trial these omitted questions. (PCR-L.F. 146). He further alleged that the juror questionnaires would contain contact information and "may contain other responses that would indicate any juror's bias concerning issues of child abuse and neglect" related to his jury-selection claim. (PCR-L.F. 2,146-47).

At a noticed hearing where the State failed to appear, Defendant's post-conviction counsel asserted that review of the juror questionnaires was necessary to compile proof for Defendant's jury-selection claim. (PCR-Tr.-I 4-7). The court observed that it was "not even sure if we still have those questionnaires." (PCR-Tr.-I 7). It further said that "typically" the juror "questionnaires are provided to counsel before trial begins" and that at "the conclusion of voir dire, we collect them." (PCR-Tr.-I 7-8). The court

explained that it does not keep the juror questionnaires after the end of the jurors' term of service because of privacy concerns and said that it was "not sure they're even available." (PCR-Tr.-I 8). Defendant's counsel stated that a court clerk had told her that the questionnaires had been destroyed. (PCR-Tr.-I 8).

In a memorandum order drafted by Defendant's counsel and signed by the motion court judge, the motion court overruled Defendant's motion to review the juror questionnaires: "Court takes up Movant's motion to review juror questionnaires, and denies said motion and states that the questionnaires have been destroyed." (PCR-L.F. 153; PCR-Tr.-I 10).

On February 18, 2011, two weeks before the post-conviction evidentiary hearing, Defendant filed a motion asking that his death sentences be reversed and to remand his case for a fourth penalty-phase proceeding based on the questionnaires' apparent destruction. (PCR-L.F. 164-71). Defendant included additional reasons in this motion why the questionnaires were necessary beyond what was alleged in his original motion relating to questions about childhood experiences as mitigation. (PCR-L.F. 165-66). These reasons included that: (1) one juror was "staring down" Defendant; (2) another juror Defendant did not like; (3) and yet another juror stated that he knew "a few bailiffs with the court" and that he

had relatives who were police officers.[20] (PCR-L.F. 165). Post-conviction counsel asserted that the questionnaires were needed to determine the jurors' employment, relation to law enforcement, and whether there was any other information indicating bias. (PCR-L.F. 165-66).

The motion court overruled Defendant's motion for a new trial based on the non-retention of the juror questionnaires. (PCR-L.F. 208).

**B. Defendant has not demonstrated that he is entitled to the drastic remedy of a new trial.**

Under Rule 27.09, juror questionnaires in criminal cases that are "maintained" by the circuit court must be "retained under seal" except as needed to create an appellate record or for post-conviction litigation:

> Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be

[20] The juror who "knew a few bailiffs" was asked about this in open court during jury selection, and he said it would not affect his ability to decide the case. (3rdTr. 163-64).

> disclosed except on application to the trial court and a showing of good cause.

Rule 27.09(b). This Court's Operating Rule 4.21, pertaining to jury records, contains a similar requirement:

> Courts shall maintain the following records pertaining to grand and petit juries:
>
> 2) Questionnaires submitted by prospective jurors:
>
> a) Information provided on the questionnaires shall be considered confidential and shall be used only for the purposes of jury selection.
>
> b) Pursuant to Supreme Court Rule 27.09 questionnaires for individuals comprising criminal jury panels shall be accessible only to the court and parties. Such questionnaires maintained by the court shall be sealed at the conclusion of the trial.

Supreme Court Operating Rule 4.21(2). This Court's Operating Rule 8, relating to the retention, transfer, and destruction of court records, suggests that court records in capital cases, including juror questionnaires, should be permanently retained. *See* Supreme Court Operating Rule 8.01(A)(13) and 8.04.2(C)(4)(b).

Defendant seeks the windfall of a new trial when nothing in the record shows that any effort was made to inform the circuit court that the juror

questionnaires were needed for post-conviction litigation. Although this Court's operating rules suggest that such questionnaires should be permanently retained in capital cases, Defendant is arguing that the circuit court's non-compliance with Rule 27.09 entitles him to a new trial. But Rule 27.09 only requires the circuit court to retain juror questionnaires "as required" for purposes of appeal or for post-conviction litigation. Defendant made no showing that the circuit court was informed that the questionnaires were needed for either purpose.

Defendant's argument must also fail because he failed to make a record demonstrating that the questionnaires have definitively been destroyed. The only proof that the questionnaires were destroyed was post-conviction counsel's statements before the court and in motions that she was told by the clerk that the questionnaires had been destroyed. But "[i]t is axiomatic that statements of counsel are not evidence of the facts presented." *State v. Lawrence*, 250 S.W.3d 763, 767 (Mo. App. S.D. 2008). *See also State v. Williams*, 623 S.W.2d 552, 554 (Mo. 1981) ("Statements of counsel are not evidence, . . . nor are assertions in a motion for new trial."). Even the motion court judge was unsure whether the questionnaires were still available. And Defendant presented no evidence or testimony affirmatively showing that the questionnaires had been destroyed. The motion court's order stating that the questionnaires had been destroyed, which was an order prepared by

Defendant's counsel at a hearing not attended by the State, does not necessarily follow from the lack of evidence presented on this matter.

Even if it is assumed that the circuit court discarded the questionnaires, the inquiry does not end. Defendant contends that the questionnaires might have provided evidence supporting his claim of jury-selection ineffectiveness, but he offered no evidence that the questionnaires sought any information germane to this claim. He presented no evidence of the information sought by the circuit court's questionnaire and how that information would relate to his claim. He did not ask trial counsel whether they recalled what information was provided by the questionnaires or even offer into evidence a copy of the questionnaire form used by the circuit court to demonstrate the nature of the information the jurors would have divulged and how their potential answers might have affected his claim. Instead, Defendant simply asks this Court to blindly order a new trial without so much as a hint that the information sought by the questionnaires would have had any relevancy whatsoever to the claim of ineffective assistance asserted in his amended motion.

Moreover, the windfall Defendant seeks—a new trial—is not warranted for non-compliance with the rule. Rule 27.09 is merely directory, not mandatory, since its language provides for no result, consequence, or penalty for non-compliance. When "a statute or rule does not state what results will

follow in the event of a failure to comply with its terms, the rule or statute is directory and not mandatory." *State v. Tisius*, 92 S.W.3d 751, 770 (Mo. banc 2002). In *Tisius*, this Court rejected the capital defendant's claim that he was entitled to a new trial based on a violation of this Court's Operating Rule 16.03(b), which states that the court "shall" give five days notice to the parties of cameras in the courtroom. The defendant further asserted that this violation rendered him "unable to voir dire the jury on whether the cameras would affect them and that he could not determine whether any of the witnesses did not wish to be videotaped." *Id.* at 770 n.63. This Court rejected the contention that a new trial was warranted because the rule was directory, not mandatory, since it did "not make provisions in the event it is not complied with." *Id.* at 770. C*ompare Dorris*, slip op. at 4 (holding that use of the word "shall" relating to the filing deadlines in Rules 24.035 and 29.15 was mandatory rather than directory because the rule provided for a result that would follow—"complete waiver"—for non-compliance).

In *State v. Walker*, 330 S.W.3d 122 (Mo. App. E.D. 2010), the defendant claimed that the circuit court erred in not suppressing evidence in his case on the ground that the search warrant was illegally executed in violation of a statute which stated that when the highway patrol serves search warrants, the sheriff in the county were the warrant is served "shall participate" in its service. The court held that despite the statute's use of the word "shall," it

was still merely directory, not mandatory, since no result for non-compliance was provided. *Id.* at 126-27. The court further held that "[w]hen a statute is deemed to be directory and a court does not follow it, the defendant must show that he or she has been prejudiced or that his or her interests have been adversely affected by such failure," and that "no such prejudice" was shown in that case. *Id.* Similarly, Defendant has failed to show any prejudice he suffered from not having access to the questionnaires other than vague, unsupported speculation.

Defendant cites no case remotely suggesting that a post-conviction defendant is automatically entitled to a new trial if juror questionnaires are unavailable and post-conviction counsel is unable to review them for potential ineffective-assistance claims. Moreover, as explained in Point I, Defendant has not properly pleaded a sufficient claim of ineffective assistance relating to jury selection, but offers bare conclusions of potential prejudice. But "[b]are assertions of prejudice are not sufficient to establish fundamental unfairness and does not show how the trial was substantially altered." *Tisius*, 92 S.W.3d at 762. Defendant tries to bolster his claim with additional speculative assertions that if the questionnaires were available, they might provide some evidence to support his speculative claim. Yet, he offered no evidence showing what information the questionnaires sought and how that information was relevant to his post-conviction claim. Assuming

the circuit court does not have the questionnaires, Defendant is essentially arguing that his inability to review them in a post-conviction case requires that a constitutional violation of ineffective assistance be presumed and a new trial ordered.

Defendant does not cite a single case supporting such a drastic reading of *Strickland*, and he overlooks the fact that the law does not permit ineffective assistance to be presumed based solely on an incomplete or missing record; it must be pleaded and proved in every case. His argument also flies in the face of *Strickland* itself, in which the Court held that counsel is presumed to have acted competently and that the defendant must affirmatively prove prejudice. *See* Points I and II. Defendant cannot rely on missing questionnaires to establish a claim of ineffective assistance and obtain a new trial. He must not only "prove his allegations by preponderance of the evidence," but he must also meet a "heavier burden" and overcome the "strong presumption" that counsel performed in a reasonable manner. *Twente*r, 818 S.W.2d at 635.

Defendant's reliance on *Dobbs v. Zant*, 506 U.S. 357 (1993), is entirely misplaced because that case stands for the unremarkable proposition that the federal court could not apply law-of-the-case doctrine to the defendant's habeas corpus claim premised on ineffective assistance of counsel during closing argument when the missing transcript of the argument was later

discovered and the lower court could offer no reason for not reviewing it. Here, as Defendant readily admits, he does not have the juror questionnaires.

In searching the numerous archive boxes relating to Defendant's case, Respondent's counsel has uncovered copies of what appears to be the completed juror questionnaires for the jurors who sat on Defendant's third penalty-phase retrial.[21] These questionnaires simply seek generic information that would have no bearing on Defendant's post-conviction claim that counsel was ineffective for failing to ask a specific childhood-mitigation question during jury selection. The questionnaires ask for the following information: name; age; address; phone numbers; employer and job title; years of residency in Missouri and Jefferson County; marital status (single, married, separated, divorced, widowed); and a list of persons also living in the same residence and their employment. In addition the questionnaire asked for either a yes or no answer to the following questions:

- Have you previously served as a juror anywhere?
- Have you or members of your immediate family ever suffered an accidental physical injury?

[21] Respondent's counsel is seeking a stipulation from Defendant's counsel so that these questionnaires can be filed under seal with this Court.

- Have you or member of your immediate family been a party to any lawsuit for damages?
- Has a claim for personal injury ever been made against you?
- Have you ever made any claim for personal injury?
- Are you related to or close friends with any law enforcement officer?

The answers to these questions would reveal no information relevant to Defendant's claim of ineffective assistance of counsel relating to the failure to specifically ask about Defendant's childhood mitigation evidence during jury selection. The motion court properly overruled Defendant's motion to set aside his death sentences and order a new trial based solely on the fact that the circuit court apparently discarded the juror questionnaires.

**VII (failure to object—cross-examination).**

**The motion court did not clearly err in rejecting Defendant's claim that counsel was ineffective for failing to object to the prosecutor's cross-examination question of Defendant's expert witness in which he used the phrase "no good s.o.b." because Defendant failed to carry his burden of proving this claim in that: (1) the question was not objectionable since the prosecutor was simply testing the expert's credibility through a rhetorical device; (2) trial counsel had valid trial-strategy reasons for not objecting; and, (3) Defendant suffered no prejudice.**

**A. The record pertaining to this claim.**

Defendant's amended post-conviction motion alleged that trial counsel were ineffective for failing to object when the prosecutor allegedly referred to Defendant as a "no-good s.o.b." during his cross-examination of defense expert Dr. Surratt. (PCR-L.F. 77). Defendant alleged that he was prejudiced because this was "improper name-calling" that "inflame[d] the passions of the jury." (PCR-L.F. 77-78).

During the prosecutor's cross-examination of child psychiatrist Dr. Surratt, he inquired why Dr. Surratt failed to ask Defendant during her eight- or ten-hour interview with him why she did not ask Defendant why he committed these murders. (3rdTr. 838-40). The prosecutor's apparent

purpose was to demonstrate that Dr. Surratt was attempting to explain Defendant's behavior without ever having discussed the criminal case with him or having asked him why he committed these murders:

Q. And during those ten hours did you actually discuss with him in any way the aspects of this criminal case?

A. No.

Q. . . . [W]hat you testified about here and why you're here is to give this jury an excuse for his behavior, are you not?

A. No, not an excuse.

Q. Well, how would you term it, then?

A. In my specialty, in my field, an[ ] understanding of how one's experiences shape their lives, how one becomes the person that they become, but not an excuse.

Q. So it's not an excuse that he had a bad childhood?

A. No, not an excuse.

Q. It just explains his behavior?

A. Yes.

Q. And . . . the behavior we're talking about is killing two people?

* * * *

A. The behavior that I'm trying to explain is the personality, is the coping style, is the—yes, choices, behaviors, the whole—the whole picture, if you will.

Q. And why someone commits a crime may play a big role in explaining the crime, or what led up to it?

A. Yes.

Q. And so you had the opportunity to ask him, did you kill these people because of bad things in your childhood, or did you kill them just because you wanted their money, and you didn't want them to go to the police and catch you? Did you ask him that question?

A. No.

Q. But asking him that question would have helped explain his behavior, wouldn't it, if he was truthful?

A. [A]t the point that I . . . made the evaluation, there was already a completed trial—and my task was not to assess—

Q. –Well, I'm asking you—I didn't mean to cut you off—but I'm asking you about you being here today. Not prior work in this case, but being here today, you're here to explain his behavior?

A. Yes.

Q. And wouldn't it be easy or helpful to explain his behavior, if you had asked him why did you put a gun against those people's head and kill them?

A. And it could have, yes.

Q. It could have, but it also could have been pretty detrimental to [Defendant], if he had said, the reason I killed them is because I'm a no-good s.o.b. and wanted them dead, because I didn't want to go to prison. That wouldn't be a very good answer for [Defendant], would it?

A. It would have went along with my findings of how he responds to things; is it good or bad, not for me to say, but it certainly would have been fitting.

Q. H[im] wanting these people dead just because he wanted their money fits along with what you believe?

[Defendant's Counsel]: Objection; asked and answered.

The Court: Sustained; move on, please.

(3rdTr. 839-41).

Trial counsel Tucci could not remember why he did not object to the use of the term "s.o.b." in the prosecutor's question. (PCR-Tr.-II 155). He did say, however, that he must have had a reason for not objecting, whether or not he could later remember what it was. (PCR-Tr.-II 197-98). Co-counsel Reynolds

testified that an objection to the question may have been "possible," but that it was not, in his opinion, a "super critical objection." (PCR-Tr.-II 259-60).

The motion court rejected this claim because "the prosecutor was not engaged in name-calling," but was simply challenging the expert's "credibility and objectivity in her assessment of Defendant" since she failed to ask him about the crime or his reasons for wanting to murder the Longs. (PCR-L.F. 222). The motion court found that trial counsel was not ineffective for failing to object to the use of the phrase "s.o.b." because the jury knew what the prosecutor meant and no juror would have perceived it as name-calling:

> Regardless of whether the question was couched in the most appropriate language, the question was not a personal attack on [Defendant]; every juror understood what the prosecution was implying, and the question did not alter the outcome of the trial. When trial counsel objected to the prosecutor's next question, the Court believed the prosecutor had adequately made his point, sustained the objection because it was argumentative, and instructed the prosecutor to move on. The questions were not an attempt at name calling, were not perceived as name calling by the jury, and [Defendant] was not denied a fair trial because his attorney did not voice that objection.

(PCR-L.F. 222-23).

**B. Defendant failed to prove counsel were ineffective for failing to object to the prosecutor's question.**

The motion court did not clearly err in rejecting this claim for at least three reasons. First, the question was not objectionable. Second, trial counsel had valid trial-strategy reasons for not objecting. And, third, Defendant cannot prove that he suffered any prejudice.

The prosecutor's question simply employed a rhetorical device to test the expert's credibility and imply that she failed to ask Defendant why he killed the victims perhaps because she might have gotten an answer that would have been unfavorable to Defendant. A prosecutor may use a rhetorical device in challenging the credibility of the defendant's evidence. *State v. Hopson*, 168 S.W.3d 557 (Mo. App. E.D., 2005). *See also State v. Black*, 50 S.W.3d 778 (Mo. banc 2001) (holding that prosecutor's comment during closing argument did not imply any special knowledge, but was simply a rhetorical argument based on the evidence). Since the prosecutor here was using a rhetorical device to test the credibility of the expert's opinion, any objection to the phrasing of this question would not have been meritorious. "Counsel cannot be deemed ineffective for declining to make a non-meritorious objection." *State v. Kreutzer*, 928 S.W.2d 854, 878 (Mo. banc 1996).

The record also shows that trial counsel strategically chose not to object to this question, though he could not remember exactly what that reason might have been. Co-counsel testified that it was not a "critical" objection to make in the context of the entire trial.

Defendant's trial counsel testified that he did not typically object to cross-examination because he would not want to emphasize it to the jury. A decision based on reasonable trial strategy is virtually unchallengeable. *See State v. Sanders*, 903 S.W.2d 234, 240 (Mo. App. E.D. 1995). The decision whether to object is inherently strategic and is left to the judgment of trial counsel. *State v. Suarez*, 867 S.W.2d 583, 587 (Mo. App. W.D. 1993). "[A]ny experienced trial lawyer knows . . . that it is not always wise to make all possible objections." *Jones v. State*, 784 S.W.2d 789, 792 (Mo. banc 1990). Trial counsel's inability to remember why he did not object does not aid Defendant. *See Rickey v. State*, 52 S.W.3d 591, 596 (Mo. App. W.D. 2001) ("[trial counsel's] inability to remember why he took a specific course action during trial does not establish lack of competent performance").

Finally, considering the context in which the statement was made and the record before the jury, Defendant cannot prove that the prosecutor's use of this rhetorical device in questioning the defense's expert established any basis to reasonably believe the result of Defendant's trial would have been different if counsel would have objected.

Defendant's reliance on *State v. Banks*, 215 S.W.3d 118 (Mo. banc 2007), in which the prosecutor specifically referred to the defendant as the "Devil" in closing rebuttal argument, is entirely misplaced. The context of the prosecutor's question in this case shows that he was not actually calling Defendant an "s.o.b.," but was simply using the word colorfully to make his credibility point to the jury about the expert's failure to ask Defendant a highly relevant question directly relating to her opinion.

**VIII (failure to object—closing argument).**

**The motion court did not clearly err in rejecting Defendant's claim that counsel was ineffective for failing to object to the prosecutor's closing argument in which he referred to Defendant's "escapes," despite the fact that Defendant had only one conviction for aiding an escape, and his statement that Defendant helped others serving "life-without-parole sentences" to escape when the record did not show what their sentences were because Defendant failed to carry his burden of proving this claim in that: (1) trial counsel had valid trial-strategy reasons for not objecting; and (2) this Court considered this claim on direct appeal for plain error and found "no prejudice."**

**A. The record pertaining to this claim.**

Defendant's amended post-conviction motion alleged that trial counsel were ineffective for failing to object to the prosecutor's closing argument references to Defendant's "escapes" and helping others serving life-without-parole sentences to escape when the evidence showed that Defendant had only one conviction for aiding an escape and no other details of the crime were heard by the jury. (PCR-L.F. 80-82).

The State's amended information charged that Defendant was a persistent offender. (3rdL.F. 62-64). One of the convictions relied on to

support that allegation was Defendant's 1985 conviction for aiding an escape. (3rdL.F. 64). The trial court admitted the certified copy of the conviction into evidence. (3rdTr. 679-80; Exhibit. 57[22]). This conviction was not mentioned during the prosecutor's initial closing argument. (3rdTr. 943-54). During rebuttal closing argument, the prosecutor told the jurors that their verdict can protect society and reminded them that Defendant had helped others to escape:

> [The Prosecutor]: He knows how to escape, *helping people that were in for the rest of their live*s. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates. But I need you and our society need[s] you to be the sheepdog.

(3rdTr. 968-69) (emphasis added). The prosecutor also mistakenly told jurors that they could consider Defendant's "escapes":

> The next thing we have to do is to convince you that all this bad evidence, the aggravating evidence in the case warrants a death sentence. It does. You can consider all his prior escapes. You can consider how he leaned over these bodies.

[22] This exhibit was deposited with this Court in Case No. SC89830.

(3rdTr. 949). Since the record contains no evidence that Defendant himself ever escaped—only that he aided others in doing so, it appears that the prosecutor simply misspoke.

Although this Court considered this claim for plain-error review on direct appeal, it concluded that Defendant was not "prejudiced" by either statement:

> No prejudice resulted from the first argument that suggested Deck had escaped more than one time. It appears the prosecuting attorney's comment was a simple misstatement—he used the plural rather than the singular form of the word "escape." Deck argues that based on this mistake, the jurors speculated, assumed facts outside of evidence and then imposed the death sentences based on that one comment. Comments made during closing argument must be looked at in the context of the entire record. After review of the entire record there is no demonstration Deck was prejudiced by this misstatement.
>
> No prejudice resulted from the second argument that suggested the other inmates whom Deck attempted to help escape were serving life sentences. There was no evidence that the inmates Deck aided were "in for the rest of their lives," but the jury was aware he previously had participated in an escape. After review of the entire record, this

> comment was not prejudicial because there is no basis to conclude that this argument had a decisive effect on the outcome of the trial.

*Deck IV*, 303 S.W.3d at 543 (citation omitted).

Mr. Tucci testified that while only one conviction for aiding an escape was introduced into evidence, he was aware that Defendant had been put in administrative segregation because of an escape plot. (PCR-Tr.-II 157-58). He did not want to object and highlight this issue, which may have prompted the prosecutor to "clean it up," since there was evidence about an escape plot beyond the conviction itself. (PCR-Tr.-II 158-59). He explained that it was his trial strategy not to highlight the issue:

> You know, again, it was such a close call about, do we highlight this issue. If [Defendant] had not had an escape conviction, I think there would have been—there certainly—I believe I would have objected. But did it seem like it was just a mistake that I didn't want to highlight, that as long as he—and that may have been the only time that he even mentioned an escape during the argument. If he had kept going, certainly there would have been objections raised. We would have asked to approach the bench. But it seemed to me, in my recollection at least, and you will correct me with the transcript, but it seemed my recollection was that it was isolated.

(PCR-Tr.-II 159-60). When asked why he did not object to the prosecutor referring to Defendant's "escapes," Tucci said that he only heard the word "escape, singular . . . [m]y ear heard escape during the course of the argument." (PCR-Tr.-II 160). Co-counsel testified that he should have objected to the prosecutor's use of the word "escapes." (PCR-Tr.-II 261-63).

The motion court found no prejudice from the reference to others serving life sentences because the thrust of the argument was that Defendant knew how to escape, and the length of the sentence of those he helped was not "consequential or significant." (PCR-L.F. 223).

**B. The motion court did not clearly err in rejecting this claim.**

Defendant's trial counsel testified that he had valid trial-strategy reasons for not objecting the prosecutor's misstatements. He did not want to highlight the matter to the jury and give the prosecutor the opportunity to "clean up" the record in response to an objection. Although the only evidence before the jury relating to escape was Defendant's conviction for aiding an escape, the certified record showed that the state alleged that Defendant attempted to help two men escape from the county jail by procuring a saw blade from a third party to use to cut through jail bars. (Exhibit 57; 3rdTr. 678). Trial counsel's testimony confirms the fact that counsel consciously chose not to object to avoid giving the prosecutor the opportunity to point out the details of the conviction.

Trial counsel also testified that he heard only the word "escape" in its singular form, not the plural, "escapes." Counsel should not be held ineffective for failing to object when he believed that he heard only the singular form of the word being used. *Compare State v. Lopez*, 836 S.W.2d 28, 36 (Mo. App. E.D. 1992) (holding that counsel cannot be deemed ineffective for failing to timely endorse a witness of which she was unaware); *State v. Cobb*, 820 S.W.2d 704 (Mo. App. S.D. 1991) (holding that counsel cannot be found ineffective for failing to object to a false statement made during closing argument when counsel was unaware of the statement's falsity).

Defendant failed to prove a reasonable probability that the result of his trial would have been different if not for these two comments. Two other juries—twenty-four jurors in all—have unanimously voted to sentence Defendant to death, and there is nothing to suggest that this jury would have acted any differently. The jury was also instructed that arguments of counsel "are not evidence," (3rd L.F. 638; 3rd Tr. 942), and nothing in the record suggests that it considered the prosecutor's statement as anything more than argument. *See State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996) (no ineffective assistance of counsel because failure to object was trial strategy and cautionary statement in instructions that argument of counsel is not evidence).

Defendant's reliance on *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), is entirely misplaced. The argument made in *Storey* is not comparable in any sense to the statement the prosecutor made here. In *Storey*, the defendant claimed that his counsel was ineffective for not objecting to an argument describing the murder in graphic detail as if the jurors themselves were the victims. *Storey*, 901 S.W.2d at 901. This Court held that this argument was "grossly improper" because it had asked the jurors to "put themselves in [the victim's] place, then graphically detail[ed] the crime as if the jurors were the victims." *Id.* Here, the prosecutor did not ask the jurors to "relive the crime in graphic detail," *Roberts*, 948 S.W.2d at 594, nor is it a case where the argument contained numerous "egregious errors, each compounding the other" as was the case in *Storey*. *See Kreutzer*, 928 S.W.2d at 873.

Although "[t]he [plain error and *Strickland* prejudice] tests are not equivalents," "this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the *Strickland* test." *Deck II*, 68 S.W.3d at 427-28. This is not one of those rare cases where *Strickland* prejudice can be found after an appellate court has already determined that the same claim did not constitute plain error. Moreover, this

Court did more than simply reject Defendant's direct-appeal claim based on his failure to prove manifest injustice; rather, it found "no prejudice." *Deck IV*, 303 S.W.3d at 542-43. When "a plain error point was reviewed on direct appeal and the appellate court concluded that no error occurred, the issue cannot be relitigated in a post-conviction proceeding." *Shifkowski v. State*, 136 S.W.3d 588, 591 (Mo. App. S.D. 2004); *see also Ringo v. State*, 120 S.W.3d 743, 746 (Mo. banc 2003). Since this court found no prejudice on direct appeal, Defendant cannot re-litigate this claim in a post-conviction proceeding. In any event, Defendant's case in this instance is not one of those rare cases that falls within the narrow gap between *Strickland* prejudice and manifest injustice under the plain-error standard of review.

## CONCLUSION

The motion court did not clearly error, and its judgment overruling Defendant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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STATE OF MISSOURI

## CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 27,814 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the Missouri eFiling System on March 12, 2012, to:

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