No. SC97231

In the Missouri Supreme Court

DAVID R. HOSIER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Cole County
Nineteenth Judicial Circuit
The Honorable Patricia S. Joyce, Judge

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Defendant appeals from the denial of his Rule 29.15 motion following an evidentiary hearing in the Circuit Court of Cole County.

In the underlying criminal action, Defendant was convicted by a jury of first-degree murder, armed criminal action, first-degree burglary, and unlawful possession of a firearm by a felon. §§565.020; 571.015; 569.160; 571.070.[1] (Tr. 1439-1441; LF 392-395). The jury recommended the death penalty for the murder conviction, and the court sentenced Defendant to death for murder, 15 years for armed criminal action, 15 years for burglary, and 7 years for being a felon in possession of a firearm. (Tr. 1672-1673, 1692-1694; LF 412, 531-534). The jury and the court specifically found two statutory aggravators: 1) Defendant had a serious assaultive conviction in that he was convicted of battery in Indiana because he beat Nancy Marshall about the face while she was handcuffed; and 2) the murder was committed while Defendant was engaged in the commission of another unlawful homicide, that of Rodney Gilpin. (Tr. 1672-1673, 1692-1693; LF 412, 531-534).

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[1] All statutory citations are to RSMo. (2000), as amended through the 2009 Cumulative Supplement, unless otherwise indicated. The transcript of the criminal trial will be cited as "Tr.," and the legal file as "LF." The evidentiary hearing transcript in the postconviction action will be cited as "PCR Tr." and the postconviction legal file as "PCR LF [Doc. No.]:[Page No.]"

On direct appeal, this Court affirmed. *State v. Hosier*, 454 S.W.3d 883 (Mo. banc 2015).

The evidence at trial established the following facts:

On September 28, 2009, Defendant shot and killed Angela Gilpin ("Victim"), a married woman with whom he had been having an affair which she had recently ended, and her husband, Rodney.

During the spring and summer of 2009, Defendant was involved in an on-again, off-again affair with Victim. (Tr. 782-783, 788-790, 802-803, 816-817). Defendant helped Victim get an apartment in a neighboring apartment building in Jefferson City. (Tr. 828). The relationship was "back and forth with a lot of drama." (Tr. 829).

Defendant rented an apartment on the top floor of 1107 West Main St., a building that is much higher and looks down on the apartment building at 1100 West High St. where the Victim rented. (Tr. 844, 847-848). There was a parking lot in between for the tenants of either building (Tr. 848). Defendant rented the apartment in the West Main building from August 2007 to September 2009; Victim rented the apartment in the W. High St. building from May 2009 through September 2009 (Tr. 844).

The relationship was ended by Victim near the end of August 2009, when she reconciled with her husband, Rodney (Tr. 781, 788-790). Victim's husband moved in with Victim during the late summer of 2009 (Tr. 783).

After the breakup, Defendant asked Geralyn Bleckler to try to get Victim and him back together because he didn't think Victim's husband was good enough for her (Tr. 788-89). Defendant made this request on several occasions (Tr. 789).

At the end of August, Defendant told Bleckler that he was in love with Victim and always would be, and that he thought he was the one that Victim needed and not her husband (Tr. 789-90). Defendant would get upset because he could not figure out why Victim was still with her husband (Tr. 790). Defendant told Bleckler that if Victim would not come back with him, he would "put a stop to it somehow." (Tr. 790). Defendant said if he couldn't have Victim, nobody was going to have Victim. (Tr. 790).

After Victim broke up with Defendant in late August, she dropped some items that Defendant had given her as little mementos just outside his apartment because she didn't have access to the building (Tr. 808). Defendant brought them to Bleckler's porch with a note saying he didn't want them and to give them back to Victim (Tr. 808). Bleckler delivered them to Victim, but Victim asked her to take them back to the Defendant, and they went together to Defendant's building and set them on the outside during the first or second week of September 2009 (Tr. 809).

On September 27, 2009, Bleckler returned home from watching a football game with the Victims at the Victims' apartment and there were several voice

mails from Defendant informing Bleckler that he knew she had been over there because he had seen her, and asking whether she had had time to talk to Victim about Victim's husband (Tr. 791).

Defendant then called Bleckler and told her that he knew she wasn't going to try to get him back together with Victim again (Tr. 792). Defendant also knew that Victim's husband had been there and was angry that Bleckler hadn't gotten Victim away from her husband. Exhibit 10. Bleckler told Defendant that he needed to leave Victim alone, that Victim was going to be with her husband, and that there was no sense in pursuing the situation because Victim didn't want to have anything to do with him (Tr. 792).

After that conversation, Defendant continued to call Bleckler, but she did not answer the calls and allowed them to go to voice mail (Tr. 792). Bleckler did not retrieve those messages until the next morning, when Detective Miles came to her apartment and informed her that Victim had been murdered and that another man had been murdered (Tr. 792-793). Bleckler told Detective Miles the man was probably Rodney Gilpin, and subsequently identified Rodney from a photograph (Tr. 792-793). Voice mails left by Defendant for Bleckler at 1:56 PM and 8:03 PM on September 27, 2009 were played for the jury (Tr. 798-802).

The 1:56 voice mail expressed frustration that Bleckler did not get Victim away from her husband to talk to her on his behalf. Ex. 9-10. The 8:03 voice mail said:

> Yeah, you know, I have yet to meet a woman that could do what a man ask her to do without comin up with fifty reasons why it didn't work or why it won't work, I should say, or why they couldn't do it or whatever else. I've asked you, I don't know how many times, to talk with that bitch to tell her to knock her shit off and talk to me tell me what the fuck's going on and she's come up with excuses. I told you to get that fuckin asshole away from her and talk to her when you can't do it, you've not asked her, you've not tried. Well, you know what I'm tired of the shit. I told you to tell her to get her fuckin ass out of my sight for good. Get the fuck away from here. Move back with fuckin Rodney. Get out of that god damn apartment. You didn't tell her that. I'm gonna fuckin finish it. I'm tired of the shit. You don't believe me. I'm tired of the shit.

Exs. 11-12.

During the month prior to the murders, Defendant discussed his relationship with Victim with longtime friend, Steven Armstrong, and told him that Victim was upset and wanted to break up with him and was going back to her husband (Tr. 781). Defendant was upset and called Armstrong two weeks

before the murders because he had received an eviction notice from his apartment and a restraining order (Tr. 781-782).

Both Victim and Defendant rented from the same landlord, in neighboring buildings (Tr. 843-848, 866). The landlord was aware in March or April 2009 that Victim and Defendant were having a relationship, and that Victim was staying at Defendant's apartment (Tr. 866). Very soon thereafter, Defendant made arrangements to get Victim an apartment in the High Street building (Tr. 866). Defendant told landlord during the late summer of 2009 that he had keys to Victim's apartment and that Victim had given them to him (Tr. 868). Defendant told landlord that on one occasion when Victim had threatened to kill herself, to save time, he had gone through the storage room to which he had access because he did odd jobs for the landlord, and obtained the master keys (Tr. 869). However, landlord believed that after he took Defendant off the code list for the storage room, that code was erased, and Defendant couldn't get into the storage room any longer (Tr. 869-870). Defendant did get into the storage room on one occasion after that when he did some work on a little house next to the apartment building (Tr. 870). However, the keys to the key cabinet are not there, so landlord believed that Defendant didn't have access to the key cabinet. (Tr. 870). Landlord let Defendant into the storage room during that time (Tr. 870).

During the time period of the breakup, Victim called her landlord and left a message that Defendant had entered her apartment without her permission and that she was changing the deadbolt on her door (Tr. 852-853). After the complaint, the landlord asked Defendant for the keys to Victim's apartment and informed Defendant that he did not have permission to enter the building at 1100 West High St. where the Victim's apartment was located (Tr. 854-855).

On September 21, 2009, the landlord read a letter he had received from Victim indicating that she feared Defendant and had filed for a restraining order in court, and asking whether he had other properties for rent so that she could move (Tr. 856-857).[2] On that same day, landlord learned from Jodene Scott that she believed Defendant had a felony conviction in Indiana (Tr. 858). Landlord checked out the felony conviction and then attempted to contact Defendant, but he was not home that day (Tr. 858-859).

After talking to Ms. Scott, while attempting to make contact with Defendant at his apartment, landlord was working on a defective entry door lock when a sheriff's deputy came and said he was there to serve papers on

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[2] Victim's note to the landlord stated in part: "I am writing you to inquire as to [whether] you may have any other apartment rentals anywhere else in town. I can no longer live next door to Dave Hosier. I have gone to the Court House and [filed] for a restraining order.… I'm sorry for all the B.S. Believe me, he scares me. I don't know what he will do next." (Tr. 1403; Ex. 199A).

Defendant (Tr. 864-865). Landlord informed the deputy that to his knowledge, Defendant was out of the state (Tr. 865).

On September 22, 2009, landlord contacted Defendant by phone; Defendant told landlord he was driving back from Indiana (Tr. 859). Landlord told Defendant that Victim had asked him to move out, but that he had learned of Defendant's past conviction and given the circumstances, he thought Defendant should move out by the end of the month (Tr. 860).

The landlord then replied to Victim, saying that he had asked Defendant to be out of his apartment by the end of the month and would like her to consider staying, and slipped that note under Victim's apartment door on September 22, 2009 (Tr. 857-858).

On September 23, 2009, Defendant met with police and claimed that Victim would frequently drive drunk; Defendant provided police with detailed information he kept in a notebook about Victim's habits, her vehicle information, her license information, and the various times that she went to work or left the Budweiser Inn (Tr. 881-885, 889-890, 891-894). Defendant also claimed that Rodney Gilpin sometimes drove while intoxicated and provided information about his vehicle license plate number as well (Tr. 895). A trooper who investigated the complaint advised his sergeant that it was unfounded (Tr. 884).

On September 25, 2009, Defendant told landlord that if Victim was going to be moving out, he didn't know why he couldn't remain there, but landlord told Defendant his mind was made up and that he would have to move and asked him why he had not told him about his background when he initially leased from him (Tr. 860-861). Defendant did not say or acknowledge that he would be out of his apartment by the end of the month as requested (Tr. 861).

Jodene Scott met Defendant and Victim in April 2009 when she looked at an apartment in the same building as Defendant (Tr. 816). Scott subsequently lived in the same apartment building as Defendant (Tr. 815). Scott went to garage sales and out to eat with Defendant (Tr. 815-816). Scott knew the Defendant and Victim were having an affair (Tr. 816-817). Scott worked a second job at the Bee Line convenience store in Wardsville, and knew that Victim always opened that store at 3:30 or 4 o'clock in the morning (Tr. 818).

In early September 2009, Defendant told Scott that he and Victim were having a lot of problems and that Victim was trying to get back with her husband, which Scott knew to be true (Tr. 817). Defendant expressed that he was upset with that on more than one occasion (Tr. 817).

On September 15, 2009, Victim filed a verified "Adult Abuse/Stalking Petition for Order of Protection," against Defendant, citing constant stalking, false reports made by Defendant to JCPD, and violent behavior by Defendant

in previous marriages. Ex. 200 at 2. Victim said under oath that Defendant and she were "ex-lovers," that "he knows everywhere i go, who i go with, who comes to my home and is harassing me calling JCPD for no reason[.]" [sic] Ex. 200 at 1. A copy of this document was found in Victim's purse when her body was found. Testimony described these documents as an application for an *ex parte* order of protection. (Tr. 955, 987-989).

Included within the exhibit was information Victim had provided on a form, apparently for purposes of obtaining service, describing Defendant as having a prior criminal record and "lots of firearms in his [apartment]." Ex. 200 at 5.

In addition, the documents included an "Adult Abuse/Stalking Notice of Hearing on Full Order of Protection" with a hearing date of September 24, 2009 set by the court on September 15, 2009. Ex. 200 at 6.

Within the exhibit was a typewritten piece of paper folded together with the court papers in Victim's purse and admitted into evidence (but not read or published to the jury) which listed malicious acts of vandalism against Victim and her family's property, a statement that "Now I'm really scared, for he has been evicted from his apartment," and the fact that Defendant had "a lot of guns" and that "I think he just might shoot me or my husband, or both." Ex. 200 at 9.

The week prior to the murders, Defendant stopped by Scott's workplace; Defendant said he was upset that Victim wouldn't talk to him or take any of his phone calls, that he "was really tired of being blamed for shit," and said three times that he "was going to fuck [Victim] over since she fucked him over." (Tr. 823-826, 1053).

Scott received a call from Defendant on September 27, 2009, at 9:49 PM (Tr. 818-820). Defendant wanted to come up to her apartment to give her something, but Scott told Defendant not to because she had just gotten home from work, and she was tired and had to get up the next morning to go to her regular job (Tr. 821). Defendant then said he was going to leave something on her car, including keys and instructions to take care of his stuff if something occurred or anything happened to him (Tr. 821, 1049-1050). Defendant said during the phone call that he was going to eliminate his problems. (Tr. 823).

Victim's store manager testified that she was aware that Victim had obtained a conceal and carry permit for a firearm during the spring of 2009 and was concerned with Victim's safety based on their discussions due to troubles with the Defendant rather than with the store (Tr. 878-879).

Jennifer Stubbs, who lived across from Victim in the same building, returned from out of town during the early morning hours of September 28, 2009, and saw bodies lying on the floor at approximately 3:30 AM (Tr. 762-

763). She called 911 (Tr. 764). The light in the common area of the building was left on at all times (Tr. 764-765).

Another neighbor heard pops that sounded like gunfire between 3:15 and 3:20 AM (Tr. 767). A third neighbor awoke to the sound of gunshots, heard somebody walk out the back door,[3] down the stairs, and on the rocks below his open window; this neighbor got up and looked out his window at what he estimated was approximately 3:30 AM (Tr. 771-772).

Sgt. Gary Campbell of the Jefferson City Police Department received a dispatch about a deceased person at 1100 West High St., and obtained a key from Jennifer Stubbs to get into the apartment complex within two minutes of her 911 call (Tr. 940-941). Police found Victim lying at the threshold of her apartment, partially in the open foyer, with numerous spent shell casings around the body, and found her husband lying within the apartment (Tr. 941-942, 946, 949). The shell casings were 9 mm and were present both in the foyer area and within the apartment itself (Tr. 943-944, 1041-1042). Both Victim and her husband were dead (Tr. 942).

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[3] A photograph and diagram of the buildings admitted into evidence demonstrates that the back door to Victim's building leads towards the direction of Defendant's building and that the parking lot of Victim's building was outside this back door and visible from Defendant's apartment. State's Exhibits 3 & 4.

Police also found four bullet holes in the wall of the apartment and observed that some rounds that penetrated the door also penetrated the wall (Tr. 950). Some of the bullet holes were not round holes, which is very unusual (Tr. 965). Detective Lee Tubbesing testified that he had seen those types of bullet holes before in both his military and police experience, and that the projectiles were tumbling at the time they penetrated, rather than penetrating in a nose-on fashion. (Tr. 967-968).

Victim was wearing a Bee Line shirt with the Bee Line logo on it; a Bee Line snack shop coffee cup, the handle of which appeared to have a bullet hole in it, was found in the hallway (Tr. 963, 971). The cup contained almost a full cup of coffee (Tr. 973).

Victim had gunshot wounds in the lower back, in the upper chest area, and to the back of the head (Tr. 975-976). Victim had an Application for an Adult Abuse/Stalking Order of Protection against Defendant in her purse, along with service information noting that Defendant had a prior criminal record and a lot of guns (Tr. 980, 987-988; Exs. 57, 200). Victim also had a typewritten document folded with the court documents stating that she was even more afraid now that Defendant had been evicted from his apartment and that she was afraid that Defendant would shoot her, her husband or both. Ex. 200.

Dennis Prenger, who was both Defendant's and Victim's landlord, received a call from the Police Department at 4:25 AM on September 28, 2009, and went to the scene (Tr. 861). Prenger told police that Victim was the tenant in Apartment 2 at 1100 W. High and that Victim had had problems with Defendant; Prenger gave police a copy of the letter Victim had given him (Tr. 862). Prenger also gave police a copy of the national criminal check that he ran on Defendant after being notified by Scott that she believed Defendant had a criminal record (Tr. 862). Prenger was familiar with Defendant's vehicle, and with the fact that Defendant generally parked up the street on West Main; Prenger noticed and told police that Defendant's vehicle was gone (Tr. 863-864).

At the request of police, Prenger showed them to Defendant's apartment on W. Main St. and, after they had obtained a search warrant, police went in (Tr. 864).

Steven Armstrong, who had known Defendant for 25 to 30 years and had helped him move back to Jefferson City from Indiana, knew that Defendant had brought back several weapons with him; Armstrong had had discussions with Defendant about his relationship with the Victim in the month prior to the murders (Tr. 777, 780-781). When Armstrong heard on the early morning news on September 28, 2009, that there been a double homicide and thought the address sounded familiar, he drove to the area where the police had

barricaded off the streets, and recognized it as the apartment area that the Defendant had lived in (Tr. 777, 779). Armstrong told a police officer that Defendant could be heavily armed and that there were several weapons that Defendant had in his apartment (Tr. 780).

Police used information from Armstrong, Prenger, and others to obtain a search warrant for Defendant's apartment (Tr. 1019). Police knocked on the door and announced their presence, but received no answer (Tr. 1018-20). They used a key provided by Prenger to open the door (Tr. 1020).

Immediately inside the door, Defendant had a gun safe (Tr. 1020). Inside the gun safe, police found a partial box of 9 mm ammunition (Tr. 1021). On top of the safe, police found an empty carton or box for fifty 9-mm shells (Tr. 1021, 1026). Police found a wooden chest sitting on the floor with a TV on top of it that was used for the storage of long guns, rifles or shotguns (Tr. 1021).

Inside the case was a schematic for a STEN gun, "basically a blueprint on how to make a submachine gun." (Tr. 1021). ATF agents arrived to help process the search warrant, and pointed out that the schematic or template to the STEN gun could be used to manufacture a weapon that would fire 9 mm ammunition (Tr. 1022-1023). The STEN MK II submachine gun receiver template wrapped around the metal to show the areas that could be used to manufacture a weapon out of that tube. (Tr. 1028). Half of the ammunition

inside the 9 mm box was spent and half was live (Tr. 1029). The bag of spent ammunition was in the common living area of the apartment. (Tr. 1038).

Numerous other weapons, weapon parts including speed loaders (which enable the rapid switching of ammunition in and out of a weapon), and other calibers of ammunition were found at the apartment. (Tr. 1021-1022, 1024-1025, 1027, 1030-1032, 1037-1039). Two empty packages for a speed loader were found right on top of the trash in the kitchen trash can (Tr. 1021-1022, 1030-1031).

After talking with Jodene Scott, police retrieved an envelope left on the windshield of her car (Tr. 956-958). The envelope contained keys to a self-storage locker in Holts Summit leased by Defendant and instructions to call his sister if anything happened to him. (Tr. 959).

Along with a search warrant for Defendant's apartment, police obtained an order allowing them to "ping" and track Defendant's cell phone. (Tr. 1019). After receiving information from the cell phone tracking at approximately 9:45 AM, police notified the Oklahoma Highway Patrol of the area of his last known location (Tr. 899, 927).

Troopers in Oklahoma spotted Defendant's vehicle, but Defendant refused to pull over; police from multiple Oklahoma jurisdictions were forced to engage in a pursuit down multiple highways in Oklahoma, during which

Defendant evaded a roadblock and was stopped successfully only after a second ramming maneuver (Tr. 899-901, 919-923).

Upon being stopped between 10:30 and 11:00 AM, Defendant was instructed to go to the ground at gunpoint, but refused to comply with multiple commands (Tr. 923-924, 927). Defendant said something to the effect of "shoot me, and get it over with" or "end it" numerous times. (Tr. 924). Police were extra cautious because they had received information that Defendant may be heavily armed (Tr. 925). One officer eventually took Defendant to the ground, but Defendant continued to say, "just shoot me" while he was on the ground multiple times (Tr. 925, 934).

Detective Edwards and Detective Miles of the Jefferson City Police Department flew to Tahlequah, Oklahoma; police in Oklahoma obtained a search warrant for Defendant's car and personal items. (Tr. 1054-1055).

The butt of a gun (later determined to be the murder weapon) was found next to the passenger door in the front seat of Defendant's car (Tr. 929). This weapon was later determined to be a STEN submachine gun, which fired 9 mm shells (Tr. 1066, 1068, 1075-1077, 1150). The weapon was jammed in between the passenger door and the bottom of the floorboard, with a magazine next to or underneath it (Tr. 1069). A magazine that went to the STEN submachine gun was the only one that was out of any type of bag in the car (Tr. 1068). Police found 12 other magazines to this STEN submachine gun in a duffel bag

found in the front passenger compartment, all of which were fully loaded. (Tr. 1076-1077). Each magazine held 30 rounds. (Tr. 1077).

Police found 15 guns, numerous forms of ammunition, a bulletproof vest or body armor, a crowbar or pry bar, latex gloves, a homemade police baton, two speed loaders, and a knife inside the vehicle (Tr. 1056, 1064-1065, 1066-1077, 1083-1089, 1091-1094, 1096-1103, 1108). All of the weapons inside the vehicle were loaded except for the STEN submachine gun (Tr. 1067).

A note found in the front passenger seat of Defendant's vehicle said:

> If you're going with[][4] someone, do not lie to them, do not play games with them, do not fuck them over by telling other people things that are not true, do not blame them for things that they have not done. Be honest with them and tell them if there is something wrong. If you do not, this could happen to you. People do not like being fucked with, and after so much shit they can go off the deep end. Had to [sic] much shit!

(Tr. 1081-1082; Ex. 104).

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[4] The note was read into the record with "without" substituted for "with" and a "[sic]" notation; however, the photographic exhibit of the note makes it plain that "with" was the word used (i.e., "If you're going with some one….") Ex. 104.

Inside Defendant's car, police also found a yellow notepad with information describing the license plate and a brief description of the Victim's truck (Tr. 1105-1106).

Shortly after being arrested, Defendant told Robert Sanford, a fellow inmate of a correctional facility in Leavenworth, Kansas, that an ex-girlfriend had been murdered after they had broken up and she had been involved with somebody else; Defendant expressed agitation about the breakup and her involvement with the other person (Tr. 1155-1157, 1158). Defendant said he would solve the problem and admitted to feeling he was able to kill somebody over it (Tr. 1159). Defendant also said he would possibly be physical towards the person she was involved with (Tr. 1158-1159). Defendant didn't admit that he killed anyone, but did make the statements that he was done wrong by his girlfriend and that he was capable of killing somebody. (Tr. 1160).

Defendant told Sanford that there was a way to make a gun from a semiautomatic to a fully automatic; the magazine would then come out of the side of the gun instead of the bottom (Tr. 1157-1158). Sanford testified that he thought the gun referenced had a German name, perhaps STEN Mark (Tr. 1157-1158, 1176).[5]

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[5] Sanford received no reduction in his federal sentence as the result of making the statements he testified about and no one had promised him anything in the future for testifying or making those statements, although his attorneys

The magazines to Defendant's STEN submachine gun fit into the side, as Sanford described. (Tr. 1113-1116).

Police obtained a search warrant for Defendant's storage unit in Holts Summit (Tr. 1110). Inside, they found magazines that appeared to be compatible with the STEN gun (Tr. 1113-1117, 1123-1124). Some of them had ammunition (Tr. 1124). They also found gun parts that may have been STEN or some other type (Tr. 1119). In addition, police found ammunition, ammunition cans, and various personal effects of Defendant's (Tr. 1111).

Evan Garrison, a criminalist supervisor in the firearm and toolmark section of the Missouri State Highway Patrol crime laboratory, whose primary function is to examine and compare firearms and expended ammunition to ascertain if they were fired in or from a particular firearm, testified that he was asked to test a 9 mm STEN submachine gun and expended shell casings and bullets in this case (Tr. 1181-1186). Garrison testified that the gun was designed to hold 32 rounds per magazine, but that this particular magazine would hold 33 due to a worn-out spring or its age. (Tr. 1188-1189).

Twenty-one live rounds were found in the magazine (Tr. 1189). When set in fully automatic mode, the weapon will continue firing after a single squeeze

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had told him prior to sentencing that the federal government might take that into consideration (Tr. 1166-1169, 1175).

of the trigger until the magazine is empty or until a person quit squeezing the trigger (unless there is a malfunction). (Tr. 1190-1191).

All nine of the shell casings Garrison initially received from the crime scene had agreements of class characteristics to his six test standards, which demonstrated that it was possible that they were fired in that particular firearm (Tr. 1204-1205). Due to the lack of individual characteristics as the result of the unusually smooth bore, he could not say that they were fired within that particular firearm conclusively (Tr. 1204-1205, 1221-1223).

However, there were sufficient individual characteristics to confirm that four of the cartridge cases were extracted from that particular submachine gun due to extractor marks left on the cases (Tr. 1208-1209). In addition, there were sufficient ejector marks left on five of the cartridge cases to scientifically confirm that they had been ejected from that particular STEN machine gun (Tr. 1210-1211).

A tenth cartridge case later submitted by the Police Department also contained sufficient individual characteristics to confirm that it had been ejected from that particular submachine gun (Tr. 1211-1212).

Forensic analysis of class and individual characteristics indicated that three of the expended bullets could have been fired from this particular submachine gun though there were insufficient characteristics to rise to the level of a reasonable degree of scientific certainty (Tr. 1214-1215). Two other

bullets also demonstrated sufficient agreement of class characteristics to indicate that they could have been fired from this particular submachine gun (Tr. 1215-1216). In addition, a bullet that came out of the body of Rodney Gilpin had sufficient agreement of class characteristics to indicate that it could have been fired in that particular submachine gun (Tr. 1217-1218).

A cross-comparison between tests found that all of them could have been fired from the same gun, although there were not sufficient individual characteristics to rise to a true identification between tests (Tr. 1218-1219). The primary factor preventing a more definitive conclusion was that the bore of the submachine gun was extremely smooth where there should be lands and grooves, and was very shallow (Tr. 1219, 1221-1222). A casting of the barrel indicated that the lands and grooves were worn-out or altered; Garrison could not say which. (Tr. 1220). Garrison found residual vestiges of what at one time were probably lands and grooves but the bore was very, very smooth compared to what he would expect to find in the bore of a rifle (Tr. 1222-1223).

Garrison demonstrated that an evidence marker at the scene showed a bullet impact where the bullet hit sideways as opposed to nose first, which created the need to find out what kind of gun barrel would cause a bullet to tumble (Tr. 1291-1292). Given how worn the lands and grooves were, Garrison testified that it would not surprise him "one bit" that the barrel that he examined on the STEN machine gun would cause a bullet to tumble out

because it doesn't have the spin imparted to it by adequate lands and grooves that a normal projectile would (Tr. 1220, 1292).

Special Agent Charles Tomlin of the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") assisted the Jefferson City Police Department in serving a search warrant at Defendant's residence (Tr. 1302-1303). Special Agent Tomlin testified that he found a receiver template for a STEN Mark II 9-millimeter submachine gun in Defendant's apartment, and that he had experience with a STEN submachine gun (Tr. 1303). The STEN MK II submachine gun receiver template located in Defendant's apartment was copyrighted in 1984 (Tr. 1306).

Tomlin testified that citizens can buy a parts kit on the internet and at gun shows, and could use the template to assemble the parts kit within a pipe after making cuts out of the metal, and thereby manufacture a firearm (Tr. 1304). However, a person would not be able to make an operable weapon without the additional template if they purchased only the parts kit (Tr. 1304-1305). While the parts kit is legal to own, it would not be legal to put the receiver onto the parts kit because under federal law, once assembled, it becomes an actual firearm and would be required to have a serial number (Tr. 1307).

Special Agent Tomlin accompanied Jefferson City detectives during execution of the search warrant at Defendant's storage shed and noticed two

butt stocks for a STEN gun and three other parts that were STEN receiver parts for a separate machine gun (Tr. 1308).

Special Agent Tomlin testified that he had received a certified copy of Defendant's prior felony record that included a 1993 felony in Indiana (Tr. 1309-1310).

Dr. Carl Stacy, a forensic pathologist employed by the University of Missouri, who is also the Chief Medical Examiner for Boone County, performed the autopsy of the Victim on September 29, 2009 (Tr. 1317-1320, 1324). Victim suffered four gunshot wounds to the torso and two gunshot wounds to the head (Tr. 1325). The entrance wounds of the bullets were in the front of the body and the exit wounds were on the back (Tr. 1337). One gunshot wound went into the right side of the heart (Tr. 1337). At least four bullet wounds went into the liver (Tr. 1337-1338). Victim's liver and aorta had multiple lacerations, Victim's liver was "pulpif[i]ed," Victim's spine, left kidney and spleen, as well as surrounding structures, were perforated, and Victim's kidney was pale due to massive blood loss (Tr. 1337-1338).

In addition, a gunshot wound fractured and perforated Victim's right skull (Tr. 1338-1339). Victim had a "large skull fracture" (Tr. 1351-1352). One of Victim's head wounds was just above the ear canal and the other was near the back of the head behind the ear (Tr. 1351).

Victim died as the result of gunshot wounds to the head and torso (Tr. 1339).[6]

Rodney Gilpin died as a result of three gunshot wounds to the chest; he also had a gunshot wound to the left elbow. (Tr. 1340).

During Defendant's closing argument, defense counsel stated, "[Defendant] was distraught. You can tell that by the notes." (Tr. 1431).

The jury found Defendant guilty of first-degree murder, armed criminal action, first-degree burglary, and unlawful possession of a firearm by a felon (Tr. 1439-1441).

During the penalty phase, one of Defendant's ex-wives testified that he had lost his job as a fireman with Jefferson City in 1986 and had assaulted her with their two young children present (Tr. 1464-1466). The ex-wife testified that Defendant "was really enjoying it." (Tr. 1467). The ex-wife suffered bruises from the assault and went to the doctor; in addition, she obtained an order of protection from the Defendant. (Tr. 1467). Defendant violated the order of protection, and the ex-wife eventually left the state with her children because

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[6] As Victim's clothing was removed, a projectile was recovered that had been in the clothing (Tr. 1324). The 21 remaining live rounds found in the murder weapon when seized, along with the 10 rounds submitted for examination at the crime lab, and this final round found in Victim's clothing are consistent with the normal 32-round capacity of the STEN submachine gun previously noted.

of her fear of Defendant (Tr. 1467-1468). Defendant had threatened to move the children out of the country and the statements he had made to her about the children gave her great concern for their safety (Tr. 1469-1470). The children were crying and were very, very afraid (Tr. 1470).

In September 2009, the same month as the murders, Defendant made attempts to contact the ex-wife, which she believed were designed to frighten her. (Tr. 1470-1471). Defendant left an angry voice message on her answering machine on September 25, 2009 (the Friday before the murders). (Tr. 1471).

Former Cole County Deputy Sheriff Richard Lee testified that in 1986, while serving as a Cole County Prosecutor's investigator, he had called the Sheriff's Department because of concern that Defendant was a potential threat to Sheriff's Department personnel who were trying to serve civil process upon him (Tr. 1485-1487). Defendant had come into his office to talk about an issue relating to the attempted service by the Sheriff's Department (Tr. 1485-1486). An order had been issued for a 96-hour commitment for a mental evaluation of the Defendant; Lee and Deputy Les Jobe were eventually assigned to serve it (Tr. 1487-1488). Law enforcement believed that Defendant had weapons and children in his home, and were so fearful for the neighbors in the area around his home, that they blocked the streets off, and positioned officers around Defendant's home (Tr. 1488-1489). Police were forced to negotiate with Defendant from a house across the street for approximately four hours (Tr.

1489). It was apparent that Defendant was not going to allow civil process to be served if that was possible, and officers believed it was a potential hostage situation (Tr. 1488-1489, 1494, 1498-1499).

Deputy Jobe testified that when police asked Defendant to come out, he refused to do so until police cars left, and when the deputy explained to him that they were not going to leave, Defendant said that, "We were then in a standoff." (Tr. 1510). When Defendant was asked if he intended to hurt anybody, Defendant responded that he was "prepared to do whatever he needed to do just like I was." (Tr. 1510-1511). When asked if he intended to hurt himself, Defendant responded no, he valued his own life. (Tr. 1511).

Once Defendant eventually came out of his house, as the deputy and the investigator approached, Defendant still seemed "arrogant, demanding, wanting to maintain control [of] the situation." (Tr. 1511). When told that he needed to come with them, Defendant started walking slowly backwards, and Defendant resisted when they took him into custody by struggling and trying to break free (Tr. 1511-1513).

Former Jefferson City police officer Chester Brown testified for the defense that more than 30 guns were seized from Defendant's house after the standoff ended, and that many of the guns were loaded, but not all. (Tr. 1585-1586). Defendant had been known to make threats to kill law enforcement officers at that time and was known to be armed. (Tr. 1587-1588).

Nancy Marshall, a former girlfriend of Defendant in Indiana, testified that in the summer of 1992, she told Defendant that he needed to move out of her house, and that she obtained an order of protection against him (Tr. 1515). She later rescinded the order and let him stay, but on November 21, 1992, Defendant grabbed her, took her to the basement, handcuffed her and started beating her until she lost consciousness (Tr. 1516). Marshall was taken to the hospital with a concussion and bruises on her face (Tr. 1517-1518). Defendant was convicted of assault and sentenced to eight years in prison as the result of this domestic assault. (Tr. 1518).

Detective Rick Canfield testified that he was called out to a criminal confinement, battery, and hostage situation involving Defendant where Nancy Marshall was the victim (Tr. 1520-1523). Although he had known Nancy before that, he was not able to recognize her with the injuries that she had after the assault (Tr. 1522). Nancy got out of the house only through negotiations with Defendant by the Sheriff and other officers (Tr. 1522).

After Nancy was out of the house, Defendant threatened law enforcement by saying there had better not be any confrontation or there might be a war (Tr. 1523). Defendant eluded the officers in the area trying to keep an eye on the residence and escaped the house (Tr. 1523).

Defendant later called from an adjoining county and claimed the incident was Nancy's fault because he had heard her laughing at him in a phone

conversation with another lady that he had surreptitiously recorded on Nancy's phone (Tr. 1524-1525). Defendant told police in Indiana that he had five or six firearms on him or with him and said that if anyone to started to mess with him, there would be war (Tr. 1525-1526). Defendant engaged in several such phone calls to law enforcement over a period of hours, tried to make conditions for his surrender, and did not show up at an agreed meeting for his surrender until 30-45 minutes after the agreed time (Tr. 1527-1528).

After waiving his *Miranda* rights, Defendant admitted to battering Nancy by striking her in the face, and that he confined her in the residence so that she could not leave (Tr. 1529-1530). Defendant admitted to having firearms in the residence when the confinement and battery occurred, and admitted to sitting Nancy on the toilet and striking her while she was on the toilet (Tr. 1530). Defendant said he didn't know how Nancy got the handcuffs on her, but that he had handcuffs, and that if Nancy said that he put them on her, then that must have been what happened (Tr. 1530-1531).

Ron Browning, who had been acquainted with Defendant since 1999, testified that Defendant threatened another ex-wife; Defendant said that he thought about taking her life while he lived at their property in Indiana (Tr.

1535-1537).[7] Defendant was very confrontational with the local police (Tr. 1537).

When the Brownings asked Defendant to move out, Defendant cursed, then pulled a semi-automatic gun from his car and aimed it directly at Browning (Tr. 1539). Fortunately, Browning had anticipated that Defendant might do such a thing and had his wife hold a gun on Defendant from the house during their discussion, which resulted in Defendant putting his gun down and leaving (Tr. 1538-1540).

Shortly before the homicides in 2009, Defendant showed up in Rochester, Indiana, where Browning observed that Defendant hadn't shaved in a week and had "agitated energy bouncing off of him" (Tr. 1551-1552). Because Defendant was agitated about what was going on in Missouri, Browning asked Defendant why he didn't just stay, and offered to call someone in Montana to hook him up with a place to live and a job as a short order cook with his adopted brother; Browning told Defendant, "Don't go back. There's nothing worth it."

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[7] Browning's ex-wife, Lisa, who testified for the defense, confirmed that Defendant had threatened his ex-wife with bodily harm during their divorce and had remarked that he would kill her (Tr. 1622). When Lisa learned of the double murders in Jefferson City, she moved to a place of greater safety because nobody knew where Defendant was or whether he was headed back to Indiana (Tr. 1623).

(Tr. 1552, 1573). When Browning turned around, Defendant was gone (Tr. 1552).

Victim's mother and two sons also testified concerning the loss they and Victim's new grandson had experienced (Tr. 1574-1579).

Pastor David Avery, who testified for the defense, admitted that Defendant did not request forgiveness for any of his actions and did not verbally express any remorse or regret for them (Tr. 1594).

The jury unanimously found two statutory aggravators: 1) that Defendant had a serious assaultive conviction in that he was convicted of battery in 1993 in Cass County, Indiana, because he beat Nancy Marshall about the face while she was handcuffed; and 2) that the murder was committed while Defendant was engaged in the commission of another unlawful homicide, that of Rodney Gilpin. (Tr. 1672-1673). The jury recommended a sentence of death for first-degree murder (Tr. 1672-1673).

At the sentencing hearing, the court observed that it agreed with the jury's finding and found beyond a reasonable doubt that Defendant had a serious assaultive conviction and that the murder was committed while Defendant was engaged in the commission of another unlawful homicide (Tr. 1692-1693). The court found, as did the jury, that the facts and circumstances in mitigation of punishment were not sufficient to outweigh the facts and circumstances in aggravation of punishment (Tr. 1692-1693).

The court sentenced Defendant to death for first-degree murder, 15 years in prison for armed criminal action, 15 years in prison for burglary, and seven years in prison for unlawful possession of a firearm by a felon (Tr. 1693-1695).

This Court's mandate affirming Defendant's convictions and sentences was issued on March 31, 2015, per Case.net.[8]

On June 29, 2015, Defendant filed a timely *pro se* Rule 29.15 motion. (PCR LF 2:1-6). On that same day, the motion court appointed the Public Defender to represent Defendant. (PCR LF 1:6). On July 1, 2015, appointed counsel requested an additional thirty days to file an amended motion; the motion court granted this request on July 23, 2015. (PCR LF 1:7, 6:1-3, 8:1). On September 28, 2015, appointed counsel filed a timely amended motion. (PCR LF 18:1-110).[9] On that same date, appointed counsel filed a motion to recuse Judge Joyce. (PCR LF 17:1-5).

On October 22, 2015, the motion court requested that this Court hear the motion to disqualify Judge Joyce. (PCR LF 19:1). On October 29, 2015, this

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[8] On March 31, 2015, this Court set Defendant's "initial date of execution" for July 10, 2015, per Case.net. On April 14, 2015, this Court issued an order staying Defendant's execution "until further order of the Court" per Case.net. On October 5, 2015, the United States Supreme Court denied Defendant's Petition for a Writ of Certiorari.

[9] September 27, 2015, fell on a Sunday so the motion was due on Monday, September 28, 2015. Rule 44.01(a).

Court issued an order assigning Judge Oxenhandler of Boone County to hear the matter; on November 3, 2015, this Court amended its order to clarify that Judge Oxenhandler's role was limited to hearing the motion to disqualify Judge Joyce. (PCR LF 20:1, 24:1).

On September 19, 2017, Judge Oxenhandler held an evidentiary hearing on the motion to disqualify at which Judge Joyce testified; Judge Oxenhandler subsequently issued an order denying the motion to disqualify. (PCR LF 26, 27, 28, 29:1-2, 36:1-24).

On October 25, 2017, the motion court held an evidentiary hearing. (PCR Tr. 1-121).

On May 17, 2018, the motion court issued Findings of Fact, Conclusions of Law, and a Judgment denying relief. (PCR LF 40:1-12).

On June 14, 2018, Defendant filed a timely notice of appeal. (PCR LF 44:1-2).

ARGUMENT

I.

The motion court did not clearly err by holding that Defendant failed to overcome the presumption of reasonable trial strategy and that counsel was not ineffective for failure to stipulate to his prior conviction for battery of another woman for purposes of the felon-in-possession count because the defense to that count was that Defendant had received a suspended imposition of sentence, counsel attempted to prevent admission of the exhibit proving the offense, and counsel obtained a redaction of the record which enabled Defendant to claim that an SIS precluded a conviction. Moreover, penalty phase counsel testified credibly that she desired the jury to know of the domestic battery so it would not come as a surprise during penalty phase. Finally, Defendant was not prejudiced where he was caught with the murder weapon among an arsenal of weapons in a vehicle he used to flee the state after the murder, Defendant evinced consciousness of guilt by fleeing police and urging them to end the matter by killing him, and Defendant left numerous notes evidencing his premeditated plan to kill Victim because she jilted him even as Victim sought orders of protection because she feared Defendant.

Defendant claims counsel was ineffective for failing to stipulate to a prior battery against another female victim for purposes of the charge that he was a felon in possession of a firearm. Defendant's prejudice claim is that, but for this failure to stipulate, Defendant may have been acquitted of first-degree murder. Defendant does not contend that the jury would not have imposed the death penalty.

A. Standard of review

The motion court's ruling is presumed correct. *McLaughlin v. State*, 378 S.W.3d 328, 336-337 (Mo. banc 2012). Its judgment will be overturned only when its findings of fact or conclusions of law are clearly erroneous. *Id.*; Rule 29.15(k). To overturn, the ruling must leave the appellate court with a "definite and firm impression that a mistake has been made." *Id.* at 337 (quoting *Zink v. State*, 278 S.W.3d 170, 175 (Mo. banc 2009)).

To be entitled to post-conviction relief for ineffective assistance of counsel the defendant must show by a preponderance of the evidence that his attorney failed to exercise the level of skill and diligence that a reasonably competent attorney would exercise in a similar situation, and that he was thereby prejudiced. *McLaughlin v. State*, 378 S.W.3d 328, 337 (Mo. banc 2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The court must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional

assistance. *Strickland*, 466 U.S. at 689. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id*. at 690. Substantial deference must be accorded to counsel's judgment. *Id*. at 689.

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at 690-691. "Counsel will not be deemed ineffective for reasonable choices of trial strategy

no matter how ill-fated they may appear in hindsight." *Bracken v. State*, 453 S.W.3d 866, 872 (Mo. App. E.D. 2015).

The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "[T]he purpose of the effective assistance guarantee of the Sixth Amendment … is simply to ensure that criminal defendants receive a fair trial." *Id.* at 689. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

The prejudice prong of the *Strickland* test requires the movant to demonstrate that "there is a reasonable probability that, but for [c]ounsel's errors, the outcome of the proceedings would have been different." *Nelson v. State*, 372 S.W.3d 892, 895 (Mo. App. E.D. 2012). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.... The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 691-692. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ...

not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693.

"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. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695-696.

"It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006); *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005).

"If either the performance or the prejudice prong of the test is not met, then" this Court "need not consider the other, and Movant's claim of ineffective assistance of counsel must fail." *Gold v. State*, 341 S.W.3d 177, 181 (Mo. App. S.D. 2011) (internal quotation marks omitted).

This Court defers to "the motion court's superior opportunity to judge the credibility of witnesses." *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014); *Davis v. State*, 486 S.W.3d 898, 905 (Mo. banc 2016).

B. The motion court's holding

The motion court held:

Trial counsel had the opportunity to stipulate that movant was a prior convicted felon and the state offered said stipulation as suggested in the Notes on Use to the applicable pattern instruction in MAI-CR3d. Counsel was aware of the ability to stipulate but did not enter into a stipulation based on their decision to oppose the admission of the prior certified conviction record. Counsel then obtained a court order masking parts of the record before it was sent back to the jury as an exhibit. The redacted record was sent back to the jury after the jury had requested to see it. Part of the record allowed the defense to argue that it was an SIS (suspended imposition of sentence) and therefore would not support a conviction for Felon in Possession. This was part of trial strategy in two separate ways. One was that a portion of the record as presented to the jury allowed the defense to argue that the prior was a suspended imposition of sentence (SIS) so that he could not be found guilty of being a felon in possession of a firearm. The second component of trial strategy was that the jury should know the prior felony was a domestic battery so that they would not be surprised by it in the second phase. Defense counsel testified she discussed this matter with co-counsel.

In the present case, movant has failed to carry his burden of proof that trial counsel's decision not to stipulate was not reasonable trial strategy. The SIS argument was made by the defense in closing

argument pursuant to this reasonable strategy. The second part of the trial strategy on this issue was also reasonable. This was a strong case by the state to convict of first degree murder. The jury would find out that the felony conviction was domestic battery not only by the certified record, but through the testimony of that victim as well. Movant has also failed to show any prejudice to him from a failure to stipulate.

(PCR LF 7-8).

C. The motion court's holding is not clearly erroneous.

1. Reasonable trial strategy

Trial counsel, Don Catlett, had tried "in excess of 150" criminal cases as a criminal defense attorney in both Houston, Texas and in Missouri, including nine capital cases. (PCR Tr. 72). He had been the District Defender in Cole County for four years. (PCR Tr. 72). Counsel Catlett testified that "I think there was some question about the certification that came with the record" of the Indiana conviction. (PCR Tr. 75).

Co-counsel Janice Zembles had been a public defender for 24 years, had worked as a capital trial attorney for 20 years, and was the District Defender in the capital trial office for thirteen years. (PCR Tr. 78). Zembles was primarily responsible for the penalty phase of the trial. (PCR Tr. 79).

Zembles testified that the defense had a reason for not stipulating to Defendant's status as a prior felony offender based on the Indiana conviction.

(PCR Tr. 85-86). Under the abstract of judgment, which contained "additional comments and recommendations by the judge" was typed: "Defendant is given 36 days jail time-good time credit. Court recommends Defendant be given psychiatric treatment." (PCR Tr. 86). Zembles further testified that she wanted the information about the incident out in guilt phase because in her experience, "jurors in death penalty cases don't like to be surprised a lot in the penalty phase with information that they think was withheld from them in the first phase." (PCR Tr. 86). She knew the jury would find out about the Indiana conviction and that the "woman referenced in these documents" was listed or called as a witness. (PCR Tr. 86). "So the jury was going to find out about the details of this incident in Indiana that resulted in his conviction." (PCR Tr. 87). She had previously made a mistake in keeping something from a jury in the first phase of the trial when she was "pretty sure there's gonna be a second phase of the trial." (PCR Tr. 87). Whether the reason was a good reason or a bad reason was for someone else to judge; but she "did have a reason." (PCR Tr. 87). While Zembles did not remember, she was sure she had discussed this reaon with co-counsel. (PCT Tr. 87).

Even if Defendant's 20/20 hindsight claim that a stipulation would have been reasonable trial strategy is true, "[i]t is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another

reasonable trial strategy." *Anderson*, 196 S.W.3d at 33; *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005).

2. No prejudice

Moreover, there was no prejudice where Defendant was caught with the murder weapon (and an arsenal of others) in his car after fleeing the state following the murder and evading the police before urging them to end it by shooting him, evincing consciousness of guilt. Defendant contemporaneously told multiple people he intended to end his problems and expressed his hostility towards Victim's jilting of him to others and explained this motive in a note found in his car. Victim was in the process of seeking a protective order against him and told her landlord she feared what he would do next.

Finally, Victim Marshall from the Indiana case did, in fact, testify during penalty phase, as did an officer involved in Defendant's escape, subsequent standoff threatening "war" against law enforcement in that incident, belated surrender, and partial confession. (Tr. 1513-1520, 1521-1533).

The motion court's holding is not clearly erroneous. Defendant's first point should be rejected.

II.

The motion court did not clearly err by denying Defendant's claim that counsel was ineffective for failing to file a motion to sever the felon-in-possession-of-a-firearm charge in writing because Defendant failed to prove his claim of *Strickland* prejudice, which is that the trial court would have granted it, because the motion court held that, sitting as the trial court, it had given consideration to the motion and still would have denied it. Moreover, Defendant failed to overcome the presumption of reasonable trial strategy where the motion court credited penalty phase counsel's testimony that the defense desired the Indiana incident evidence to come out in the guilt phase to prevent the jury from believing during penalty phase that information had been withheld from them.

Defendant's second point contends that the motion court erred by holding that trial counsel was not ineffective for failing to file a motion to sever the felon-in-possession count in writing. Defendant did raise an oral motion to sever at least once and, according to counsel's statement in the record, twice. (Tr. 475). Defendant's sole claim of prejudice on this point is that the trial court denied the oral motion but would have granted the motion if it had been in writing, and thereby prevented the jury from hearing about the Indiana incident and the additional guns in Defendant's car that were not the murder

weapon during the guilt phase. (App. Br. 24, 51). Defendant does not dispute that this evidence would have come in during penalty phase.

The motion court held that, while sitting as the trial court, it had considered the motion to sever even though it was not filed in writing, and further held that "there was no prejudice to movant as this Court conducted the trial and, had a written motion to sever been filed, it would have been denied." (PCR LF 40:8).

The motion court further held that "the reasonable trial strategy set out" in the claim forming Point I on appeal "was to let the jury know in advance of the second phase that movant had a domestic battery conviction so the jurors would not be surprised in the second phase." (PCR LF 40:8).

The motion court concluded that Defendant "has failed to show any prejudice" from "trial counsel's failure to file a motion to sever Count IV in writing." (PCR LF 40:8).

The standard of review is as outlined in the argument under Point I.

"If either the performance or the prejudice prong of the test is not met, then" this Court "need not consider the other, and Movant's claim of ineffective assistance of counsel must fail." *Gold v. State*, 341 S.W.3d 177, 181 (Mo. App. S.D. 2011) (internal quotation marks omitted).

Here, trial counsel's alleged error in the form of the motion to sever Defendant concedes the defense raised was not the basis for adverse trial court

action. Counsel did move to sever and the court fully considered the motion to sever as though it had been filed in writing. (PCR LF 40:8). Defendant's claim of *Strickland* prejudice—that the motion would have been granted if it had been filed in writing—is expressly refuted by the motion court's factual finding that the motion had been fully considered as though it had been filed in writing and that it would still have been denied if it had been so filed. (PCR LF 40:8). Thus, Defendant failed to prove his sole claim of *Strickland* prejudice.[10]

Moreover, counsel failed to overcome the presumption of a reasonable trial strategy where, as to both the claim raised in Point I and this claim, the motion court credited the testimony of counsel Zembles that the strategy in light of the likelihood of a penalty phase was to prevent the jurors from feeling

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[10] Defendant cannot and does not raise a claim of trial court error in the denial of the motion to sever in this Rule 29.15 postconviction action. Nor does Defendant argue in this point that a different result would have been reached on appeal. Even if he had, the failure to preserve an issue for direct appeal is not a cognizable post-conviction relief claim. *Dickerson v. State*, 269 S.W.3d 889, 893 n.3 (Mo. banc 2008). Defendant is limited to the claims pled in the amended motion. "There is no plain error review of post-conviction judgments." *Hoskins v. State*, 329 S.W.3d 695, 697 (Mo. banc 2010). Nor did Defendant make a particularized showing of prejudice where the murder weapon and incriminating statements were found in his car after his middle of the night flight evincing consciousness of guilt, and there was extensive other evidence of guilt, including threats to Victim. The penalty phase was not impacted because the jury would have heard the evidence in that phase anyway. Counsel's reasonable trial strategy accounted for both the latter factors, as the finding of fact of the motion court held, and attempted to minimize insofar as possible the impact on the key decision the jury would make: death penalty or no death penalty?

unfavorable information had been withheld from them in guilt phase by putting that information out early. This Court defers to the motion court's factual findings and credibility findings. *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014); *Davis v. State*, 486 S.W.3d 898, 905 (Mo. banc 2016). The motion court was free to believe or disbelieve any evidence, whether contradicted or undisputed. *Mendez v. State*, 180 S.W.3d 75, 80 (Mo. App., S.D. 2005). The court was free to believe none, all, or part of any witness' testimony. *State v. Cook*, 104 S.W.3d 808, 813 (Mo. App. W.D. 2003). An appellate court must assume the trial court believed the testimony consistent with its judgment. *Id*.

Defendant's second point should be rejected.

III.

The motion court did not clearly err by holding that appellate counsel was not ineffective for failing to appeal the denial of his motion to sever the felon-in-possession count under a plain-error standard because appellate counsel is not ineffective for failing to appeal unpreserved error, and experienced appellate counsel made a "reasoned decision" not to include this claim, while raising numerous others, because there was no plain error.

Defendant's third point contends that appellate counsel was ineffective for failing to raise the denial of severance of the felon-in-possession charge on appeal as a plain-error claim.

A. Standard of review

The standard of review for claims of ineffective assistance of counsel is as outlined in the argument under Point I.

The standard for reviewing a claim of ineffective assistance of appellate counsel is essentially the same as that used in a similar claim against trial counsel. *Mallett v. State,* 769 S.W.2d 77, 83 (Mo. banc 1989). The movant is expected to show both a breach of duty owed by counsel to the defendant and the prejudice resulting therefrom. *Id.* "[S]trong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a

competent and effective lawyer would have recognized it and asserted it." *Reuscher v. State,* 887 S.W.2d 588, 591 (Mo. banc 1994).

"There is no duty to raise every possible issue on appeal." *Sanfilippo v. State*, 143 S.W.3d 765, 769 (Mo. App. S.D. 2004), quoting *Parham v. State*, 77 S.W.3d 104, 107 (Mo. App. S.D. 2002). The U.S. Supreme Court has held that appellate counsel need not and should not raise every non-frivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

To be entitled to relief, a movant must show that, had appellate counsel raised the error, there is a reasonable probability that the outcome of the appeal would have been different. *Mallow v. State*, 439 S.W.3d 764, 770 (Mo. banc 2014). Counsel is not ineffective for failing to raise a meritless issue as the result would not have changed and the conviction would not have been reversed. *Bryan v. State*, 134 S.W.3d 795, 801 (Mo. App. S.D. 2004).

An attorney will not be held ineffective for failure to raise unpreserved error on appeal. *Honeycutt v. State*, 54 S.W. 3d 633, 650 (Mo. App. W.D. 2001); *Ham v. State*, 7 S.W. 3d 433, 442 (Mo. App. W.D. 1999).

B. The motion court's holding

The motion court found, after hearing testimony from appellate counsel, that:

> Appellate counsel Craig Johnston testified he considered every point in the motion for new trial. In considering the failure to sever issue, he determined it would have been reviewed under plain error as trial counsel had failed to file a written motion. Appellate counsel made a reasoned decision to not include that issue in the direct appeal. Further, there was no prejudice to movant.

(PCR LF 40:8-9).

C. The motion court's holding is not clearly erroneous.

Craig Johnston testified that he had been a public defender for over thirty years. (PCR Tr. 39). He always considered every point raised in the motion for a new trial when preparing an appellate brief. (PCR Tr. 43). Mr. Johnston believed that because Rule 24.07 required a motion for severance to be filed in written form, he did not believe the failure to sever the counts fit within the plain error rule. (PCR Tr. 43-44).

Because Defendant failed to meet his burden to overcome the presumption that the highly experienced Mr. Johnston exercised reasonable appellate strategy, because an attorney will not be held ineffective for failure to raise unpreserved error on appeal, and because there was no plain error to raise, Defendant's third point should be rejected. *Honeycutt v. State*, 54 S.W.3d at 650; *Ham v. State*, 7 S.W.3d at 442.

IV.

The motion court did not clearly err by denying Defendant's claim that counsel was ineffective for failing to call "a psychiatrist, such as Dr. Harry" in penalty phase to testify that Defendant had areas of brain damage and lesions from a stroke because Defendant instructed that he did not want such a defense presented to the jury, Defendant failed to identify a specific witness to testify at trial, there is "nothing in the record to suggest a mental defense expert would have helped movant in his trial[,]" and Defendant was not prejudiced where, after hearing such testimony, the motion court held that the testimony of Dr. Harry would not have made a difference.

Defendant's fourth point contends that counsel was ineffective for failing to call an unspecified psychiatrist "such as Dr. Harry" to testify during penalty phase that Defendant had areas of brain damage and lesions from a stroke. After hearing Dr. Harry's testimony, the motion court concluded that it would not have helped Defendant or made a difference in the outcome at trial.

A. Standard of review

The standard of review for claims of ineffective assistance of counsel is as outlined in the argument under Point I.

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. *Deck v. State*, 381 S.W.3d 339, 346 (Mo. banc 2012). To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense. *Id.* "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005) (quoting *State v. Jones*, 885 S.W.2d 57, 58 (Mo. App. W.D. 1994)).

Because Defendant is challenging counsel's failure to call certain witnesses during the penalty phase, a "viable defense" is one in which there is a reasonable probability that the additional mitigating evidence that witness would have provided would have outweighed the aggravating evidence presented by the prosecutor, resulting in the jury voting against the death penalty. *Barton v. State*, 432 S.W.3d 741, 757 (Mo. banc 2014).

"[S]trategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable[.]" *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. 2006) (quoting *Strickland*, 466 U.S. at 690); *McLaughlin v. State*, 378 S.W.3d 328, 377 (Mo. banc 2012). "Reasonable choices of trial strategy, no matter how ill-fated they appear in

hindsight, cannot serve as a basis for a claim of ineffective assistance." *Barton v. State*, 432 S.W.3d 741, 749 (Mo. banc 2014). Counsel is not ineffective for pursuing one trial strategy to the exclusion of another. *Id*. at 750. Even where "it might have been a reasonable trial strategy to call" an additional witness to testify, "counsel is not ineffective for pursuing one trial strategy to the exclusion of another." *Id*. at 751.

"When counsel is charged with failing to conduct an adequate investigation we look to whether [he] fulfilled [his] obligation to either conduct a reasonable investigation or to make a reasonable decision that a particular investigation was unnecessary." *Hill v. State*, 301 S.W.3d 78 (Mo. App. S.D. 2010), quoting *Fisher v. State*, 192 S.W.3d 551, 555 (Mo. App. S.D. 2006). "'[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.'" *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008) (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)).

The motion court is not required to believe a witness's testimony, and the appellate court defers to the motion court's credibility determinations. *Watson v. State*, 210 S.W.3d 434, 437 (Mo. App. S.D. 2006). The motion court was free to believe or disbelieve any evidence, whether contradicted or undisputed. *Mendez v. State*, 180 S.W.3d 75, 80 (Mo. App. S.D. 2005). The

finding of the motion court that the evidence did not support this error is sufficient to reject an allegation that trial counsel was ineffective. *Garrison v. State*, 992 S.W.2d 898, 902 (Mo. App. E.D. 1999).

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691.

Defendant cannot invite error and then complain of it on appeal. "It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Mayes*, 63 S.W.3d 615, 632 n. 6 (Mo. banc 2001), quoted in *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012).

B. The motion court's credibility finding defeats the claim.

In *Barton v. State*, *supra*, a defendant sentenced to death claimed that counsel was ineffective for failing to call, among others, "a doctor to testify that, due to a brain injury," the defendant "was predisposed to violent impulsive acts[.]" *Barton*, 432 S.W.3d at 757. Counsel testified "that it was their desire[,]" even during penalty phase, "to avoid presenting any witnesses whose testimony would have made it more likely that [the defendant] committed the crime." *Id*. Counsel further testified that the defendant "did not want to present any witnesses to beg for his life." *Id*.

Despite testimony from a doctor at the evidentiary hearing "that it was his opinion that" the defendant "suffered some impulse control issues due to a brain injury suffered" when the defendant "was young[,]" this Court held that counsel's strategy "to use the jury's residual doubt of" the defendant's "guilt to argue against the death penalty" was "reasonable" and that the defendant had "not demonstrated that his counsel's strategy was unreasonable, only that a reasonable alternative strategy existed." *Id.* at 758.

Here, as in *Barton*, the motion court found that the doctor's testimony, as presented at the evidentiary hearing, would not have affected the result. *See, id.* "There is nothing in the record to suggest a mental defense expert would have helped movant in his trial." (PCR LF 40:10). This appellate court defers to the motion court's credibility determinations. *Watson v. State*, 210 S.W.3d at 437.

The jury was aware that Defendant had a decades-long history of violence and threats of violence; he had engaged in multiple police standoffs, including one where he had threatened a "war," and had threatened to engage or engaged in violence towards multiple women, his own children, and at least one man in the 1980s and the 1990s, long before the alleged stroke in 2007.

The jury found the statutory aggravator involving the hours-long beating of a handcuffed Nancy Marshall into unconsciousness took place in the early 1990s. As in *Barton*, informing them that Defendant was now more, rather

than less likely to engage in future violence because of an alleged medical condition was not reasonably calculated to help his case, particularly where the jury had found a second statutory aggravator, an additional murder. Hence, the proposed testimony did not "unqualifiedly" support Defendant. "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *Worthington v. State*, 166 S.W.3d at 577; *State v. Jones*, 885 S.W.2d at 58.

"Movant was in no way prejudiced by his trial counsel following his wish to not present a mental defect expert to the jury in this case." (PCR LF 40:10). "It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Mayes*, 63 S.W.3d at 632 n. 6, quoted in *State v. Bolden*, 371 S.W.3d at 806. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691.

Defendant's fourth point should be rejected.[11]

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[11] Dr. Harry testified that according to one test but not another, Defendant may have had a trans-ischemic attack or stroke in 2007, which may have exacerbated preexisting depression that he already suffered due to the murder of his father when he was a teenager, job woes, and marital failures. (PCR Tr. 18-33). The murder took place on September 28, 2009. (Tr. 940-941).

V.

The special judge appointed by this Court did not abuse his discretion by holding that Judge Joyce was not disqualified from presiding over this post-conviction case because she filed a child support collection action against Defendant as an assistant prosecutor in 1988 because the special judge found that no reasonable person would have a factual basis to find even an appearance of impropriety where Judge Joyce represented the State of Missouri in thousands of such actions, had no contact with Defendant or his ex-wife, did not recall the case from 25 years earlier (which was litigated by another attorney before the administrative hearing commission), and no evidence was adduced that Judge Joyce showed any prejudice against Defendant on the basis of that child support matter or that it had anything to do with the former spouse's testimony in the penalty phase of the criminal trial (which was not at issue in the post-conviction case).

Defendant's fifth point contends that Special Judge Oxenhandler (who was appointed by this Court to adjudicate Defendant's motion to disqualify Judge Joyce from serving as the motion court) erred by holding that "[n]o reasonable person would have a factual basis to find even an appearance of impropriety by Judge Joyce or doubt the impartiality of the Joyce Court" on

the basis of her alleged 1988 nominal representation of Defendant's ex-wife in one of thousands of child-support enforcement actions Judge Joyce filed on behalf of the State of Missouri as an assistant prosecuting attorney. Notably, Defendant filed no motion to disqualify Judge Joyce at trial and raised no such issue on direct appeal.

A. Standard of review

"While it is generally beneficial for the trial judge to conduct post-conviction hearings, principles of fundamental fairness may require disqualification in some circumstances." *McLaughlin v. State*, 378 S.W.3d 328, 338 (Mo. banc 2012). Disqualification is required where there "is an objective basis upon which a reasonable person could base a doubt" about the impartiality of the court. *Id*. The objective basis providing a "disqualifying bias or prejudice must be one emanating from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learns from participation in the case." *Id*.

"It is presumed that a judge acts with honesty and integrity and will not preside over a trial in which he or she cannot be impartial." *Id*. (internal quotation marks omitted).

"This Court reviews the court's determination as to whether disqualification is required for an abuse of discretion." *Id*. Having the same judge during the post-conviction relief proceeding and at the trial, by itself,

does not amount to a disqualifying bias or prejudice. *Id*. "The imposition of the death penalty by the trial judge, or even a continuing belief by the judge after the postconviction hearing that the penalty is warranted, does not impinge on a judge's ability to impartially consider the claims presented in the Rule 29.15 motion." *Id*.

B. The special judge's holding and findings

On October 22, 2015, the motion court requested that this Court hear the motion to disqualify Judge Joyce. (PCR LF 19:1). On October 29, 2015, this Court issued an order assigning Judge Oxenhandler of Boone County to hear the matter; on November 3, 2015, this Court amended its order to clarify that Judge Oxenhandler's role was limited to hearing the motion to disqualify Judge Joyce. (PCR LF 20:1, 24:1).

On September 19, 2017, Special Judge Oxenhandler held an evidentiary hearing on the motion to disqualify at which Judge Joyce testified; Special Judge Oxenhandler subsequently issued an order denying the motion to disqualify. (PCR LF 26, 27, 28, 29:1-2, 36:1-24).

1. Judge Joyce did not represent Defendant's ex-spouse.

After an evidentiary hearing at which Judge Joyce testified, Special Judge Oxenhandler issued the following order:

> After due consideration of the pleadings, the evidence adduced at hearing and the suggestions of counsel, the Court finds that in 1988, 25

years before Movant's criminal trial, while Judge Joyce served as an assistant prosecuting attorney for Cole County, Missouri, Judge Joyce represented the State of Missouri in a child support collection wherein the movant was the respondent. Twenty-five years later, Movant's spouse at the time of the child support collection case (ex-spouse at the time of the trial) appeared as a State's witness in the penalty phase of Movant's criminal trial. Judge Joyce was the presiding judge. Though movant has suggested that Judge Joyce represented the Movant's then-spouse in the child support collection matter, such was not the case: Judge Joyce represented the State of Missouri.

(PCR LF 29:1).

2. Judge Joyce had no recollection of the case.

Judge Oxenhandler further held:

… Judge Joyce neither met the Movant's then-spouse or the Movant, nor did Judge Joyce ever attend a hearing with regard to the child support collection matter. In fact, the collection case was one of but thousands in which Judge Joyce participated. Further, until the Movant filed his motion to disqualify Judge Joyce on 9-28-15, Judge Joyce had no recollection of her past representation of the State of Missouri in an action for child support collection against Movant.

(PCR LF 29:1).

3. Judge Joyce objectively demonstrated no bias.

In addition, Judge Oxenhandler found:

> Further, not a scintilla of evidence was introduced that Judge Joyce demonstrated in any fashion that she recalled her past representation or that she acted in any manner that indicated that her past representation of the State impacted upon *any* decisions that she made or might make in Movant's case.

(PCR LF 29:1) (emphasis original).

4. No reasonable person would have a factual basis to find an appearance of impropriety or doubt the court's impartiality.

Judge Oxenhandler concluded:

> Movant has failed to demonstrate to ***any*** degree of certainty a factual basis for a reasonable person to find an appearance of impropriety and, in turn, call the impartiality of the Court into question:
>
> - The prior case on which movant bases his argument took place 25 years before this pending matter;
> - Judge Joyce did not represent Movant's then-wife, she represented the State – there was no direct conflict;
> - [T]he case was insignificant, just one of many thousands of the child support collection cases that Judge Joyce handled;

- Judge Joyce had no recollection of the case, nor did Judge Joyce suggest in any fashion that she recalled the case, nor is there the slightest suggestion that she showed any prejudice to the Movant predicated upon the past child support matter; and
- [N]o evidence was adduced that the prior child support collection case had anything to do with the testimony that Movant's former spouse gave in the penalty phase of Movant's criminal trial.

No reasonable person would have a factual basis to find even an appearance of impropriety by Judge Joyce or doubt the impartiality of the Joyce Court.

(PCR LF 29:1-2).

Special Judge Oxenhandler therefore denied the motion to disqualify. (PCR LF 29:2) (emphasis original).

C. The special judge appointed by this Court did not abuse his discretion.

The motion court held that this "issue was litigated in this case before a special judge appointed by the Supreme Court. This court file which the Court takes judicial notice of contains the entry by that judge. No conflict of interest was found in this case." (PCR LF 40:12).

Proof "of a disqualifying bias or prejudice requires the assertion of objective facts suggesting that as a result of an *ex parte* contact, a reasonable person could conclude that a judge received extra-judicial information which influenced a decision on the merits." *Martin v. State*, 526 S.W.3d 169, 188 (Mo. App. W.D. 2017).

Here, there is no demonstration that a reasonable person could find that Judge Joyce's rulings as the motion court were influenced by a prior child support matter she had not remembered from 25 years earlier. Such an obscure matter, among thousands she handled, where she never met either party and did not go to a hearing, pales in comparison to the evidence at trial of Defendant's violent history and multiple murders.

This case is not remotely like *Anderson v. State*, 402 S.W.3d 86 (Mo. banc 2013). In *Anderson*, the court had extrajudicial communications with the foreman of the jury and announced an opinion which referenced that contact. *See, id*. Moreover, in *Anderson*, this Court held that Rule 2-2.11(A)(1) requires disqualification only when a "judge appears to be biased by an extrajudicial source" that "results in an opinion on the merits on some basis other than what the judge has learned from the judge's participation in a case." *Id*. at 91-92.

Here, the maxim that a "judge should withdraw from a case only when the facts show prejudice to such an extent so as to evince a fixed prejudgment and to preclude a fair weighing of the evidence" applies. *Martin*, 526 S.W.2d at

184 (quoting *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 698 (Mo. App. E.D. 1990)). "Prejudice is the attitude of personal enmity towards the *party* or in favor of the adverse party to the other's detriment." *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 697 (Mo. App. E.D. 1990) (emphasis original). "Prejudice is in the personal sense rather than in the judicial sense." *Id.* "Prejudice refers to a mental attitude or spirit of ill-will against one of the litigants, or a favoritism towards one of them." *Id.* "An impersonal prejudice resulting from background experience is insufficient." *Id.*

An impartial judge appointed by this case found no such fixed prejudgment or ill-will, nor the appearance of the same.

Defendant's fifth point should be rejected.[12]

[12] Defendant's attempts to conflate arguments concerning the judge's presiding over the trial, which was never challenged in the criminal case, with those pertaining to the motion at issue, which related solely to her presiding over the postconviction case. Such attempts should also be rejected. *See,* Point VI, *infra*.

VI.

Defendant waived his claim that the trial judge was biased by failing to raise the issue in his criminal trial or on direct appeal. The claim is not cognizable in this Rule 29.15 action. In any event, the special judge appointed by this Court found no such bias and that finding was not an abuse of discretion.

Defendant's sixth point contends that Judge Joyce was obligated to *sua sponte* recuse herself as the trial judge in the criminal case—not the present action—based on a child-support enforcement action she did not remember from 25 years earlier despite no motion from Defendant. Defendant did not raise this issue at trial or on direct appeal and has waived it. *See, McLaughlin v. State*, 378 S.W.3d 328, 345 (Mo. banc 2012) (claim of trial court error not cognizable in a Rule 29.15 proceeding). Defendant makes no claim that trial counsel was ineffective for failing to raise this issue.

In any event, a special judge appointed by this Court held there was no such bias. The motion court held that the "same analysis" from Point V "shows there was no conflict of interest in the criminal case as well." (PCR LF 40:12).

Rule 2-2.7 of the Code of Judicial Conduct provides that: "A judge shall hear and decide matters assigned to that judge, except when recusal is appropriate under this code or other law."

Rule 2-2.11 of that Code governs "Recusal." Rule 2.2-11(A) provides in relevant part that:

> A judge shall recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer or knowledge of facts ***that are in dispute in the proceeding*** that would preclude the judge from being fair and impartial.
>
> (2) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household is:
>
> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
>
> (b) acting as a lawyer in the proceeding;
>
> (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
>
> (d) likely to be a material witness in the proceeding.
>
> (3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has an

economic interest in the subject matter in controversy or in a party to the proceeding.

(4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer ***in the matter in controversy***, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official ***concerning the proceeding***, or has publicly expressed in such capacity an opinion ***concerning the merits of the particular matter in controversy***;

(c) was a material witness ***concerning the matter***.

Rule 2-2.11(A), Code of Judicial Conduct (emphasis added).

Here, the judge had not served as a lawyer "in the matter in controversy" or served as a government lawyer "concerning the proceeding" and had not publicly expressed "in such capacity" an opinion "concerning the merits of the

matter in controversy." *Id*. Nor was Judge Joyce a "material witness concerning the matter." *Id*. Hence, recusal was not required.

Nor could the judge's impartiality reasonably be questioned, for the reasons found by the special judge appointed by this Court, as demonstrated in the argument under Point V.

Point VI should be rejected.

VII.

The motion court did not clearly err by holding that trial counsel was not constitutionally ineffective for failing to strike Juror Moulton because the decision to strike a venireperson is generally one of trial strategy, and Defendant failed to meet his burden to overcome the presumption of reasonable trial strategy. For example, there were other venirepersons the defense could reasonably have deemed to be higher-priority strikes, whereas this venireperson was open to evidence of "circumstances that drove" the defendant "to this," and the venireperson had a relative who had committed an armed robbery. Moreover, mere tactical errors do not constitute constitutionally ineffective assistance of counsel.

Defendant's seventh point contends that the motion court clearly erred by holding that Defendant failed to overcome the presumption of reasonable trial strategy when counsel declined to "strike Juror Moulton" because he strongly favored the death penalty in his juror questionnaire. Defendant does not expressly state whether a strike for cause should have been attempted or whether a peremptory strike should have been used. The motion court found that the defense team had a jury consultant who viewed the juror as a "wagon joiner" and found that the juror stated on his questionnaire that, while he believed in the death penalty for people who commit murder, "I feel you would

have to know the circumstances that drove them to this." (Mov. Ex. 39; PCR LF 40:9). Defendant claimed, in the note found in his car, that Victim's behavior drove him to do what he did.

A. Standard of review

The standard of review for a claim of ineffective assistance of counsel is as outlined in the argument under Point I.

"The decision to strike a venireperson is generally a matter of trial strategy" and "[r]easonable decisions regarding trial strategy cannot be the basis for an ineffective assistance of counsel claim." *McFarland v. State*, 338 S.W.3d 846, 849-850 (Mo. App. S.D. 2011) (quoting *Boyd v. State*, 86 S.W.3d 153, 158 (Mo. App. E.D. 2002)); *Tripp v. State*, 958 S.W.2d 108, 111 (Mo. App. S.D. 1998); *State v. Cage*, 945 S.W.2d 636, 640 (Mo. App. E.D. 1997); There is "a strong presumption that the challenged action constitutes sound trial strategy, thereby rendering it reasonably skillful and diligent." *Tripp v. State*, 958 S.W.2d at 111. In such a circumstance, "[t]rial strategy does not provide a basis for an attack on the effectiveness of trial counsel." *Cage*, 945 S.W.2d at 640. Even "[t]actical errors do not establish ineffective assistance of counsel" in this context. *McFarland v. State*, 338 S.W.3d 846, 850 (Mo. App. S.D. 2011). "Trial counsel is not judged ineffective constitutionally simply because in retrospect his or her decision may seem to be an error in judgment." *Id.*; *Tripp*, 958 S.W.2d at 111.

"In analyzing the performance prong of *Strickland*, we determine whether the juror was qualified." *McGuire v. State*, 523 S.W.3d 556, 564 (Mo. App. E.D. 2017); *Pearson v. State*, 280 S.W.3d 640, 646 (Mo. App. W.D. 2009). "Unqualified jurors are those whose views would substantially impair their ability to perform in accordance with the court's instructions and their oath." *Id.* (citing *State v. Middleton*, 995 S.W.2d 443, 460 (Mo. banc 1999)). Where defense counsel unreasonably fails to strike an "unqualified juror for cause," the movant is entitled to a presumption of *Strickland* prejudice. *McGuire*, 523 S.W.3d at 564.

However, defense counsel is "well within a reasonable trial strategy to exercise his limited peremptory challenges on more worrisome jurors." *Id.* at 565.

A. Venireperson Moulton's testimony during voir dire

Venireperson Moulton testified during voir dire that his nephew had committed an armed robbery. (Tr. 223-224).

During the portion of the State's voir dire devoted specifically to punishment, Venireperson Moulton agreed that he could both give meaningful consideration to a sentence of death and to give meaningful consideration to a sentence of life in prison. (Tr. 298-299). He would also be able to sign either of those verdicts if he were chosen as the foreperson. (Tr. 299).

During defense voir dire, Venireperson Moulton agreed that if the jury found "murder in the first degree" based upon "deliberate homicide," he would "consider life without parole under those circumstances to be a meaningful sentence to be considered." (Tr. 319).

Venireperson Moulton further testified that if at the end of the case the jury had decided on murder in the first degree and was weighing statutory aggravating circumstances, he would not take the fact that the Defendant did not testify and "put that on the scales on the State's side[.]" (Tr. 331).

Venireperson Moulton further agreed that if the State had not convinced him beyond a reasonable doubt during guilt phase, he "would not" add the fact the defendant did not testify to the State's side. (Tr. 331).

Venireperson Moulton testified that he understood that "the burden is all on the State to either meet it or not meet it" and that "if they don't meet it," he couldn't "find guilt." (Tr. 331-332).

Venireperson Moulton further testified that if the State didn't "meet their burden in the second phase," he couldn't impose the death penalty. (Tr. 332).

Venireperson Moulton testified that the fact that there were two deceased people and evidence of an additional homicide would not change his mind on whether life without parole could be a meaningful punishment. (Tr. 337).

In light of this record, Venireperson Moulton was qualified to serve. Defendant makes no argument as to how such a record could have resulted in a strike for cause.

B. Defense peremptory strikes

The defense struck the following venirepersons from "Group 1009": #48, Pamela Huddleston; #101, Amy Rutherford; #114, John Groseth; #125, Wesley Wood; #127, Stephen Becker; #179, Andrew Cook. From "Group 1030," the defense struck #11, Laura Weiss; #39, Daniel Wamser; and #43, Todd Willis. (Tr. 703).

Venireperson Rutherford testified that she believed the financial effect of life without parole was a burden on taxpayers. (Tr. 404). While she stated she could set that aside, prioritizing a peremptory strike on this venireperson would certainly be one reasonable trial strategy.

Venireperson Wood had apparently made a similar statement on his questionnaire although he orally stated during voir dire he could set that aside and consider life without parole. (Tr. 403-405). The same reasonable trial strategy would apply to prioritizing use of a peremptory strike against that venireperson.

Venireperson Becker had law-enforcement training, was in the military police in the National Guard at the time of trial, and also worked for the Department of Public Safety at Barnes-Jewish Hospital. (Tr. 405-406). He

knew lots of other people in law enforcement. (Tr. 407). While he stated he had seen good officers and bad officers and that it was the person rather than the position that made someone credible, one reasonable trial strategy would be to use a peremptory strike against a law-enforcement officer in a criminal case in which law-enforcement testimony was prominent.

Venireperson Weiss volunteered when asked whether she could decide the case solely on the evidence at trial that she "was the victim of an armed robbery." (Tr. 472-473). She testified it was a fairly traumatic experience for her at the time. (Tr. 608). While she said she could set that aside, such an answer may have concerned competent defense counsel in a case involving numerous weapons and a female victim.

In addition, Venireperson Weiss testified that she worked for a police department as an evidence custodian and that her brother was a police officer. (Tr. 494-495). As observed by defense counsel, a person with a similar job would be testifying in this case. (Tr. 495).

While Venireperson Weiss said she could be fair, such a background would justify the use of a peremptory strike as at least one reasonable trial strategy.

Venireperson Wamser testified that he had a close friend whose father was a police officer. (Tr. 497-498). Venireperson Wamser also testified that he would prefer to answer a question pertaining to mental health in private. (Tr.

520). In private, Venireperson Wamser informed the court that his daughter was bipolar and suffered from depression and that his wife suffered from depression and anxiety, that they were on medication and stable, and that these facts would not affect his ability to hear evidence and judge it. (Tr. 537-538). Such facts might reasonably prompt a competent defense counsel to be concerned that the venireperson would consider psychological issues to be manageable and controllable, a view which might be unfavorable for the defense.

Venireperson Wamser had also indicated on his questionnaire that "if a person has committed a murder," he believed "they should be put to death in a timely fashion, not years and years after the conviction. (Tr. 580). He further stated: "My belief is that if they're found guilty then they should be sentenced to death and not live out life in prison." (Tr. 580). Venireperson Wamser also stated that he didn't "want to support them for the rest of their lives with my tax dollars." (Tr. 582). Despite his oral protestations that he could follow the court's instructions and consider the consensus of the jury, one reasonable trial strategy among others would be to use a peremptory strike against such a venireperson.

Venireperson Willis had a military background. (Tr. 584). On his questionnaire, he said, "My first choice would be in favor of the death penalty. If a person is found to have committed two deliberate murders, why spend tax

dollars to keep someone in prison?" (Tr. 585). While he stated during voir dire that he would "want to see mitigating circumstances" before making a decision, one reasonable trial strategy would be to strike such a venireperson.

The defense had attempted to strike Venirepersons Weiss, Wamser, and Willis for cause. (Tr. 679, 686-688, 702-703).

Venireperson Huddleston described herself as "[a] little shy" when asked if she would have trouble stating her opinions in groups. (Tr. 333). Venireperson Huddleston's alarm went off in court and she said she had it "on silent, so I don't know why it went off." (Tr. 348). One reasonable trial strategy for the defense in a case with strong evidence of a lifetime of cruelty would be to seek a juror who could stand up against the tide of his or her fellow jurors in opposing the death penalty. A reasonably competent counsel could reasonably believe that Venireperson Huddleston was not going to be that juror, and therefore choose to prioritize a peremptory strike against her. In the alternative, reasonably competent counsel could be concerned about her ability to follow simple instructions of the court in turning off electronic devices or in the truthfulness of her response.

Venirepersons Groseth and Cook easily answered their death-qualification questions and volunteered little else. (Tr. 373-374, 386-387). Venireperson Groseth did ultimately say that a previous conviction as a felon would not change his opinion as to whether death or life without parole was an

appropriate punishment but the transcript admits the possibility that an earlier answer was to the contrary (although other interpretations are possible). (Tr. 399).

Reasonably competent counsel could have been persuaded that Venireperson Moulton was a more persuadable juror on mitigation in that he expressed a specific interest in knowing what drove the defendant to do what he did before voting for the death penalty. Moreover, he had a family member who had been convicted of a crime involving a weapon.

Counsel's assessment of which venirepersons were most in need of peremptory strikes is quintessential trial strategy and Defendant does not, on this record, overcome the presumption of reasonable trial strategy. Even if counsel committed a tactical error in judgment with 20/20 hindsight, that is insufficient to establish constitutionally ineffective assistance. *McFarland v. State*, 338 S.W.3d at 850; *Tripp*, 958 S.W.2d at 111.

C. The defense argued that courtroom testimony should be considered to mitigate what was written in the questionnaires.

The defense argued vehemently that several venirepersons who appeared to be against the death penalty on their questionnaires should be deemed rehabilitated based on their courtroom testimony after receiving further instruction from the court and information about the process. (Tr. 701-702). While it appears that the defense was arguing both ways at different

times, just as it accused the State of doing, if this was a sincere belief, the questionnaire alone should not be deemed the exclusive basis for the defense's ultimate decisions of trial strategy as to which jurors to strike. Moreover, had the defense relied exclusively on questionnaire statements that were not reflective of the venireperson's testimony during voir dire, this argument would not have been available to the defense to object to State strikes. Thus, assessing the tradeoff was quintessential trial strategy, which is not subject to Monday-morning quarterbacking under *Strickland*.

D. No prejudice

Because Defendant failed to show that Venireperson Moulton was not qualified, he also failed to prove *Strickland* prejudice. *McGuire*, 523 S.W.3d at 564. A movant is entitled to a presumption of prejudice resulting from counsel's ineffectiveness during the jury selection process only if the movant can show that a biased venireperson ultimately served on the jury. *Strong v. State*, 263 S.W.3d 636, 648 (Mo. banc 2008). Otherwise, Defendant must show a reasonable probability of a different outcome at trial. *Id*. Here, as in *Strong*, Defendant did not do so where one qualified juror served instead of others. *Id*.

Defense counsel was "well within a reasonable trial strategy to exercise his limited peremptory challenges on more worrisome jurors." *McGuire*, 525 S.W.3d at 565.

Defendant's seventh point should be rejected.

VIII.

The motion court did not clearly err by holding that Defendant failed to meet his burden to overcome the presumption of reasonable trial strategy and that trial counsel was not constitutionally ineffective for failing to strike Juror Oden. Counsel had hired a jury consultant, Juror Oden ranked himself a 5 on a scale of 1-7 on the death penalty which was within the target range for the defense, and Juror Oden had a brother who had been convicted of "terroristic threats" in the past and who had had a restraining order "filed on him" by a woman, just as Defendant had had, and the juror opposed any arbitrary disregard of human life by a jury imposing a death sentence. By contrast, other strikes may reasonably have appeared more urgent as outlined in the argument under Point VII.

Defendant's eighth point contends that trial counsel was constitutionally ineffective for failing to strike Juror Oden because of his views on the death penalty. Defendant implicitly concedes that no questioning elicited any evidence that would warrant a strike for cause. The motion court held that the decision was reasonable trial strategy.

The standard of review is as outlined in the arguments under Point I (ineffective assistance of counsel) and Point VII (presumption of reasonable trial strategy for juror strikes).

A. Venireperson Oden's statements

Venireperson Oden testified on voir dire that his brother had been convicted of a serious crime in the past. (Tr. 479-480). Venireperson Oden also testified that his father had been a sheriff's officer and police officer in Texas but hadn't worked in that field since the "late 80's" when the venireperson either wasn't born or was "really little[,]" had "never really spoken about it," and that this fact would not make him more on the side of law enforcement generally. (Tr. 496-497).

Venireperson Oden further testified that his brother "had an ex parte filed on him by his ex-wife—or current wife at the time. But I do not believe that that incident would affect my judgment in any way." (Tr. 533). "That order became a charge of terroristic threats, a felony charge." (Tr. 533). From what Venireperson Oden understood, "there was an element of abuse, and there was an element of significant threats being made." (Tr. 534). Venireperson Oden later testified that his brother had been convicted of "[f]elony terroristic threats." (Tr. 599). Venireperson Oden testified that his brother's issues would not be something he would "carry into the jury room" during penalty phase. (Tr. 599-600). He tried "to be as unbiased as possible" and was "an underwriter by profession" and did not "see how the two circumstances would correlate." (Tr. 600). It was "nothing that's going to affect these mitigating circumstances" the defense attorney was talking about. (Tr. 600-601).

B. Venireperson Oden's death penalty response was within the defense's targeted range.

The defense employed a jury consultant, Bret Dillingham. (PCR Tr. 60). Jury questionnaires were employed which ranked a juror's numerical opposition or support of the death penalty (in the abstract) from 1 (strongly opposed) to 7 (strongly in favor). (PCR Tr. 60-61). There were three different sets of questionnaires in this case which were sent to the jury consultant. (PCR Tr. 61-62).

Venireperson Oden's numerical opinion of the death penalty in the abstract was a 5 (tending towards support). (PCR Tr. 67). Asked his opinion if the Defendant was convicted of two deliberate murders, he responded, "If it can be proven beyond all reason [sic] doubt that an individual planned and committed two murders, then the death penalty is a just and appropriate punishment." (PCR Tr. 67). Venireperson Oden further wrote, "A willful disregard for human life is not something that can be met with a great deal of leniency." (PCR Tr. 67-68).

Asked his opinion of life without parole in such a circumstance, Venireperson Oden wrote, "Under the circumstances as provided, I would say that a sentence of life in prison would represent a humanitarian gift." (PCR Tr. 68). The venireperson underlined "humanitarian." (PCR Tr. 98-99).

Experienced penalty-phase counsel, Janice Zembles, testified that the defense would "be looking for 4's or 5's under the assumption" that they were never going to get the 1's and were "probably" "not gonna get" the 2's and 3's either. (PCR Tr. 96). "So we're looking at 4's and 5's generally." (PCR Tr. 96).

Zembles testified that while Venireperson Oden wrote that a willful disregard for human life was "not something that can be met with a great deal of leniency" in the multiple-homicide context: "However, the punishment must fit the crime and the circumstances surrounding the crime. ***The death penalty should not be considered lightly. … A jury can be just as guilty of disregarding human life if they arbitrarily condemn someone to death***." (PCR Tr. 98) (emphasis added). "Again, every circumstance is different and requires different considerations." (PCR Tr. 98).

The consultant had noted that the venireperson's answer to question 19 "may be helpful in mitigation?" (PCR Tr. 99-100). "Are humanitarian gifts appropriate? Or is he saying that LWOP, life without parole, off the table?" (PCR Tr. 100).

In short, this venireperson had both plusses and minuses in his attitude towards the death penalty, including his expression concerning the gravity of the state taking human life arbitrarily and concern for the circumstances and the potential humanitarian element involved. Highly-experienced capital

counsel were entitled to balance these responses, and their sense of the venireperson in the room, with those of the others they chose to strike.

The motion court's finding is not clearly erroneous, especially when the juror was within the target range as to the death penalty generally and had a family member who had faced domestic abuse charges. The presumption remains that counsel employed one reasonable trial strategy among many. Defense counsel was "well within a reasonable trial strategy to exercise his limited peremptory challenges on more worrisome jurors." *McGuire*, 525 S.W.3d at 565.

D. No prejudice

A movant is entitled to a presumption of prejudice resulting from counsel's ineffectiveness during the jury selection process only if the movant can show that a biased venireperson ultimately served on the jury. *Strong v. State*, 263 S.W.3d 636, 648 (Mo. banc 2008). Otherwise, Defendant must show a reasonable probability of a different outcome at trial. *Id*. Here, as in *Strong*, Defendant did not do so where one qualified juror served instead of others. *Id*.

In this situation, as outlined in the argument under Point VII, the presumption of a reasonable trial strategy in the use of strikes applies. "The decision to strike a venireperson is generally a matter of trial strategy" and "[r]easonable decisions regarding trial strategy cannot be the basis for an ineffective assistance of counsel claim." *McFarland v. State*, 338 S.W.3d 846,

849-850 (Mo. App. S.D. 2011) (quoting *Boyd v. State*, 86 S.W.3d 153, 158 (Mo. App. E.D. 2002)); *Tripp v. State*, 958 S.W.2d 108, 111 (Mo. App. S.D. 1998); *State v. Cage*, 945 S.W.2d 636, 640 (Mo. App. E.D. 1997); There is "a strong presumption that the challenged action constitutes sound trial strategy, thereby rendering it reasonably skillful and diligent." *Tripp v. State*, 958 S.W.2d at 111. In such a circumstance, "[t]rial strategy does not provide a basis for an attack on the effectiveness of trial counsel." *Cage*, 945 S.W.2d at 640. Defense counsel was "well within a reasonable trial strategy to exercise his limited peremptory challenges on more worrisome jurors." *McGuire*, 525 S.W.3d at 565.

Defendant's eighth point should be rejected.

IX.

The motion court did not clearly err by denying Defendant's claim that trial counsel was ineffective for failing to object to Dakota Gilpin's penalty-phase testimony about the loss of his father as well as his mother, because his father's presence at the murder scene and killing by Defendant was part of the *res gestae* of the charged murder, and the testimony thus pertained to the impact of the crime, which was charged as a statutory aggravating factor. Moreover, Defendant failed to meet his burden to overcome the presumption of reasonable trial strategy where counsel testified they just wanted Dakota off the stand because of the emotional nature of the testimony and therefore did not make an unsympathetic objection. Finally, Defendant failed to meet his burden to demonstrate *Strickland* prejudice. The jury found two statutory aggravators, including prior violence in beating a woman unconscious for hours, and the murder of Mr. Gilpin in addition to Ms. Gilpin, which outweighed any mitigating factors and thus warranted the death penalty.

Defendant's ninth point contends that trial counsel was ineffective for failing to object to a portion of Dakota Gilpin's penalty-phase testimony concerning the impact the loss of both parents at the hands of Defendant had on him. Defendant contends that the loss of his father was not at issue.

However, the loss of the father was one of the statutory aggravators submitted and found by the jury. Moreover, counsel testified that she did not object because it was her trial strategy to get Dakota off the stand as quickly as possible due to the emotional content of the testimony. (Tr. 110). Any objection therefore would have been perceived by the jury as hard-hearted and callous. Defendant fails to overcome the presumption that this trial strategy was reasonable. Nor does Defendant meet his burden to demonstrate *Strickland* prejudice.

A. Standard of review

The standard of review for claims of ineffective assistance of counsel is as articulated in the argument under Point I.

"In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good." *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998) (quoting *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996)).

"The movant must prove that a failure to object was not strategic and that the failure to object was prejudicial." *Clay*, 975 S.W.2d at 135; *Tokar*, 918 S.W.2d at 768.

"Counsel will not be deemed ineffective for failing to make nonmeritorious objections." *Clay*, 975 S.W.2d at 135.

B. The motion court's holding

The motion court found that Defendant failed to prove prejudice from the failure to object and that, "Often times it is very reasonable for defense counsel to not object to sympathetic witness' testimony where, as here, it was simply stating the obvious." (PCR LF 40:11). The court further found that Defendant's "trial counsel both had years of work as public defenders and years trying capital cases." (PCR LF 40:11). The court concluded that there was neither deficient performance nor prejudice, so neither prong of the *Strickland* test was satisfied. (PCR LF 40:11).

C. The motion court's holding is not clearly erroneous.

Because the failure to object was quintessential trial strategy, as testified to by trial counsel, where the witness was sympathetic and "stating the obvious" (PCR LF 40:11), and counsel wanted him off the stand quickly without calling attention to the emotional impact of the testimony or attacking a victim in the eyes of the jury (Tr. 110), the motion court's holding that there was no ineffective assistance is not clearly erroneous.

Moreover, the testimony was admissible as an obvious outcome of the double-homicide perpetrated against the witness's parents—the murder of the mother was the charged crime, and the murder of the father was a statutory aggravator submitted to the jury for its consideration in determining punishment. The testimony was therefore relevant and any objection would

have been meritless. Trial counsel is not ineffective for failing to make a meritless objection. *Clay*, 975 S.W.2d at 135.

Finally, Defendant failed to meet his burden to prove *Strickland* prejudice where the jury properly found that the two statutory aggravators—Defendant's prior brutalization of another female victim and the double-homicide—were not outweighed by the evidence in mitigation. Any sensible jury would infer, even without testimony, that a murder victim's son would miss either parent, and the jury was aware that the second victim was Mr. Gilpin even without Dakota's mention of it.

Defendant's ninth point should be rejected.

X.

The motion court did not clearly err by denying Defendant's claim, after an evidentiary hearing, that counsel was ineffective for failing to preserve an appeal point by objecting to the State's closing argument that "you will have to accept that if you give him the death sentence he will be executed" because the statement was not objectionable. Moreover, failure to preserve an appeal point is not a cognizable claim in a postconviction action. Finally, counsel did object to the previous sentence about prior executions obtained by the prosecutor.

Defendant's final point claims the motion court clearly erred by denying his claim that counsel was ineffective for failing to object to the prosecution's closing argument acknowledging that the jury would have to face the fact that if they voted to give Defendant the death penalty, he would be executed. Defendant does not argue the outcome at trial would have been different. Rather, Defendant contends that he would have been prejudiced because while the objection would have been overruled—as it was at trial—he would have obtained a new penalty phase by arguing a point of preserved error on appeal. No such argument was raised on appeal nor does Defendant fault appellate counsel for failing to raise such a point. Defendant acknowledges that the point was not preserved in the motion for new trial. The Point Relied On does not

claim that counsel was ineffective for failing to preserve the issue in the Motion for New Trial.

The standard of review is as outlined in the arguments under Points I (ineffective assistance of counsel) and IX (failure to object).

A. The claim of ineffective assistance for failure to object as raised in the Point Relied On and the motion court's ruling

Defendant's point contends that the motion court clearly erred in denying Defendant's claim "that counsel was ineffective for failing to properly object to the prosecutor's penalty phase closing argument about how he works on death penalty cases and the last four to five he has worked on have been executed[.]" (App. Br. 107).[13] Defendant contends that "reasonably competent counsel would have objected that the prosecutor was arguing facts outside of the evidence and attempting to lessen the responsibility of the jurors[.]" (App. Br. 107). Finally, Defendant claims that "there is a reasonable probability that if counsel had properly objected, it would have preserved this issue for appeal and this Court would have reversed for a new penalty phase." (App. Br. 107).

[13] Similarly, the amended motion faults the failure to "adequately object" when the prosecutor argued, "And for purposes of making that decision, I've worked on death penalty cases as a prosecutor. And the last four to five that I've worked on have been executed" (Tr. 1644). (PCR LF 18:67).

The failure to preserve an issue for direct appeal is not a cognizable post-conviction relief claim. *Dickerson v. State*, 269 S.W.3d 889, 893 n.3 (Mo. banc 2008).

In any event, nowhere in the Point Relied On does Defendant fault counsel for not preserving this issue in the Motion for New Trial, although Defendant acknowledges the point was not preserved for appeal in that motion. (App. Br. 107, 108). Hence, phrasing the objection differently at trial would not have improved Defendant's appellate posture and the claim of *Strickland* prejudice fails.

The motion court held that Defendant "failed to show any prejudice from the defense attorneys['] failure to make objection" to this line of argument. (PCR LF 40:11).[14]

The motion court also held that "during argument to the jury, which is not evidence, the making of objections by defense is left to experienced trial counsel. Movant's trial counsel both had years of work as public defenders and years trying capital cases." (PCR LF 40:11). The court therefore did not fault their decision not to object. (PCR LF 40:11).

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[14] The motion court construed Defendant's complaint in the amended motion as pertaining to the failure to object to the follow-up argument that the jury "will have to accept that if you give him the death sentence he will be executed." (PCR LF 40:11).

B. The argument, objection, and ruling at trial

Counsel did, in fact, object to the statement at trial on the grounds that it implied special knowledge of facts outside the record made in the courtroom, i.e., "arguing facts outside of the evidence[,]" precisely the objection urged here. Defendant's other complaint in this appeal is that the argument was "attempting to lessen the responsibility of the jurors[.]" (App. Br. 107). The argument, objection, and ruling, in context, demonstrate the opposite was true:

> … the State urges you to find beyond a reasonable doubt those two aggravating circumstances and that this evidence in aggravation outweighs any evidence of mitigation, and then consider the death penalty as the just verdict in this case.
>
> And in courts, jurors talk oftentimes – or people talk and then talk about justice and doing one thing or the other and whether something would actually get done or not. And for purposes of making that decision, I've worked on death penalty cases as a prosecutor. And the last four to five that I've worked on have been executed.
>
> [DEFENSE COUNSEL]: Judge, I'm going to object to this.
>
> [PROSECUTOR]: They've been executed.
>
> [DEFENSE COUNSEL]: I'm going to object at this point. …

(Tr. 1643-1644).

The colloquy continued at the bench as follows:

[DEFENSE COUNSEL]: It's inappropriate closing argument. If [the prosecutor] is preparing to imply or explicitly state to this jury or even imply that he has some special knowledge that hasn't been evidence in this courtroom –

[PROSECUTOR]: The next sentence, Your Honor, is, "And you will have to accept that if you give him the death sentence he will be executed."

THE COURT: Okay.

(Tr. 1644).

When the proceedings returned to open court, the prosecutor emphasized the responsibility the jurors would have for Defendant's execution if they returned such a verdict:

As I was saying before the objection there, and you as jurors will have to base your decision if you give death that he will certainly be executed. In other words, have no doubt about that.

(Tr. 1644-1645).

C. No IAC for failure to make a meritless objection

Because one objection was made, unsuccessfully, and the other would have been meritless, and because Defendant failed to prove *Strickland* prejudice, Defendant's final point should be rejected. *Clay*, 975 S.W.2d at 135.

CONCLUSION

The judgment of the motion court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 21,115 words, as determined by Microsoft Word 2010 software, excluding the cover page, signature bloc, and this certificate; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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