No. SC97737

IN THE

Supreme Court of Missouri

VINCENT MCFADDEN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Louis County
21st Judicial Circuit
The Honorable David Lee Vincent III, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Mr. Vincent McFadden (Defendant) appeals from a St. Louis County Circuit Court judgment denying his Rule 29.15 motion for postconviction relief which sought to vacate convictions of first-degree murder and armed criminal action and a sentence of death. (PCR D222).

In the underlying criminal case, Defendant was charged with the class A felony of first-degree murder in Count I, for acting with another in knowingly causing the death of Todd Franklin after deliberation by shooting him; and the unclassified felony of armed criminal action in Count II; for an incident occurring on or about July 3, 2002. (L.F.315-16). Defendant's initial convictions were reversed on direct appeal by this Court, and the case was retried in July 2007. (L.F.15, 17-18, 453).

Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

On July 3, 2002, Todd Franklin (Victim) and his friend, Mark Silas, were walking around Pine Lawn when they encountered Defendant, also known as "J.R.", and Michael Douglas (Co-Defendant). (Tr.1042-43, 1050, 1054, 1135, 1147, 1190-91, 1375, 1426-28; State's Ex.78-C, pp.1-2, 6). When they reached a vacant lot, Defendant and Co-Defendant asked Victim if he had a gun. (Tr.1192, 1375; State's Ex.78-C, pp.2-3, 6). Victim said that he did not. (State's Ex.78-C, p.3). Co-Defendant then pulled out a gun and fired, and Victim

responded by running across the street. (Tr.1043-44, 1148, 1160, 1191; State's Ex.78-C, p.3).

Victim, followed closely by Defendant and Co-Defendant, ran to Victim's next-door neighbor's yard, where Gregory Hazlett (Neighbor), Gary Lucas, Glenn Zackary, and another man, were repairing Neighbor's house. (Tr.1044, 1069-70, 1112, 1148, 1160, 1178, 1190-92, 1229, 1447, 1450-51). Victim asked Neighbor if he had any work for him. (Tr.1069, 1148-49, 1162-63, 1192-93, 1241, 1451). Having heard the previous shots, Neighbor felt as if something wasn't right and walked away toward his house. (Tr.1149, 1193, 1251).

Co-Defendant then shot Victim twice, and Victim fell in Neighbor's driveway. (Tr.1141, 1149-50, 1165, 1193, 1199-1201, 1211, 1227-28, 1452, 1630; State's Ex.78-C, p.3). Defendant took the gun from Co-Defendant, went to where Victim lay on the ground, kicked him, and said, "N**** ain't dead yet," or "I'm going to make sure you're dead, motherf***er." (Tr.1149-50, 1166, 1193, 1211, 1228, 1452-53, 1463, 1481). Defendant stood over Victim and shot him three more times, including in the head. (Tr.1075-76, 1114, 1149-51, 1166, 1193, 1196-97, 1211, 1228, 1254, 1453, 1456; State's Ex.78-C, pp.4-5). Co-Defendant and Defendant ran away, and Neighbor called 911. (Tr.1087, 1150, 1199-1200, 1454; State's Ex.78-C, p.5). Victim was alive when each of the five gunshots were inflicted, but he died at the scene as a result of the gunshot wounds. (Tr.1139, 1507-08, 1519).

During the ensuing investigation, a cigar, still contained in a clean, clear wrapper, was located at the end of the driveway approximately eight feet from Victim's body. (Tr.1285-90, 1296, 1305, 1314, 1321). Subsequent analysis determined that Defendant's right thumb print was present on the cigar. (Tr.1309-18).

During an interview that took place shortly after the shooting, Silas identified Defendant as the second shooter. (Tr.1046, 1054, 1057, 1067, 1416-17; State's Ex.78-C, pp.1-2, 4-6). Neighbor initially told police that he would speak to them later because he did not want to be identified as a "snitch" in Pine Lawn. (Tr.1203-04). Later that night, Neighbor went to the police station and identified Defendant from a photo lineup as the second shooter. (Tr.1203-05, 1224). Both Lucas and Zackary also eventually identified Defendant from a photo lineup as the second shooter. (Tr.1153, 1181, 1223, 1454-56, 1460).

Approximately eight months before he was murdered, Victim gave sworn testimony against Corey and Lorenzo Smith, identifying them as the men who had robbed and assaulted him, and the two men pleaded guilty shortly thereafter. (Tr.1363-68). Defendant was close friends with Corey and Lorenzo Smith. (Tr.1376-77, 1395-96). On the day after Victim's murder, Defendant called his girlfriend's cousin, Evelyn Carter, laughed, and told her that "it felt good" to kill Victim because Victim had "snitch[ed]" on his "homies." (Tr.1393-94, 1398-99, 1403, 1410-12). Carter understood Defendant to mean that he had

killed Victim because Victim had "told on" Corey and Lorenzo. (Tr.1399, 1409-10).

After Victim's murder, Defendant moved to California because he was wanted for the murder. (Tr.1384-89, 1402, 1617). Defendant was eventually arrested on May 17, 2003, 10 months later, at a motel in St. Charles, where he was staying under another person's name. (Tr.1353-56).

The defense called Co-Defendant to testify and elicited that Co-Defendant had previously stated on multiple occasions that he and his brother, Kyle Dismukes, not Defendant, had shot and killed Victim. (Tr.1631-35). But Co-Defendant claimed at trial that his previous statements were lies and that Defendant was the second shooter. (Tr.1648, 1672-73).

Defendant did not testify. (Tr.1697-1706, 1716).

The jury found Defendant guilty as charged. (L.F.623-24; Tr.1799-1802).

During the penalty phase, the State presented evidence that Defendant had been convicted of first-degree assault and armed criminal action for shooting at both Daryl Bryant and Jermaine Burns on April 4, 2002, approximately three months before shooting and killing Victim; that Defendant had subsequently killed his girlfriend's 18-year-old sister, Leslie Addison, on May 15, 2003, because their older sister had "told on him" for shooting Bryant; that Defendant had attempted to convince Eva Addison to recant her identification of him as Leslie's murderer; that Defendant had five

other prior convictions; and that Defendant was in possession of 17 bags of crack cocaine at the time he was arrested on May 17, 2003. (Tr.1841-79, 1910-15, 1923-34, 1958-89, 2001-04, 2019, 2028-32; State's Ex.148-C).

In mitigation, five members of Defendant's family testified about Defendant's upbringing, establishing that Defendant generally "bounced around from one person to another,". (Tr.2080-2146, 2204-15, 2234). The defense also presented evidence that Defendant grew up in "[p]retty rough and violent" neighborhoods that were "[e]conomically depressed" and "[d]ifficult . . . to live in." (Tr.2139, 2154-55, 2172-73, 2196, 2240, 2253-54).

The defense also called Dr. Wanda Draper, an expert in human development, who testified that Defendant had developed a "severe, disorganized attachment" disorder as a result of the absence of a consistent parental figure during his childhood. (Tr.2223-25, 2233-37, 2262-63). Dr. Draper testified that "love and attachment, mutual relationship between that consistent parent and the baby, are all undergirding factors to the roots of morality" and that a "bonding problem makes it difficult for the individual to have the ability to make good decisions under certain circumstances." (Tr.2237, 2270). Dr. Draper also testified that Defendant's environment, including the amount of violence in his neighborhood, constituted a "major factor[ ]" in producing Defendant's violent behavior. (Tr.2239-40).

The defense concluded by announcing a stipulation that Victim was in possession of one gram of cocaine at the time of his death. (Tr.2332).

The jury found five statutory aggravators—four serious assaultive convictions and depravity of mind, and it recommended a sentence of death. (L.F.684-85; Tr.2420-2424). The trial court sentenced Defendant accordingly, imposing the death penalty for first-degree murder and life imprisonment for armed criminal action. (L.F.740-42; Sent.Tr.12).

This Court affirmed the convictions and sentences on direct appeal. *State v. McFadden*, 369 S.W.3d 727 (Mo. banc 2012). The mandate issued on July 31, 2012. (PCR D130, p.5; PCR D173, p.2; PCR D222, p.4; PCR Tr.20-21). On October 26, 2012, Defendant timely filed a pro se Rule 29.15 motion, 87 days after the mandate affirming the judgment had been issued. (PCR D100, p.10; PCR D129). On September 10, 2013, the motion court appointed postconviction counsel. (PCR D100, p.11; PCR D125). Postconviction counsel was subsequently granted a 30-day extension to file an amended motion. (PCR D100, p.11; PCR D122). On December 9, 2013, 90 days after being appointed, postconviction counsel timely filed an amended motion that raised 16 claims. (PCR D100, p.13; PCR D130). An evidentiary hearing was held in May 2018. (PCR Tr.9, 591; PCR D213, p.1). The motion court entered a judgment denying Defendant's claims. (PCR D100, p.22; PCR D222).

STANDARD OF REVIEW

"Review of a Rule 29.15 judgment is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010); *see* Rule 29.15(k). "Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is a definite and firm impression that a mistake has been made." *Moore*, 328 S.W.3d at 702. "Even if the stated reason for a circuit court's ruling is incorrect, the judgment should be affirmed if the judgment is sustainable on other grounds." *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. banc 2013).

Generally, for a claim of ineffective assistance of counsel, Defendant "must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and (2) that he was thereby prejudiced." *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Appellate inquiry into an attorney's performance "must be highly deferential." *Strickland*, 466 U.S. at 689. "To satisfy the *Strickland* performance prong, a movant 'must overcome the strong presumption that counsel's conduct was reasonable and effective.'" *Tisius v. State*, 519 S.W.3d 413, 420 (Mo. banc 2017) (quoting *Hoeber v. State*, 488 S.W.3d 648, 655 (Mo. banc 2016)). "Defense counsel has wide discretion in determining what

strategy to use in defending his or her client." *Worthington v. State*, 166 S.W.3d 566, 578 (Mo. banc 2005). "Reasonable choices of trial strategy, no matter how ill[-]fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *Id.* at 573 (quoting *Cole v. State*, 152 S.W.3d 267, 270 (Mo. banc 2004)). "It is also not ineffective to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Id.* "Strategic choices made after a thorough investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable." *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006) (quoting *Strickland*, 466 U.S. at 690). "This Court . . . has never found that a failure to litigate a trial perfectly constitutes ineffective assistance of counsel, nor does this Court believe a 'perfect' litigation to be possible." *Strong v. State*, 263 S.W.3d 636, 650 n. 7 (Mo. banc 2008)

"To establish *Strickland* prejudice, a movant must prove that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Tisius*, 519 S.W.3d at 420 (quoting *McIntosh v. State*, 413 S.W.3d 320, 324 (Mo. banc 2013)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "Regarding a sentence to death, a defendant must show

with reasonable probability that the jury, balancing all the circumstances, would not have awarded the death penalty." *Tisius*, 519 S.W.3d at 420 (quoting *Strong*, 263 S.W.3d at 642).

ARGUMENT

I. (Calling Co-Defendant to Testify)

The motion court did not clearly err in finding that trial counsel's decision to call Co-Defendant to testify in order to elicit evidence that Co-Defendant's brother, Kyle Dismukes, not Defendant, was the second shooter was a reasonable trial strategy.

A. The record regarding this claim.

During its case-in-chief, the State offered State's Exhibit 501, a letter written by Co-Defendant, and it was admitted without objection. (Tr.1540-42, 1565, 1672). In the exhibit that was addressed to trial counsel, Co-Defendant admitted shooting Victim with his brother, Kyle Dismukes, but he claimed that Defendant was not involved and only happened to be present at the scene. (State's Ex.501). Defense counsel asked to read to the jury a portion of State's Exhibit 501. (Tr.1572). The State objected "to that as hearsay," and the trial court sustained the State's objection. (Tr.1572-73). The trial court noted that if Co-Defendant testified, "[the exhibit] would no longer be subject to a hearsay objection." (Tr.1573).

Before the defense presented their case, a discussion was held, during which defense counsel stated, "[I]f [Co-Defendant] takes the stand and says that he acted with [Defendant] – He made prior statements to myself and Ms. Kraft and a recorded statement over the phone with Ms. Kraft, myself[,] and [the

prosecutor], in which he stated that the only reason he pled guilty and implicated [Defendant] was because he wanted to get the 20 years." (Tr.1579). Defense counsel further noted that "[Co-Defendant] is looking at getting up to life on a perjury charge if he now changes his testimony" from his sworn statements during the plea and that "he did not want to take an oath at a deposition because . . . he did not want to intentionally get charged with perjury." (Tr.1581). Defense counsel stated that "[they] have statements that [Co-Defendant] made where he said that somebody other than [Defendant] did it" and that "if he comes in and testifies that no, it's [Defendant] who did it—he's told us that he made those statements, that statement originally, in order to get the 20 years on the murder second." (Tr.1582).

The defense called Co-Defendant to testify during the guilt phase. (Tr.1622). Defense counsel asked Co-Defendant, "Were you involved in [Victim] getting killed?" and Co-Defendant answered, "Yes, ma'am." (Tr.1623). Defense counsel then immediately directed Co-Defendant to his conversation with them on February 7, 2007, and asked him, "[W]hat did you tell us about [Defendant] being involved in the killing of [Victim]?" (Tr.1623-24). The prosecutor objected on the basis of hearsay, and the trial court sustained the objection. (Tr.1624).

Defense counsel then asked Co-Defendant about the events surrounding the shooting. (Tr.1624). Co-Defendant testified that he was with both his brother, Kyle Dismukes, and Defendant at that time. (Tr.1624). Co-Defendant testified

that they saw Victim with two other unknown males, one of whom shot at them. (Tr.1626-27). Co-Defendant testified that he chased after them and that he shot Victim because "he was the last one behind." (Tr.1627). Co-Defendant admitted shooting Victim in Neighbor's driveway. (Tr.1629). Co-Defendant testified that he had aimed for Victim's head and shot him multiple times. (Tr.1630). Co-Defendant testified that he then "passed the gun." (Tr.1630).

Defense counsel asked, "And who took the gun from you?" to which Co-Defendant answered, "JR." (Tr.1631). Co-Defendant testified that "[a]s far as [he] kn[e]w," Defendant then shot Victim. (Tr.1631). Defense counsel immediately referred back to their meeting with Co-Defendant on February 7, 2007, and asked, "And on that day, what did you tell us about [Defendant] being involved in this?" (Tr.1631). Co-Defendant answered, "I said he ain't had nothing to do with it." (Tr.1631-32). Co-Defendant admitted that he had told them that his brother, Kyle, was the other shooter. (Tr.1632). Co-Defendant further admitted that he had written them a letter, dated February 7, 2007, stating the same thing, and that he had told them the same thing during a phone deposition on April 19, 2007. (Tr.1632-36, 1672).

Co-Defendant admitted that he had refused to swear to tell the truth before the phone deposition. (Tr.1638). Co-Defendant testified that he had previously entered a guilty plea to murdering Victim, during which time he had stated under oath that he and Defendant had shot Victim. (Tr.1638, 1647, 1679-80).

Co-Defendant testified that he had made those statements in order to benefit from a plea bargain, pursuant to which he had received less than the maximum sentence. (Tr.1640, 1679-80). Co-Defendant admitted that he was afraid that he would be charged with perjury if he made a sworn statement that differed from what he said during his guilty plea. (Tr.1639, 1674). Co-Defendant believed that he could face life imprisonment for committing perjury. (Tr.1639-40).

During cross-examination, Co-Defendant testified that his previous statements that Defendant was not involved in Victim's murder were lies and that his testimony that Defendant was the second shooter was the truth. (Tr.1648, 1672-73, 1680).

Defense counsel told the jury during closing, "We didn't have to put [Co-Defendant] on the stand. . . . We knew, when we put him on the stand, that he had pleaded guilty. . . . Plus he had these other statements about what might have happened that day. We thought you needed to consider that." (Tr.1768-69).

Defense counsel argued, "[W]hen [Co-Defendant] came in here, he said he pled guilty in this case and that he got the benefit of a plea bargain and that's why he pled guilty and that he didn't want to commit perjury because he knew he could get charged and that it could be up to a Class A felony, or that's what he believed. And he knew if he said, when he took the stand, that [Defendant]

was there, that [Defendant] wasn't the shooter, it was Kyle, he'd get charged with perjury." (Tr.1771). Defense counsel concluded, "You can take his belief, that he could get charged with perjury, into account as to why he might have said things he said on the stand yesterday." (Tr.1771).

Defendant's amended motion alleged that counsel was ineffective for calling Co-Defendant "and eliciting harmful testimony from him while on the stand." (PCR D130, pp.25-31).

Trial counsel testified that their defense theory for the guilt phase was that Defendant was not one of the persons who shot Victim. (PCR Tr.38, 462). Trial counsel testified that they strategically called Co-Defendant because "there were some things that he wrote that basically would have exonerated [Defendant], if believed[.]" (PCR Tr.42, 546-47).

Trial counsel testified that they met with Co-Defendant in person on February 6, 2007, and that he sent them a letter shortly thereafter. (PCR Tr.45-48, 462). They also spoke to Co-Defendant on the phone on April 19, 2007, approximately two and a half months before trial. (PCR Tr.48-49, 463-64; PCR Ex.85). Trial counsel testified that Co-Defendant had stated in both his letter and during the phone call that Kyle Dismukes, not Defendant, had shot Victim. (PCR Tr.51, 53, 464).

Trial counsel testified that when they called Co-Defendant to testify, they didn't know "which version he was going to say," as to whether Defendant was

the other person who shot Victim. (PCR Tr.55-56, 147, 547). Trial counsel testified that "whether or not he testified that [Defendant] was the shooter or wasn't the shooter, [they] would be able to get out [Co-Defendant's] other statements that [Defendant] wasn't the shooter," which was what they specifically wanted to elicit. (PCR Tr.57, 147, 547).

Trial counsel acknowledged that the issue of calling Co-Defendant to testify was "a tough decision" and "kind of a Hail Mary on [their] part," but that that they were trying to present the defense that Defendant wanted, that "[they] didn't have much else to work with," and that "at least [they] would get out [Co-Defendant's] statements . . . that Kyle Dismukes was the other shooter." (PCR Tr.58, 154, 157). Trial counsel testified that Defendant wanted them to call Co-Defendant as a witness. (PCR Tr.550). Trial counsel testified that "[they] did think about it and have a reason why, and those statements on their face certainly are supportive of [their] defense, and that's why [they] wanted to put them on." (PCR Tr.154-55, 548). Trial counsel testified that Co-Defendant's prior statements were the only evidence they had from a witness at the scene that Defendant was not the second shooter and that calling Co-Defendant was the only way to get those statements into evidence. (PCR Tr.147-48, 155-57, 547). Trial counsel further testified that they elicited that Co-Defendant did not want to be charged with perjury in order to explain why his trial testimony was different than his unsworn statements. (PCR Tr.151).

Trial counsel also testified that they were able to elicit that Co-Defendant had received a parolable sentence for his involvement in Victim's murder, which suggested to the jury that there would be "an unfair disparity" in the outcomes of the cases if Defendant were to receive the death penalty. (PCR Tr.57, 151-52, 466-67, 549).

Co-Defendant's attorney testified that she told trial counsel before the trial that Co-Defendant was not going to testify inconsistently with his plea agreement—"he was not going to say anything different than he acted in concert with [Defendant]." (PCR Tr.249-51). Co-Defendant's attorney testified that "for [her], [Co-Defendant] was either going to testify consistently with his plea or refuse to testify." (PCR Tr.252). Co-Defendant's attorney admitted receiving a letter that was written by Defendant, in which Defendant told Co-Defendant that he had his permission to testify. (PCR Tr.253).

The motion court denied this claim, finding that "trial counsel made a strategic choice to present evidence through [Co-Defendant]," that "[t]hey understood the possible pitfalls and benefits," and that they "made a reasonable decision based on the information they had and the defense they pursued." (PCR D222, p.25).

B. Counsel's decision to call Co-Defendant was a reasonable trial strategy.

"The selection of witnesses and the introduction of evidence are questions of trial strategy which do not provide a basis for post-conviction relief." *Rios v. State*, 368 S.W.3d 301, 312 (Mo.App.W.D. 2012). "Trial counsel's admission of evidence tending to support the State's position can be a significant factor in finding ineffective assistance of counsel." *Gant v. State*, 211 S.W.3d 655, 659 (Mo.App.W.D. 2007). But a movant must still overcome the presumption that counsel's decision to call a witness was a reasonable trial strategy. *See Rios*, 368 S.W.3d at 314; *Robinson v. State*, 469 S.W.3d 871, 879 (Mo.App.E.D. 2015); *In re Care and Treatment of Braddy*, 559 S.W.3d 905, 909-11 (Mo. banc 2018) (holding that trial counsel's strategy under the circumstances was not so flawed as to be unreasonable, despite the appellant's contention that counsel brought out unfairly prejudicial information before the jury).

Here, trial counsel were well aware that Co-Defendant might provide unfavorable testimony if called, but they nevertheless decided to call him in order to elicit favorable evidence that Kyle Dismukes, not Defendant, was the second shooter. (PCR Tr.55-57, 147, 547; PCR D222, p.25). The motion court did not clearly err in finding that this was a reasonable trial strategy under the circumstances, especially considering that Co-Defendant's prior statements to counsel were the only evidence from a witness at the scene that

directly exculpated Defendant and that calling Co-Defendant to testify was the only way to present such evidence. (PCR Tr.147-48, 155-57, 547; Tr.1573). *See* § 491.074, RSMo 2000 ("[A] prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement."). While Defendant argues that there was already evidence from Silas that Defendant did not shoot Victim, Silas in fact testified only that he did not see the shooting and so did not see Defendant, or anyone else, shoot Victim. (Def's Br.52; Tr.1044-45, 1053, 1059, 1090-92).

Defendant also argues that counsel's strategy was unreasonable because it relied on "unsworn statements" by Co-Defendant, but counsel elicited that Co-Defendant was afraid of being charged with perjury if he provided a sworn statement that differed from his sworn statement at his plea hearing that Defendant was the second shooter and that he had only made that statement in order to receive the benefit of a plea bargain. (Def's Br.51-52; Tr.1638-40, 1647, 1674, 1679-80). Counsel thereafter argued to the jury that it could find that Co-Defendant thus had reason to lie about the identity of the second shooter in his sworn statements, including his testimony at trial, and that it should therefore believe his unsworn statements that Defendant was not the second shooter. (Tr.1771-72).

Under such circumstances, the motion court did not clearly err in finding that trial counsel's decision to call Co-Defendant was reasonable trial strategy that was consistent with Defendant's wishes and that supported his theory of innocence. (PCR Tr.38, 157, 462, 550; PCR D222, p.25).

II. (Victim's Bad Character)

The motion court did not clearly err in finding that trial counsel were not ineffective for failing to present evidence of Victim's prior guilty plea to possessing cocaine and Ms. Clark's testimony regarding Victim's character because counsel's strategy to limit their attack on Victim's character was reasonable, Defendant failed to show that Ms. Clark could have been reasonably located, and there is no reasonable probability that Defendant was prejudiced.

A. The record regarding this claim.

During the penalty phase, the State presented victim impact testimony from Victim's mother, girlfriend, and sister. (Tr.2035-73). Victim's mother testified that when Victim was five years old, he did not complain about another boy taking his lunch because the boy was hungry and needed a lunch. (Tr.2046-47). She also testified that when Victim was seven years old, he gave the money in his piggy bank to a girl whose mother died because they didn't have any food. (Tr.2047). Victim's mother described Victim as "always smiling" and "always joking around, laughing, [and] playing." (Tr.2047-48). Several photographs from throughout Victim's life that showed him smiling were admitted into evidence. (Tr.2050-54). Victim's mother testified that Victim was a "[p]retty clean-cut kid." (Tr.2052).

Defense counsel asked, "Now, were you aware that when [Victim] was shot, he had cocaine in his pocket?" and Victim's mother answered, "No, . . . I was not aware of that." (Tr.2055). She testified that she never knew that Victim was involved with drugs. (Tr.2055).

Victim's girlfriend testified that Victim was happy, friendly, and "[w]ouldn't do anything to anyone." (Tr.2057). On cross-examination, defense counsel elicited that she did not know that Victim was involved with drugs. (Tr.2060).

Victim's sister testified that Victim was her "father figure" and that he had "stood up" for her when their biological father had hit her. (Tr.2062-63, 2066-67). She testified that Victim was not a violent person at all. (Tr.2064). She also testified that Victim always had a job and that he helped people in need like his grandfather and his grandfather's neighbor. (Tr.2067-71).

Dr. Draper testified that Defendant sold drugs as "a way to kind of make a living" in order to buy clothes and food. (Tr.2242). She further testified that "in that community . . ., that was not unusual for a lot of kids to get involved with drugs." (Tr.2241).

The prosecutor noted in closing argument that "[i]nstead of [Victim] trying to retaliate against the two guys that robbed him with a gun . . ., he went to the police." (Tr.2383). The prosecutor stated, "You see the difference between [Defendant and Victim]? They grew up in the same neighborhood." (Tr.2383).

The prosecutor emphasized that "[Victim] did things the right way: nonviolently." (Tr.2383).

Defense counsel argued that "[Victim] did not deserve to die" and that "none of us have the right to determine that [Victim] should die." (Tr.2400). But defense counsel further argued that "we also all know that [Victim] wasn't quite what he appeared to be." (Tr.2401). In support, defense counsel cited that "[w]hen [Victim] died, he had cocaine in his pocket." (Tr.2401).

Defendant's amended motion alleged that counsel were ineffective for failing to investigate and present testimony to rebut the State's alleged presentation of "good character evidence" of Victim. (PCR D131, p.149). Specifically, the amended motion alleged that counsel should have discovered and presented evidence that "[Victim] was a drug user and seller, an enforcer for a violent drug dealer, and had pled guilty to drug distribution and served time in jail." (PCR D131, pp.151, 157; PCR D132, pp.1, 83-85).

At the evidentiary hearing, Defendant submitted a certified court record showing that Victim had pleaded guilty to second-degree trafficking for possessing six or more grams of cocaine base. (PCR Tr.24-25; PCR Ex.46).

Tanesia Clark testified that Victim was "nice," "sold drugs," and "was in a gang." (PCR Ex.86A, pp.13, 32). Ms. Clark specifically testified that she had asked Victim not to sell drugs in front of her mother's house after seeing him on a phone call for what she believed was a drug transaction. (PCR Ex.86A,

pp.13-14, 32). Ms. Clark also testified that Victim was "very close" to another person name "Pelle," who was involved in "a big territorial fight over gang territory and drugs." (PCR Ex.86A, pp.14-15). Ms. Clark testified that she had seen Victim with a gun, which he had for "protection." (PCR Ex.86A, pp.15, 33). Ms. Clark also testified that she had heard that Victim was "one of the people that were in the car" during an alleged drive-by shooting of her mother's house, for which she was not present. (PCR Ex.86A, pp.15, 34).

Trial counsel testified that if they had obtained the record of Victim's prior guilty plea to second-degree trafficking, they "[p]ossibly" would have sought to admit it at trial. (PCR Tr.134, 518-19).

Trial counsel testified that they had tried to "find" Ms. Kirkman-Clark, but that they were unsuccessful. (PCR Tr.134). Trial counsel testified that they would have "[p]otentially" considered calling Ms. Kirkman-Clark at trial if they had successfully located her and were aware of her potential testimony about Victim, but that they would have had to consider whether her potential testimony about Defendant's gang activity would have been more harmful. (PCR Tr.134, 213, 519, 583-84).

Trial counsel also acknowledged that it was possible that the jury would not have appreciated an attack on Victim's character after having found Defendant guilty of murdering him. (PCR Tr.211). Counsel Kraft agreed that it was "a concern for [her] . . . to attack[ ] the victim in the penalty phase, when [she's]

asking [the jury] for mercy" and that "sometimes it's not beneficial to go after the victim at that point." (PCR Tr.583).

The motion court denied this claim, finding that Defendant had failed to show that counsel were ineffective or that he was prejudiced. (PCR D222, p.81). The motion court cited counsel's testimony that the jury may not have responded favorably to an attack on the victim's character. (PCR D222, p.80). The motion court also found that "to the extent that the victim's drug affiliation was in any way persuasive, [Victim] having drugs on him at the time of his murder was elicited and argued." (PCR D222, p.81). The motion court further found that "the evidence presented in aggravation . . . was not going to be outweighed with the added information that [Victim] had plead guilty in his past" and that Ms. Clark's testimony would also have had "no effect on the verdict" because her testimony about Victim "was both positive and negative " (PCR D222, p.81).

B. Counsel were not ineffective for failing to present rebuttal evidence of Victim's character, and it is not reasonably probable that Defendant was prejudiced as a result.

Defendant failed to establish that trial counsel's failure to present evidence of Victim's prior guilty plea created a reasonable probability that the outcome of the penalty phase would have been different. At the postconviction hearing, Defendant presented evidence that Victim had pleaded guilty to second-degree

trafficking for possessing six or more grams of cocaine base. (PCR Tr.24-25; PCR Ex.46). Contrary to Defendant's claim, Victim's guilty plea was thus not for an act of "drug dealing," but rather for an act of possession of cocaine. *Cf.* § 195.222.3, RSMo Cum. Supp. 1998 (emphasis added) ("A person commits the crime of trafficking *in the first degree* if . . . he distributes, delivers, . . . or attempts to distribute, deliver, . . . more than two grams of a mixture or substance . . . which contains cocaine base."). (Def's Br.59-60). Trial counsel presented evidence that Victim was in possession of cocaine at the time of his death and recounted that evidence during closing argument. (Tr.2332, 2401; PCR D222, p.81). Counsel went further and elicited that Victim's mother and girlfriend were apparently unaware of Victim's involvement with drugs. (Tr.2055, 2060). Counsel then argued to the jury as a result that "[Victim] wasn't quite what he appeared to be." (Tr.2401). Because counsel presented evidence during the penalty phase that Victim had possessed cocaine and reminded the jury of that evidence, the motion court did not clearly err in finding that Defendant had failed to show that he was prejudiced as a result of counsel's alleged error in failing to present evidence that Victim had pleaded guilty to possessing cocaine. (PCR D222, p.81). *See McLaughlin v. State*, 378 S.W.3d 328, 343-44 (Mo. banc 2012) ("Failure to present evidence that is cumulative to that presented at trial does not constitute ineffective assistance of counsel.").

Defendant also failed to establish that counsel were ineffective for failing to call Tanesia Clark to testify about Victim. In order to prevail on a claim of ineffective assistance of counsel for failure to call a witness, the defendant must show, among other things, that the witness could have been located through reasonable investigation. *See McFadden v. State*, 553 S.W.3d 289, 305 (Mo. banc 2018). Here, trial counsel testified that they were familiar with Ms. Clark and had attempted to "find" her, but that they were unsuccessful. (PCR Tr.96-97, 134, 491-92). Defendant failed to satisfy his burden of proving that counsel were deficient in their efforts to contact Ms. Clark or that she could have been located through reasonable investigation.

Even if counsel should have been successful in locating Ms. Clark, Defendant has failed to show that she could have provided a viable defense. Ms. Clark testified that Victim "sold drugs," but all she offered in support was that she had asked Victim not to sell drugs in front of her mother's house after witnessing him receive a phone call and then seeing another person waiting for him. (PCR Ex.86A, pp.13-14, 32). Ms. Clark's speculative conclusion that Victim sold drugs would have been inadmissible, and her testimony that Victim had received a phone call would not have reasonably established that Victim was a "drug dealer." (Def's Br.58). *See State v. Boyd*, 706 S.W.2d 461, 465 (Mo.App.E.D. 1986) ("[T]he general rule provides that a lay witness must be restricted to statements of fact, not opinions or conclusions.").

Additionally, Ms. Clark conceded that she was not present for an alleged drive-by shooting of her mother's house and that she had only heard from others that Victim was involved. (PCR Ex.86A, pp.15, 34). As Ms. Clark herself acknowledged, this testimony would have been inadmissible hearsay. (PCR Ex.86A, pp.15, 34). *See Tisius*, 519 S.W.3d at 422 ("Out-of-court statements offered for the truth of the matter asserted constitute hearsay and are inadmissible unless they fall under a recognized exception."). Similarly, Ms. Clark testified that Victim "had a reputation of being associated with Pelle," who was allegedly involved in "a big territorial fight over gang territory and drugs." (PCR Ex.86A, pp.14-15). Defendant failed to establish that this testimony was based on Ms. Clark's own personal observations. Counsel were not ineffective for failing to present Ms. Clark's testimony that was based on speculation and hearsay. *See id.* ("Trial counsel will not be found ineffective for failing to present inadmissible evidence.").

Defendant failed to establish that the remainder of Ms. Clark's testimony would have created a reasonable probability that the outcome of the penalty phase would have been different had it been presented. Ms. Clark testified that she had seen Victim with a gun, but she also testified that the gun was merely exhibited for self-protection. (PCR Ex.86A, pp.15, 33). Additionally, even assuming that Ms. Clark's testimony that Victim was in a gang was admissible, she did not testify that she had ever observed Victim commit any

acts of violence. Instead, she repeatedly testified that "[Victim] was nice," that "[h]e was respectable," and that "[h]e liked to . . . make people laugh." (PCR Ex.86A, pp.13-14, 32). Therefore, Ms. Clark's testimony had only minimal probative value in rebutting the State's argument that Victim was nonviolent. (Tr.2383).

Moreover, "[a]s a general matter, . . . victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." *Payne v. Tennessee*, 501 U.S. 808, 823 (1991). "It is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Id.* The motion court did not clearly err in finding that "the evidence presented in aggravation . . . was not going to be outweighed" by evidence that Victim had possessed a gun and associated with a gang. (PCR D222, p.81).

Additionally, Defendant failed to overcome the presumption that trial counsel's failure to present such evidence was reasonable trial strategy. Counsel testified that it was "a concern for [her] . . . to attack[ ] the victim in the penalty phase, when [she's] asking [the jury] for mercy" and that "sometimes it's not beneficial to go after the victim at that point." (PCR Tr.211, 583). Counsel's concern that the jury might have an unfavorable response was

reasonable. *See Storey v. State*, 175 S.W.3d 116, 132-36 (Mo. banc 2005) (finding that counsel's failure to object to victim impact evidence and argument "avoided the possibility of alienating the jury," making "the defense look callous," and "upset[ting] the jury"); *Payne*, 501 U.S. at 823 (noting that "for tactical reasons it might not be prudent for the defense to rebut victim impact evidence"); *McGuire v. State*, 523 S.W.3d 556, 571 (Mo.App.E.D. 2017) (quoting *Tramble v. State*, 414 S.W.3d 571, 575 (Mo.App.E.D. 2013)) ("Counsel may make a reasonable strategic choice 'to either limit or not impeach a witness at all for fear that doing so would alienate the jury or create sympathy for the State's witnesses.").

III. (Co-Defendant's Letters to Defendant)

The motion court did not clearly err in finding that trial counsel were not ineffective for not objecting to the admission of Co-Defendant's letters because they reasonably supported counsel's trial strategy that Co-Defendant's out-of-court statements exculpating Defendant were credible and not the result of Defendant's influence.

A. The record regarding this claim.

Trial counsel did not object to the admission of State's Exhibits 501-06, which were handwritten letters that had been seized from Defendant and Co-Defendant's jail cells, aside from the inclusion of any cover pages authored by the "Gang Task Force Coordinator at Potosi." (Tr.1523-24, 1527-28, 1531-33, 1540-42). A handwriting expert testified that those exhibits were written by Co-Defendant. (Tr.1564-69).

When the prosecutor asked to read some of the letters to the jury, the trial court responded, "You're talking about reading only from the letters that were identified as [Defendant's] handwriting?" and the prosecutor replied, "That's correct. Only those." (Tr.1571). In contrast, the trial court ruled that the defense would not be permitted to read Exhibit 501, one of Co-Defendant's letters, to the jury because, unless and until Co-Defendant testified, it was hearsay. (Tr.1572-73).

Later, during cross-examination of Co-Defendant, the prosecutor was permitted to read the entirety of Defendant's Exhibit A—Co-Defendant's letter to defense counsel that was substantially similar to State's Exhibit 501—to the jury. (Tr.1632-35, 1666-72). At the end of the letter, Co-Defendant stated, "I am willing to testify on [Defendant's] behalf to the facts that prove [Defendant] had nothing to do with the murder of [Victim]." (Tr.1671).

Additionally, Co-Defendant admitted that he wrote the letter constituting State's Exhibit 504, in which he told Defendant, "When your s*** make [sic] it to the courtroom, tell your lawyer to put me on the stand because I know you wasn't there and I'm willing to testify on your behalf." (Tr.1658).

During closing argument, the prosecutor told the jury to "ask for the exhibits," but he noted, "I don't think you're going to get all the letters. There's all kinds of stuff in the letters that may not be admissible or relevant. . . . You already heard the relevant contents of the letters in the case." (Tr.1726). The prosecutor repeatedly referred to and read from Co-Defendant's letter to defense counsel. (Tr.1729-30, 1732, 1747, 1749-54, 1780-82). The prosecutor also cited other letters, noting that Co-Defendant called Defendant "Big Bro" and repeatedly referred to "Loyalty is royalty," which the prosecutor called "their motto." (Tr.1785-87).

Defendant's amended motion alleged that counsel were ineffective for failing to object to the admission of State's Exhibits 502-06 because they were

hearsay and Co-Defendant had not yet testified at the time of their admission. (PCR D130, pp.22-23). The amended motion also alleged that the letters were irrelevant. (PCR D130, p. 23).

Trial counsel testified that they wanted the letters in evidence because "some of the letters . . . if believed would have been helpful to [Defendant's] case." (PCR Tr.42, 144). Ms. Kraft agreed that "the jurors probably could have inferred [that there was gang activity going on] from these letters." (PCR Tr.589).

The motion court denied this claim, finding that "[t]he defense was trying to establish at trial that the real shooters of [Victim] were [Co-Defendant] and Kyle Dismukes, not [Defendant]" and that "[l]etting the letters come in . . . furthered the defense theory because the defense argued they showed that [Defendant] had not coached [Co-Defendant's] testimony regarding Kyle Dismukes being the shooter, and allowed for the impeachment of [Co-Defendant] . . . ." (PCR D222, pp.20-21). The motion court found that "[Defendant] has failed to show the strategy was unreasonable and has failed to establish prejudice." (PCR D222, p.21).

B. Counsel were not ineffective for not objecting to Co-Defendant's letters because an objection would have been meritless and the letters reasonably supported the defense's trial strategy.

Counsel were not ineffective for not objecting to Co-Defendant's letters as hearsay because such an objection would have been meritless, and it is not reasonably probable that Defendant was prejudiced as a result of their admission. "The reason hearsay is generally inadmissible is because the person who made the offered statement is not under oath or subject to cross-examination." *State v. Jackson*, 426 S.W.3d 717, 719 (Mo.App.E.D. 2014). "To the 'extent a declarant is available for live testimony, under oath, the dangers of hearsay are largely non-existent.'" *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006) (quoting *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000)). "Accordingly, prejudice will not be found from the admission of hearsay testimony where the declarant was also a witness at trial, testified on the same matter, and was subject to cross-examination because the primary defects in hearsay testimony are alleviated." *Jackson*, 426 S.W.3d at 719. Moreover, "[a]ny objection to [the hearsay] testimony would have been meritless and therefore will not serve as a basis for finding ineffective assistance of counsel." *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo.App.E.D. 1995); *see also Elliott v. State*, 272 S.W.3d 924, 926 (Mo.App.S.D. 2009).

Here, while Co-Defendant had not yet testified at the time his letters were admitted into evidence, trial counsel intended to call Co-Defendant later as a defense witness. (Tr.1622-80; PCR Tr.41-42, 546-48). Moreover, the trial court expressly ruled that, even though Co-Defendant's letters had been admitted into evidence, they could not be read to the jury unless and until Co-Defendant testified because they were hearsay. (Tr.1572-73). Finally, during his testimony, Co-Defendant admitted that he had exchanged letters with Defendant, including State's Exhibit 504, and that he had written State's Exhibit 501. (Tr.1635-37, 1658). Because counsel were aware that Co-Defendant would testify at trial, and Co-Defendant was cross-examined about the letters, counsel were not ineffective for not objecting to the admission of Co-Defendant's letters, and Defendant was not prejudiced as a result. *See Hamilton*, 892 S.W.2d at 378-79; *Elliott*, 272 S.W.3d at 926.

Defendant also claims that Co-Defendant's letters were inadmissible because they were irrelevant. (Def's Br.25). Given that the State objected to hearsay in response to defense counsel's request to read State's Exhibit 501 to the jury, and that the trial court sustained that objection, it appears that Co-Defendant's letters were admitted merely to establish that Co-Defendant was exchanging letters with Defendant, thereby giving more weight to the State's argument that Defendant exhibited consciousness of guilt in his attempts to

influence Co-Defendant into concealing his involvement in Victim's murder. (Tr.1523-24, 1571-73). *See* Point IV at 57-58.

In any event, trial counsel were not ineffective for not objecting to the relevance of Co-Defendant's letters because it was a reasonable trial strategy. (PCR D222, p.20-21). Trial counsel's defense strategy relied in part on Co-Defendant's out-of-court statements that he and Kyle Dismukes, not Defendant, shot and killed Victim. (PCR Tr.57, 147, 547; PCR D222, p.20-21). Accordingly, trial counsel testified that they wanted his letters in evidence because they showed that "the talk about testifying [on Defendant's behalf], originate[d] from [Co-Defendant]." (Tr.1770; PCR Tr. 41, 144). Additionally, as the motion court found, the letters "allowed for the impeachment of [Co-Defendant] should he have chosen to testify that [Defendant] was in fact the shooter." (PCR D222, p.21; State's Ex.501).

Defendant argues that counsel's strategy was unreasonable and that Defendant was prejudiced because Co-Defendant's letters contained phrases such as "Love & Loyalty," "Loyalty is Royalty," and "Lawn Life," which allegedly referenced gang affiliation. (Def's Br.62-63). But counsel could have reasonably determined that the value of showing Defendant's lack of involvement with Co-Defendant's statements exculpating Defendant outweighed any prejudice resulting from the inclusion of vague, familial phrases like "Love & Loyalty." *Cf. State v. Davidson*, 242 S.W.3d 409, 415

(Mo.App.E.D. 2007) ("Where, as here, there is no reference to any specific criminal act committed either by the defendant or by any gang to which the defendant might belong, admission of such a vague reference . . . does not support a claim of reversible error.").

Defendant also argues that counsel's strategy was unreasonable because the jury could have inferred from Co-Defendant's reciprocal use of the phrases containing the word "[l]oyalty" that Co-Defendant was influenced by Defendant to exculpate him, but the letters contained no explicit direction by Defendant and reasonably supported trial counsel's argument to the jury that "[t]he letters, the talk about testifying, originate from [Co-Defendant]. [Defendant's letter] that talks about Corey and Lorenzo is after [Co-Defendant] has come forward and made all these statements, saying he did this with his brother, Kyle." (Def's Br.67; Tr.1770). Defendant has thus failed to overcome the presumption that counsel's strategy in permitting Co-Defendant's letters to be admitted into evidence was reasonable.

IV. (Defendant's Letters to Co-Defendant)

The motion court did not clearly err in finding that trial counsel were not ineffective for not objecting to the admission of Defendant's letters to Co-Defendant because they were relevant to show Defendant's consciousness of guilt and motive for Victim's murder and they reasonably supported counsel's trial strategy that Co-Defendant's out-of-court statements exculpating Defendant were credible and not the result of Defendant's influence.

A. The record regarding this claim.

Trial counsel did not object to the admission of State's Exhibits 401, 402, 403, 405, 407, and 409, aside from the inclusion of any cover pages authored by the "Gang Task Force Coordinator at Potosi." (Tr.1527-28, 1542-45). A handwriting expert testified that those exhibits were written by Defendant. (Tr.1537-39, 1551-64). The prosecutor read State's Exhibits 401, 403, 405, 407, and 409 aloud to the jury. (Tr.1573-76).

Co-Defendant admitted that Defendant had sent him a letter, telling him not to say anything about "Corey and Lorenzo." (Tr.1636-37; State's Ex.409). During closing argument, the prosecutor referred to that letter and noted that Defendant had used a different name for the return address. (Tr.1788-90). The prosecutor also emphasized that Defendant called Co-Defendant, "Lil Bro," in his letters and used "their motto," "[l]oyalty is royalty." (Tr.1791).

Defendant's amended motion alleged that counsel were ineffective for failing to object to the admission and reading of State's Exhibits 401, 403, 405, and 407 because they were irrelevant. (PCR D130, pp.19-20).

Trial counsel agreed at the postconviction hearing that the prosecutor used Defendant's letter directing Co-Defendant not to say anything about Corey and Lorenzo as evidence of Defendant's motive to kill Victim. (PCR Tr.140). Counsel Kraft acknowledged that "the jurors probably could have inferred [that there was gang activity going on] from these letters." (PCR Tr.589). But trial counsel also testified that "there were some good things" in the letters "that [they] wanted to use to [their] advantage," such as the absence of any direction by Defendant to Co-Defendant to exculpate Defendant before Co-Defendant made such a statement. (PCR Tr.142-43, 145, 545).

The motion court denied this claim, finding that counsel were not ineffective because "[b]y allowing portions of the letters [to] come into evidence, defense counsel [were] attempting to shore up their argument that Mr. Dismukes was the shooter with [Co-Defendant], not [Defendant], and that [Defendant] had not told [Co-Defendant] what to say before he made the statements." (PCR D222, p.20). The motion court further noted that "some portions of the letters were redacted as irrelevant" and that "[t]he letters and envelopes were admitted partially for use as exemplars for the handwriting expert" to identify Defendant's handwriting. (PCR D222, p.19).

B. Counsel were not ineffective for not objecting to Defendant's letters to Co-Defendant because they were admissible and reasonably supported the defense's trial strategy.

Counsel were not ineffective for failing to object to the admission of Defendant's letters to Co-Defendant because they were both logically and legally relevant. Evidence "is admissible if it is logically relevant, in that it has some legitimate tendency to directly establish the defendant's guilt of the crime charged, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect." *Davidson*, 242 S.W.3d at 415.

Here, Defendant's letters to Co-Defendant were logically relevant because they tended to show Defendant's consciousness of guilt, in that they contained Defendant's repeated encouragement to Co-Defendant that "[they] going [sic] to make it, Bro," that "[he] got this s*** covered," that Co-Defendant should "[j]ust hold fast," and that "[l]oyalty is royalty," from which the jury could reasonably infer that Defendant was attempting to convince Co-Defendant to conceal Defendant's involvement in Victim's murder. (Tr.1573-76). *See id.* (quoting *State v. Barton*, 998 S.W.2d 19, 28 (Mo. banc 1999)) ("Conduct and declarations of a defendant that are relevant to show consciousness of guilt or a desire to conceal the offense are admissible because they tend to establish the defendant's guilt of the charged crime."). Such relevance was further enhanced by Defendant's direction to Co-Defendant to refrain from "say[ing]

anything about Zo and Corey in this case," which the State argued showed not only Defendant's consciousness of guilt but Defendant's motive for killing Victim. (Tr.1788-89). Defendant's letters to Co-Defendant were therefore logically relevant.

Defendant argues that Defendant's letters were nevertheless inadmissible because they contained phrases such as "Love-N-Loyalty," Loyalty is Royalty," and "Yung Hood," which Defendant claims referenced his gang affiliation. (Def's Br.66). But "[w]here, as here, there is no reference to any specific criminal act committed either by the defendant or by any gang to which the defendant might belong, admission of such a vague reference . . . does not support a claim of reversible error." *Davidson*, 242 S.W.3d at 415. Moreover, the probative value in showing Defendant's consciousness of guilt and his attempt to influence Co-Defendant by emphasizing the bond between them outweighed any undue prejudice resulting from the phrases' vague reference to gang affiliation. *See State v. Wren*, 317 S.W.3d 111, 124 (Mo.App.E.D. 2010) ("[E]vidence of Defendant's and [a defense witness's] gang membership was solicited by the State . . . to demonstrate [the defense witness's] bias in providing a belated alibi for Defendant and, as such, was probative and admissible.").

Because Defendant's letters to Co-Defendant were both logically and legally relevant and therefore admissible, counsel were not ineffective for failing to

object to their admission. *See Anderson*, 196 S.W.3d at 38 ("Counsel is not ineffective for failing to make non-meritorious objections.")

Additionally, the motion court did not clearly err in finding that trial counsel's alleged failure to object was a reasonable trial strategy. (PCR D222, p.20). Trial counsel's defense strategy relied in part on Co-Defendant's out-of-court statements that he and Kyle Dismukes, not Defendant, shot and killed Victim. (PCR Tr.57, 147, 547; PCR D222, p.20). In support of that strategy, trial counsel testified that "that [they] wanted to use to [their] advantage" the absence in Defendant's letters of any direction by Defendant to Co-Defendant to exculpate Defendant before Co-Defendant made such a statement. (PCR Tr.142-43, 145, 545). While Defendant claims that counsel's strategy was unreasonable because the letters contained alleged references to gang affiliation, counsel could have reasonably determined that the value of showing Defendant's lack of involvement with Co-Defendant's statements exculpating him outweighed any prejudice resulting from the inclusion of vague, familial phrases like "Love-N-Loyalty." (Def's Br.66). Defendant also argues that counsel's strategy was unreasonable because the jury could have inferred from the letters that Defendant influenced Co-Defendant to exculpate him, but the letters contained no such explicit direction by Defendant, which allowed trial counsel to reasonably argue to the jury that "[t]he letters, the talk about testifying, originate from [Co-Defendant]. The one that talks about Corey and

Lorenzo is after [Co-Defendant] has come forward and made all these statements, saying he did this with his brother, Kyle." (Def's Br.67; Tr.1770). Defendant has thus failed to overcome the presumption that counsel's strategy in permitting Defendant's letters to be admitted into evidence was reasonable.

V. (Co-Defendant's Prior Claim of Innocence)

The motion court did not clearly err in finding that Defendant failed to overcome the presumption that trial counsel's alleged failure to impeach Co-Defendant with his prior statement that he was not present when Victim was shot was a reasonable trial strategy.

A. The record regarding this claim.

Defendant's amended motion alleged that counsel was ineffective for failing to impeach Co-Defendant with his statement in his Rule 24.035 motion that he was not present when Victim was murdered. (PCR D130, p.59). The amended motion alleged that such impeachment would have shown that Co-Defendant's testimony that Defendant shot Victim was false. (PCR D130, p.61).

At the evidentiary hearing, the trial court took judicial notice of State's Exhibit 500, which was Co-Defendant's pro se Rule 24.035 motion. (PCR Tr.289; Tr.1546-47). In the exhibit, Co-Defendant claimed that his judgment of conviction for second-degree murder should be set aside because he had "witnesses to stand in trial to inform [his] whereabouts at the time of the incident," "which would help prove [his] innocence." (State's Ex.500).

The motion court denied this claim, finding that "[a] statement that [Co-Defendant] was not at the scene of the crime would not have supported [Defendant's] defense" that he was not the second shooter. (PCR D222, p.30). The motion court added that impeaching Co-Defendant with his "self-serving

alibi" would have "possibly ma[de] it even less likely that the jury would buy the version that [Defendant] was not the second shooter." (PCR D222, p.30). The motion court concluded that Defendant had not "overcome the presumption that counsel's decision not to impeach was a matter of trial strategy" and that "[i]t was not ineffective assistance of counsel to fail to impeach [Co-Defendant] as alleged." (PCR D222, p.31).

B. Defendant failed to overcome the presumption that trial counsel's alleged failure to impeach Co-Defendant was reasonable trial strategy.

"Generally, this Court presumes that counsel's decision not to impeach a witness is a matter of trial strategy." *Barton v. State*, 432 S.W.3d 741, 750 (Mo. banc 2014). Defendant failed to overcome that presumption, in part because Defendant never asked counsel at the evidentiary hearing about this claim. (PCR Tr.35-214, 452-590; PCR D222, p.31). *See Helmig v. State*, 42 S.W.3d 658, 676 (Mo.App.E.D. 2001) ("By failing to ask counsel for an explanation why he did not elicit this testimony, movant failed to provide the motion court with any basis for concluding that counsel did not have a strategic purpose . . . .").

The record otherwise showed that trial counsel's strategy was to show that Defendant was innocent by eliciting Co-Defendant's prior statements that he and his brother, Kyle Dismukes, not Defendant, shot Victim. (PCR Tr.57, 147, 547). *See* Point I at 31-33. It would have been inconsistent with that strategy

to present evidence that Co-Defendant was not present when Victim was shot and that he therefore could not have seen whether Defendant or someone else shot Victim. (PCR D222, p.30). Furthermore, it would have been reasonable for counsel to have been concerned that if the jury had been presented with a third alternative account by Co-Defendant of the circumstances of Victim's murder, it would have been less likely to believe the version in which Defendant was not one of the shooters. (PCR D222, p.30). Therefore, Defendant failed to overcome the presumption that it was reasonable strategy for trial counsel to have decided not to impeach Co-Defendant with his prior statement that he was not present when Victim was shot.

Additionally, even if it would have been reasonable for trial counsel to have impeached Co-Defendant in the alleged manner, "counsel is not ineffective for purs[u]ing one trial strategy to the exclusion of another." *Barton*, 432 S.W.3d at 750.

VI. (Co-Defendant's Deposition)

The motion court did not clearly err in denying Defendant's motion to compel Co-Defendant to answer deposition questions because Co-Defendant had a privilege not to incriminate himself of having previously committed perjury, and Defendant has failed to show that he was prejudiced as a result.

A. The record regarding this claim.

Defendant attempted to depose Co-Defendant on October 24, 2013, but he "[p]lead the Fifth" to every question asked of him, pursuant to the advice of his attorney. (PCR D118, 120). Co-Defendant's attorney stated on the record of the deposition that they had not received a list of questions before the deposition and that she had advised Co-Defendant to invoke the Fifth Amendment in response to any question that he was asked in order to avoid the possibility of waiving his rights. (PCR D118, pp.33-37).

Defendant moved for a court order under Rule 61.01(g) to compel Co-Defendant to answer the questions asked of him during the deposition. (PCR D118). The motion alleged that "[t]he answers to all of these questions are necessary and discoverable to allow for a full and fair investigation into [Defendant's] [postconviction] claims." (PCR D118, p.5).

The motion court denied Defendant's motion to compel "as said questions would be a violation of [Co-Defendant's] 5th [A]mendment rights not to

incriminate himself as said questions could lead to priviledged [sic] information." (PCR D110, p.12; PCR D115).

Defendant's amended Rule 29.15 motion alleged that the motion court's refusal to compel Co-Defendant to answer the deposition questions was a violation of Defendant's right to due process. (PCR D130, p.9). The amended motion alleged that "[t]here is a reasonable probability that the deposition of [Co-Defendant] would have resulted in evidence which would have supported the other claims in this Amended Motion." (PCR D130, p.9).

Defendant also filed a renewed motion to compel before the evidentiary hearing. (PCR D168). The motion court denied Defendant's renewed motion. (PCR D178, p.1).

The motion court denied this claim, stating that "Movant has provided no law suggesting a Court must or should pierce the Fifth Amendment rights and attorney-client privilege of a third party in order to serve the interests of Movant" and that "Movant only speculates" that the court's failure to do so prejudiced him. (PCR D222, pp.14-15). The motion court added that "it is impossible for Movant's counsel to know" that Co-Defendant's answers "would not have incriminated him," as alleged in the amended motion. (PCR D222, p.14).

B. Co-Defendant had a privilege not to incriminate himself of having previously committed perjury.

The motion court did not clearly err in denying Defendant's motion to compel Co-Defendant to answer deposition questions because Co-Defendant had a Fifth Amendment privilege to refuse to answer the questions. "The Fifth Amendment protects an individual from being compelled to provide testimonial evidence against himself which may then be used to prosecute him." *State v. Sanders*, 842 S.W.2d 170, 173 (Mo.App.E.D. 1992). "The Fifth Amendment protects a witness from being required to give self-incriminating evidence of prior crimes." *State v. Benson*, 633 S.W.2d 200, 202 (Mo.App.E.D. 1982). "A witness validly exercises the privilege where an answer to the question propounded subjects the witness to a real danger of further incrimination." *Sanders*, 842 S.W.2d at 173. "When there has been no waiver of a privilege, a blanket invocation of the right by a witness is routinely upheld by the trial court." *Id.*

Defendant claims that "[Co-Defendant] could not invoke the Fifth Amendment because he had pled guilty to killing [Victim]." (Def's Br.73). It is true that "a knowing and voluntary guilty plea waives the protection against compelled self-incrimination, . . . as the witness 'can no longer be incriminated by his testimony about said crime.'" *Id.* (quoting *Reina v. United States*, 364 U.S. 507, 513 (1960)). But while Co-Defendant could not be convicted again of

murdering Victim, he remained subject to criminal prosecution for perjury if it could be proven that he testified falsely under oath during his guilty plea or Defendant's trial that Defendant had shot Victim. *See* § 570.040.1, RSMo 2000; *State v. Churchill*, 454 S.W.3d 328, 338 (Mo. banc 2015) ("A false statement under oath . . . is an entirely new crime."). Thus, Co-Defendant was entitled to refuse to answer questions at the deposition if a truthful answer might have tended to incriminate him of having previously committed perjury. *See Churchill*, 454 S.W.3d at 338. The motion court therefore did not clearly err in denying Defendant's motion to compel.

C. Defendant has failed to show that he was prejudiced by the court's denial of his motion to compel Co-Defendant to answer deposition questions.

Even if the motion to compel should have been granted, Defendant has failed to prove that he was prejudiced as a result. First, Defendant did not establish that Co-Defendant would have answered the questions, even if ordered to do so by the court. Indeed, his former counsel testified at the postconviction hearing that Co-Defendant had previously contemplated refusing to testify at Defendant's trial "and get a year if it came to that from Judge Ross, if he found he had no [F]ifth [A]mendment right." (PCR Tr.252-53).

Further, even if Co-Defendant had chosen to answer the questions, Defendant failed to specifically identify which claims would have been supported by the answers or explain the significance of that support. Instead, Defendant vaguely claims that he was "denied . . . the opportunity to fully present his [Co-Defendant] claims." (Def's Br.74). Given Defendant's failure to allege specific facts to support his claim of prejudice, the motion court did not clearly err in finding that "Movant only speculates" that he was prejudiced. (PCR D222, pp.14-15).

Indeed, several of the subjects contained in Co-Defendant's deposition questions were sufficiently established by other testimony in the record and are not in dispute, including the fact that Co-Defendant pleaded guilty to murdering Victim, that he refused to be sworn during an attempted deposition by trial counsel, that he wrote a letter to trial counsel in February 2007 alleging that Defendant did not shoot Victim, and that Co-Defendant filed a 24.035 motion. (Def's Br.71-72; Tr.1632-36, 1638, 1647, 1672, 1679-80; PCR Ex.67).

Additionally, Defendant did not attempt to present evidence from Co-Defendant at the postconviction hearing, which was held almost five years after Co-Defendant invoked his privilege against self-incrimination at the deposition, nor did Defendant attempt to establish during the postconviction hearing that Co-Defendant still would have refused to answer questions if

called, further undercutting his claim that Co-Defendant's answers were material to his claims. (PCR Tr.9, 244-55, 284-90; PCR Ex.49).

The motion court did not clearly err in denying Defendant's motion to compel Co-Defendant to answer questions during a deposition.

VII. (Defendant's Photo at Police Station)

The motion court did not clearly err in finding that trial counsel were not ineffective for not objecting to evidence that Silas identified Defendant from a photograph at the police station because such an objection would have been non-meritorious.

A. The record regarding this claim.

During Silas's interview with police, the detective asked Silas, "[Y]ou pointed out a picture in this room, . . . the picture you see on the wall, that's the same person that shot," and Silas interjected, "[Victim], yes." (State's Ex.78-C, p.6). The two detectives both confirmed that Silas referred to a "photograph on the wall of the room where the interview was occurring." (Tr.1416-17, 1609). The interview took place at the Pine Lawn police station. (Tr.1415, 1421, 1609; State's Ex.78-C, p.1). The photograph, with the fact that Defendant was "wanted" redacted from it, was admitted into evidence without objection and shown to the jury. (Tr.1707-08, 1716).

Defendant's amended motion alleged that counsel were ineffective for failing to object to evidence that Silas identified Defendant from a photograph at the police station because it concerned "prior bad acts and uncharged crimes." (PCR D130, p.45).

Trial counsel acknowledged that there were no direct references to the photograph as a "wanted photo" and that the unredacted version did not go to the jury. (PCR Tr.66, 160-61, 475, 552-53).

The motion court denied this claim, finding that "[a]t no point during the trial was the photograph identified as a "wanted" poster, and there was nothing presented as to why [Defendant's] photo was on the wall of the police station." (PCR D222, p.27). The motion court concluded that "it does not appear that there would have been valid grounds for exclusion of [Defendant's] photo during trial." (PCR D222, p.27).

B. Counsel were not ineffective for not objecting to evidence that this Court found on direct appeal was properly admitted.

This claim was raised for plain error and denied on direct appeal. *McFadden*, 369 S.W.3d at 740-41. This Court held that "[t]he evidence that [Defendant's] photograph was displayed at the police station did not constitute evidence of uncharged crimes." *Id.* at 741; *see also State v. Tivis*, 933 S.W.2d 843, 846 (Mo.App.W.D. 1996) ("[T]he mere fact that a police department previously had on file a photograph of a defendant does not lead to the inference that the defendant has committed prior crimes."); *State v. Carr*, 50 S.W.3d 848, 856-57 (Mo.App.W.D. 2001); *State v. Ware*, 326 S.W.3d 512, 523-24 (Mo.App.S.D. 2010); *State v. Futrell*, 565 S.W.2d 465, 467 (Mo.App.St.L.D. 1978) ("'[M]ugshots' are admissible if the objectionable parts of the

photographs which contain police data are masked and the photographs are relevant to the issue of identity."). Because this Court found no error on direct appeal with the trial court's decision to admit the evidence, trial counsel cannot be found to have been ineffective for failing to object to its admission. *See Ringo v. State*, 120 S.W.3d 743, 746 (Mo. banc 2003).

VIII. ("On File" Fingerprints)

The motion court did not clearly err in finding that trial counsel were not ineffective for not objecting to evidence that the fingerprint found at the murder scene matched one of Defendant's on-file fingerprints because such an objection would have been non-meritorious.

A. The record regarding this claim.

The latent print examiner testified that after obtaining a fingerprint from the cigar found at the murder scene, she searched through the Automated Fingerprint Identification System (AFIS) and "determined that it was a match with one of the candidates from the computer." (Tr.1309-10). She further testified that "[o]nce [she] get[s] a match on the computer, . . . [she] get[s] the prints from the master files, if [she] ha[s] them there[.]" (Tr.1312). The print examiner testified that State's Exhibit 2-A was "an older card" of Defendant's fingerprints that "[she] ha[d] or were located on file." (Tr.1315).

Defendant's amended motion alleged that counsel were ineffective for failing to object to the print examiner's testimony because it referenced "prior bad acts and uncharged crimes." (PCR D130, pp.37-39).

Trial counsel acknowledged that "there was no reference to any other actual arrests, crime, or anything of that nature," which would be objectionable. (PCR Tr.63, 157-58, 470, 552).

The motion court denied this claim, finding that "[t]here were no references to any other actual arrests or crimes" and concluding that "[i]t is hard to imagine how an objection to the fingerprint cards would have been meritorious in this situation." (PCR D222, p.26).

B. Counsel were not ineffective for not objecting to fingerprint evidence that this Court found on direct appeal was properly admitted.

This claim was raised for plain error and denied on direct appeal. *McFadden*, 369 S.W.3d at 740-42. This Court held that "[t]he fingerprint examiner's testimony was neutral," in that "[t]here was no testimony by the fingerprint examiner that [Defendant] was fingerprinted pursuant to an arrest or conviction of a crime, which would render the fingerprint examiner's testimony inadmissible." *Id*. at 741.; *see also State v. Morrow*, 968 S.W.2d 100, 111 (Mo. banc 1998) ("Fingerprint cards, in and of themselves, do not constitute evidence of a prior crime."); *State v. McMilian*, 295 S.W.3d 537, 540 (Mo.App.W.D. 2009) (quoting *State v. Perryman*, 851 S.W.2d 776, 779 (Mo.App.E.D. 1993)) ("Admission of fingerprint cards is unobjectionable when 'an examination of the challenged testimony reveals that the witness gave no indication that defendant was fingerprinted pursuant to an arrest or conviction of a crime and the testimony was neutral."). Because this Court found no error on direct appeal with the trial court's decision to admit the evidence, trial

counsel cannot be found to have been ineffective for failing to object to its admission. *See Ringo*, 120 S.W.3d at 746.

IX. (State's Arguments)

The motion court did not clearly err in finding that trial counsel were not ineffective for failing to object to penalty-phase arguments that were not improper.

A. The record regarding this claim.

During the State's initial penalty-phase closing argument, the prosecutor recounted that "[Defendant] threatens to kill Eva . . . if she doesn't get his name out of it." (Tr.2380). The prosecutor argued, "[Defendant] wants to kill her. He just didn't get a chance to kill her because he got caught in St. Charles. That's aggravating. He's not done killing." (Tr.2380-81). Later, in rebuttal argument, the prosecutor reiterated that "[Defendant] threatens Eva, that Eva is going to be next if she doesn't get his name out of it." (Tr.2408). The prosecutor further argued, "And you know what? She would have been next . . . . Eva was next on his list to kill. She was next." (Tr.2408).

Defense counsel concluded her penalty-phase argument by remarking on the "sanctity of life" and telling the jury, "You do not have to participate in the death of another human being. You can choose life." (Tr.2403).

In rebuttal, the prosecutor argued, "My only hope [sic] is that [defense counsel] would have been there . . . and made that same eloquent plea of her client . . . for mercy or forgiveness for [Victim] and for Leslie. But it wouldn't have made any difference, because her pleas would have fallen on deaf ears.

Because [Defendant] was hell bent on one thing: execution." (Tr.2404). The prosecutor further argued, "The defendant, at that time, decided the death penalty was appropriate. . . . [I]f there's one person that believes in the death penalty in this courtroom, it's that man." (Tr.2404).

Later, the prosecutor argued, "[W]e live in a civilized society. But there was a time when . . . we would have given the McFadden [sic] and the Addison family an opportunity for retribution. We would have let them hunt [Defendant] down like he deserves. But we don't live in that society. We gave him a fair trial." (Tr.2409). The prosecutor argued that "[Defendant] is the one that's been mocking our system." (Tr.2410).

The prosecutor told the jury, "Please don't forget Leslie and [Victim]. That is why we're here." (Tr.2407). The prosecutor said, "Think of the terror that Leslie went through. Think of the terror that [Victim] went through. Think of the terror that Ms. Franklin, when she came home, went through. Think of the terror that Eva went through when she watched her sister get killed. Think of that." (Tr.2413).

The prosecutor concluded, "I leave you with [Victim] and Leslie Addison. Hold them. Hug them. Tell them you love them. But most of all, ladies and gentlemen, don't let them down." (Tr.2414).

Defendant's amended motion alleged that counsel were ineffective for failing to object to the penalty-phase arguments made by the prosecutor in part

because they improperly "inflamed the passions of the jury against [Defendant]." (PCR D132, pp.9-19).

Counsel Kraft testified that she did not have any reason for not objecting to the State's arguments. (PCR Tr.520-26).

The motion court denied this claim, finding that the prosecutor's arguments were proper, that "[t]rial counsel cannot be held ineffective for failing to make meritless objections," and that "[a]ny objection . . . would not have changed the outcome of the case." (PCR D222, pp.84-86).

B. Counsel were not ineffective for failing to object to arguments that were not improper.

Defendant first claims that the prosecutor's argument that Defendant would have killed Eva if he wasn't arrested was "speculative argument that misled the jury." (Def's Br.81-82). But the prosecutor argued a reasonable inference based on Eva's testimony that Defendant told her shortly before he was arrested that "he was going to kill [her] next if [she] didn't get his name off" of Leslie's murder. (Tr. 1353-56, 1841-42, 1865-66). *See State v. Brown*, 337 S.W.3d 12, 14 (Mo. banc 2011) ("A prosecutor is allowed to argue the evidence and all reasonable inferences from the evidence during closing arguments."). "The failure to make meritless objections does not constitute ineffective assistance of counsel." *Tisius*, 519 S.W.3d at 429.

Defendant next claims that the prosecutor's argument that Defendant was given a fair trial rather than allowing the Victims' families an opportunity for retribution was improper because it "lessened the jury's sense of responsibility." (Def's Br.82). But on direct appeal, this Court held that "the State did not comment that the victim's family deserved retribution in the form of demanding the death penalty" but instead "explained that as members of a civilized society we engage in preserving the due process rights of a defendant and ensuring a fair trial; we do not seek retribution." *McFadden*, 369 S.W.3d at 751. An objection to this argument would have been meritless.

Finally, Defendant claims that the prosecutor's arguments regarding the terror of the victims and their families, that Defendant believed in the death penalty, and to hold, hug, and love the victims were "improper opinions and argued facts outside the record." (Def's Br.82). But the evidence presented at trial supported a reasonable inference that the victims and their families felt terror as a result of Defendant's actions. (Tr.1148, 1191-92, 1229, 1450-51, 1850-54, 1857, 2036-37). It was also reasonable to infer from the evidence that Defendant was not opposed to killing an individual under certain circumstances, given the overwhelming evidence showing that he committed two execution-style murders. (Tr.1075-76, 1114, 1149-51, 1166, 1193, 1196-97, 1211, 1228, 1254, 1453, 1456; 1851-54; State's Ex.78-C, pp.4-5). *See McFadden*,

369 S.W.3d at 751. Defendant fails to explain how telling the jurors to hold, hug, and love the victims argued facts outside the record. (Def's Br.82).

Finally, Defendant claims that "[a]ll of the discussed arguments injected passion, prejudice, caprice, and emotion." (Def's Br.82). But as this Court has repeatedly found, "arguments likely to inflame and excite prejudices of the jury are not improper if they help the jury understand and appreciate evidence that is likely to cause an emotional response." *McFadden*, 553 S.W.3d at 316 (quoting *State v. McFadden*, 391 S.W.3d 408, 425 (Mo. banc 2013)); *McFadden*, 369 S.W.3d at 751. The motion court did not clearly err in finding that counsel were not ineffective for failing to object to arguments that were not improper.

X. (Dr. White)

The motion court did not clearly err in finding that trial counsel were not ineffective for failing to call Dr. White to testify about the cultural conditions present in Pine Lawn and their relationship with crime because Defendant failed to prove that counsel's presentation of lay testimony regarding the impact of Pine Lawn's violent culture on Defendant constituted deficient performance or that there is a reasonable probability that Defendant was prejudiced as a result.

A. The record regarding this claim.

Defendant's amended motion alleged that counsel was ineffective for failing to call Professor Norman White to testify about how growing up in "a severely disadvantaged community" affected Defendant's decision-making ability. (PCR D130, pp.73-79).

Trial counsel testified that their mitigation theory was that "[Defendant] came from a very bad background," "had a very, very poor home life," "had been raised in a pretty difficult and violent environment," and "basically did not have a chance in life." (PCR Tr.70, 477). Counsel testified that it was their intent to present evidence of Pine Lawn's environment because it "had an effect on [Defendant]." (PCR Tr.89). Trial counsel testified that they talked to Defendant's family and friends, did "interviews with residents from the community," and presented Dr. Draper to talk about "child developmental

issues," including "the impact that growing up in an at-risk community can have on the youth there." (PCR Tr.72, 90, 478).

Trial counsel testified that they did not recall considering hiring a sociologist to talk about the effects of growing up in an at-risk community, but that they decided not to hire an expert in gang culture, consistent with their efforts to keep out evidence of Defendant's gang membership, which they did not consider to be mitigating evidence. (PCR Tr.72-73, 171, 173, 479, 557-59, 588). Trial counsel testified that they were not aware of "any sociologists being called in death penalty cases to put on evidence of at-risk communities" in Missouri at the time of the trial in 2007, and that only in 2008 did the ABA guidelines focus "more . . . on doing a broader sort of investigation of the person's environment than . . . was sort of the standard previously." (PCR Tr.169-71, 556).

Professor White, a professor of criminology in St. Louis since 1997, whose research focused on factors that influence youth into becoming involved in the criminal justice system, testified that he was asked by postconviction counsel to create a social profile of Pine Lawn in the 1980's and 90's and "paint a picture of what . . . life was like for [Defendant] growing up . . . and what impact that might have had on him as an individual." (PCR Ex.43, pp.456-59, 463, 466, 633). Professor White reviewed Dr. Draper's report, read some newspaper clippings about Pine Lawn, and spoke to a number of people, only some of

whom knew Defendant, as well as Defendant himself. (PCR Ex.43, pp.467-68). Professor White also relied on a video compilation of interviews about living in the area of Pine Lawn. (PCR Ex.43, pp.468, 497-98; PCR Ex.37). Professor White admitted that this was the first time he had ever done a social profile for court. (PCR Ex.43, p.632-33).

Professor White testified that "[p]lace matters," in that environmental factors, such as a lack of education, poverty, and illegitimate births in a community, are highly correlated to a higher community crime rate. (PCR Ex.43, pp.473-74). Professor White testified that such factors immerse the entire community in risk. (PCR Ex.43, pp.474, 476). Professor White cited U.S. Census Bureau statistics for Pine Lawn that showed a declining population that was predominantly African-American, a high unemployment rate, a high poverty rate, and a high percentage of single-parent households. (PCR Ex.43, pp.478-81). Professor White also cited crime statistics that he believed showed a "fairly high" crime rate. (PCR Ex.43, pp.482-83). Professor White testified that he talked to "a number of people" who described Pine Lawn as "a war zone" and who alleged that the schools were not safe. (PCR Ex.43, pp.488, 626, 628, 643). Professor White also relayed that gang violence proliferated in the community, making it difficult to travel safely from one block to another for access to various resources. (PCR Ex.43, pp.629-30). Professor White testified

that there were few employment opportunities and that the pay was not much. (PCR Ex.43, p.492).

Professor White testified that "[his] interpretation" was that Defendant "was a guy who was a product of the storm he was in," in that his personal background and challenges combined with the violence in the community made it "really hard" for Defendant. (PCR Ex.43, pp.486, 631). Professor White acknowledged that just living in Pine Lawn did not "guarantee" that one would become a murderer, but he testified that it increases one's chances of committing crimes. (PCR Ex.43, pp.631, 634, 666, 669).

The motion court denied this claim, finding that trial counsel "conducted a thorough investigation" of Defendant's environment, that "[c]ultural evidence was in some respects cumulative to the evidence offered by [Defendant's] family and friends," and that "[Defendant] has not demonstrated that counsel's strategy was unreasonable, only that an alternative strategy existed," which was "not readily available at the time of the trial" and was not then routinely considered by defense teams in capital cases in Missouri. (PCR D222, pp.37-38). The motion court also noted that "[m]uch of Dr. White's testimony is rife with hearsay and speculation" and that "[t]here is insufficient information in the record to conclude that his . . . . methods were generally accepted in the scientific community at any point in time." (PCR D222, pp.34-35, 38). The motion court further noted that "Dr. White was unable to render any opinion

regarding the impact of growing up in Pine Lawn as it related to the murders of either Leslie Addison or [Victim]" and that "[i]n light of the execution[-]style killing of both Leslie Addison and [Victim], as well as the multiple shootings, weapons charges, and drug possessions presented as aggravating circumstances, there was no reasonable probability that Dr. White's proposed testimony would have resulted in [Defendant] receiving a different sentence." (PCR D222, pp.38-39).

B. Counsel were not ineffective for presenting lay testimony about the cultural impact of Pine Lawn on Defendant, and not expert testimony, and Defendant has failed to establish that he was prejudiced as a result.

Defendant failed to prove that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have performed under similar circumstances. Counsel testified that they were not aware of "any sociologists being called in death penalty cases to put on evidence of at-risk communities" in Missouri at the time of the trial in 2007. (PCR Tr.169-71, 556). While Defendant alleges for the first time on appeal that ABA Guidelines and a case from Ohio support a contrary finding that counsel should have considered calling a sociological expert, no such supporting evidence was presented to the motion court. (Def's Br.89-91). Defendant thus failed in his opportunity to rebut counsel's testimony, which was accepted by the motion

court, that it was not common practice at the time to present expert testimony rather than lay testimony on the impact of the Defendant's environment. (PCR D222, pp.37-38). *See Tisius*, 519 S.W.3d at 425 (quoting *Mallow v. State*, 439 S.W.3d 764, 769 (Mo. banc 2014)) ("[D]efects in post-conviction relief pleadings 'cannot be remedied by the presentation of evidence and refinement of a claim on appeal.'"); *Strickland*, 466 U.S. at 689 ("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 performance at the time."). Moreover, counsel presented several lay witnesses who testified about the cultural influence of Pine Lawn on Defendant. (Tr.2139, 2154-55, 2172-73, 2196, 2240, 2253-54). The motion court thus did not clearly err in finding that counsel were not ineffective.

Additionally, the motion court did not clearly err in finding that Defendant failed to establish a reasonable probability that the jury would not have sentenced Defendant to death if they had heard Dr. White's testimony. (PCR D222, pp.38-39). Counsel presented evidence through several witnesses that Defendant grew up in "[p]retty rough and violent" neighborhoods that were "[e]conomically depressed" and "[d]ifficult . . . to live in." (Tr.2139, 2154-55, 2172-73, 2196, 2240, 2253-54). A former resident of Pine Lawn and friend of Defendant's testified that she heard gunshots "[a]ll the time" and that she

would "[h]it the floor" as a result. (Tr.2149, 2154-55). Counsel also presented evidence of the direct impact of the environment upon Defendant, showing that Defendant was regularly beaten up by other kids when he was a child, that he was later shot in the leg, and that he had several close friends who were killed. (Tr.2089, 2123, 2139, 2149, 2152, 2210-11, 2240, 2248, 2278, 2326). Defendant was further described as "always looking sad and weary" as a result. (Tr.2153). Counsel then argued in closing that "[n]one of us choose the environment into which we are born," that "when you grow up in violent neighborhoods, when you're just surrounded by violence, when you have . . . friends who are murdered by the time you're 20, that's going to have a serious effect on you," and that "you learn that violence is one way that you can survive and that you have to survive in these violent areas where you're forced to live." (Tr.2393, 2398-99). It is not reasonably probable that Dr. White's testimony would have changed the outcome of the penalty phase, given the evidence of cultural impact that was presented and the argument that was made by counsel, as well as the strong evidence that was presented in aggravation. (PCR Ex.43, pp.473-74). *See McFadden*, 553 S.W.3d at 311 ("As [Dr. White's] testimony was of limited assistance, the motion court did not clearly err in concluding counsel were not ineffective in failing to call him as a witness.").

XI. (Lay Witness Cultural Mitigation)

The motion court did not clearly err in finding that trial counsel were not ineffective for failing to call lay witnesses Tanesia Clark, Elwyn Walls, Sean Nichols, and Willabea Blackburn to testify about the adverse cultural conditions in Pine Lawn because such testimony would have been cumulative to the testimony already presented by other witnesses and there is no reasonable probability that such testimony would have resulted in a different sentence.

A. The record regarding this claim.

Defendant's amended motion alleged that counsel were ineffective for failing to investigate and present lay witnesses to testify about the "difficulties and the trauma associated with growing up and living in the Pine Lawn community and surrounding . . . areas." (PCR D131, pp.85-91).

Tanesia Clark testified that she lived in Pine Lawn from 1978 until approximately 2000 and that it changed in the 1980s from being a "very nice community" to becoming overwhelmed by drugs and gangs. (PCR Ex.86A, pp.4, 7, 16-17). Ms. Clark testified that "[t]he youth became destroyed" and that they took advantage of the financial benefit that came from dealing drugs. (PCR Ex.86A, p.17). Ms. Clark testified that the gun violence in the '80s and '90s was "bad," citing the fact that her mother's house was "shot up twice," as well as

other houses. (PCR Ex.86A, p.18). Ms. Clark also testified that there were shootings and fights at the schools over gang disputes. (PCR Ex.86A, pp.25-26). Ms. Clark testified that "[m]ost of the youth that lived in Pine Lawn were killed due to gun violence," citing "at least fifteen of the youth, all of them under age eighteen or seventeen, that were killed due to gun violence." (PCR Ex.86A, pp.18-19). Ms. Clark testified that the conditions of Pine Lawn caused her to become hopeless and suicidal, saying that "it takes a toll on you." (PCR Ex.86A, pp.19, 26). Ms. Clark testified that "[m]ost of the fathers were not in the households." (PCR Ex.86A, p.23).

Ms. Clark testified that she had moved out of Pine Lawn into another area in St. Louis by 2007, but that she would have been available to testify if she had been contacted. (PCR Ex.86A, pp.7, 27-28).

Ms. Willabea Blackburn testified that she had lived in a surrounding neighborhood of Pine Lawn since 1970 and that it began to deteriorate and become more violent in the 1980s. (PCR Ex.44, pp.386-90). Ms. Blackburn testified that her grandson was killed in Pine Lawn. (PCR Ex.44, p.389). Ms. Blackburn also testified that the high school had guards and police, though she admitted that she was relying on what other people had told her. (PCR Ex.44, p.390, 394).

Sean Nichols testified that he had been a teacher and administrator for St. Louis City public schools for almost 30 years, though he admitted that he had

never taught nor been an administrator for a school in Pine Lawn. (PCR Tr.256-58, 274-75). Mr. Nichols testified that "probably 80 percent" of the children he had worked with were from "at-risk communities." (PCR Tr.258). Mr. Nichols testified that "[a]lmost 99 percent of those that do not have father figures . . . have problems at school." (PCR Tr.263). Mr. Nichols admitted that he was not a psychologist. (PCR Tr.275). Mr. Nichols also admitted that he did not know Defendant. (PCR Tr.281).

Elwyn Walls testified that he had lived in Pine Lawn in the 1980s, that he continued to visit Pine Lawn during the 1990s, and that he had owned a building with a barber shop in Pine Lawn throughout that period of time. (PCR Tr.434-36, 440-41). Mr. Walls did not know Defendant. (PCR Tr.448). He testified that crime and gun violence in Pine Lawn substantially increased in the '80s and that "there started to be a gang problem." (PCR Tr.436-38, 445). Mr. Walls testified that the sale and use of illegal drugs in Pine Lawn was "prevalent" and visible. (PCR Tr.441-42). Mr. Walls agreed that there was a lack of positive male role models in the community. (PCR Tr.444-45). Mr. Walls testified that he knew people who had family members that were involved in disputes at the high school due to the fractions between the communities. (PCR Tr.439-40). Mr. Walls testified that "after 2005, 2006, or 2007, and then after 2010," he became involved in public politics and was presently an alderman on the city council for Pine Lawn. (PCR Tr.443). Mr. Walls testified that he would

have appeared and testified to the best of his abilities had he been called in 2007. (PCR Tr.447).

Trial counsel testified that they presented witnesses who provided evidence of the neighborhood that Defendant grew up in and that those witnesses "didn't have any baggage." (PCR Tr.89, 167-68, 176, 560-61). Trial counsel admitted that they did not interview "leaders in the community or persons who were working to address the socioeconomic issues in Pine Lawn[.]" (PCR Tr.90, 487). Trial counsel testified that they did not recall the name of Willabea Blackburn. (PCR Tr.91, 487-88). Trial counsel testified that they had tried to locate and contact Tanesia Kirkman-Clark but that their efforts were unsuccessful. (PCR Tr.96-97, 491-92). Trial counsel were not familiar with Sean Nichols. (PCR Tr.98-99, 492-93). Trial counsel also did not recall Elwyn Walls. (PCR Tr.104-05, 498-99).

The motion court denied this claim, finding that "[t]rial counsel did in fact call witnesses in the penalty phase of the trial, and from these witnesses they were able to elicit testimony supporting the propositions of [Defendant's] rough upbringing and the neighborhood in which he grew up." (PCR D222, pp.54-55). The motion court also found that much of the witnesses' testimony was "based upon hearsay, opinion, and speculation." (PCR D222, pp.58-59). The motion court further found that "[i]f called as witnesses, these individuals would give damaging testimony regarding gangs and the horrific effects their violence has

had on the community thereby providing additional evidence of aggravation for the jury to consider." (PCR D222, pp.58-59). The motion court concluded that "[Defendant] has failed to establish that the listed witnesses would testify to relevant, noncumulative facts" or that their testimony would have "create[d] a reasonable probability that the defendant wou[l]d not have been sentenced to death." (PCR D222, p.59).

B. Counsel were not ineffective for failing to present cumulative evidence.

The motion court did not clearly err in finding that trial counsel were not ineffective for failing to call additional lay witnesses or that Defendant was not prejudiced as a result because their testimony would not have significantly added to the evidence already presented by counsel. Counsel presented several witnesses, including Defendant's family members, a former resident of Pine Lawn and friend of Defendant, and Defendant's juvenile probation officer, who testified that Defendant grew up in "[p]retty rough and violent" neighborhoods that were "[e]conomically depressed" and "[d]ifficult . . . to live in" and about the direct impact of the environment upon Defendant. (Tr.2089, 2123, 2139, 2149, 2152-55, 2172-73, 2196, 2210-11, 2240, 2248, 2253-54, 2278, 2326). *See* Point X at 76-77. Counsel argued to the jury, "You heard everybody. . . . Everywhere [Defendant] was living was a violent neighborhood." (Tr.2399). The prospective witnesses' testimony regarding the prevalent violence in Pine

Lawn during the '80s and '90s would therefore have been cumulative to the testimony presented by counsel. "Counsel is not ineffective for not presenting cumulative evidence." *McFadden*, 553 S.W.3d at 310 (quoting *Deck v. State*, 381 S.W.3d 339, 351 (Mo. banc 2012)).

To the extent that the prospective witnesses would have provided additional detail regarding the adverse conditions in Pine Lawn beyond what was presented at trial, the motion court did not clearly err in finding that there was no reasonable probability that such additional detail would have resulted in a different sentence. (PCR D222, p.59). Indeed, neither Mr. Nichols nor Mr. Walls even knew Defendant, and they could not testify as to what Defendant experienced while living in Pine Lawn. (PCR Tr.281, 448). *See McFadden*, 553 S.W.3d at 310 (finding that their "[t]estimony regarding the particular circumstances surrounding [Defendant's] life and his crimes would only have been speculation.").

Additionally, Defendant failed to establish that counsel was ineffective for failing to call Ms. Clark. Trial counsel testified that they were familiar with Ms. Clark and had attempted to contact her, but that they were unsuccessful. (PCR Tr.96-97, 491-92). Defendant failed to satisfy his burden of proving that counsel were deficient in their efforts to contact Ms. Clark or that she could have been located through reasonable investigation. *See McFadden*, 553 S.W.3d at 305; Point II at 34.

XII. (Failure to Provide Dr. Draper with Dr. White's Findings)

The motion court did not clearly err in finding that trial counsel were not ineffective for failing to provide Dr. Draper with Dr. White's cultural analysis because Dr. Draper never requested such sociological information in order to form her expert opinion regarding Defendant's development, nor did Defendant establish that he was prejudiced as a result.

A. The record regarding this claim.

Defendant's amended motion alleged that counsel were ineffective for failing to provide Dr. Draper with the social profile completed by Professor White because "Dr. Draper could have explained to the jury how her evaluation of [Defendant] and his disorganized attachment with his family dovetailed with Professor White's testimony about the chronically disadvantaged community he was raised in." (PCR D131, p.35). Defendant's amended motion further alleged that Dr. Draper "did not have all the information Professor White discovered." (PCR D130, p.81).

Trial counsel testified that Dr. Draper never indicated that she needed sociological information or anything from Dr. White specifically and that they would have attempted to provide her with more information if she had made such a request. (PCR Tr.184-85, 535, 570).

Prior to the postconviction hearing, Dr. Draper was given Dr. White's report, which she testified provided her with additional information regarding the neighborhood that Defendant grew up in. (PCR Tr.299-300). For the hearing, Dr. Draper prepared a "LifePath," or a timeline of events in Defendant's life, in which she incorporated Dr. White's findings regarding the risks present in Defendant's community. (PCR Tr.301-02, 304-05). Dr. Draper acknowledged that she could have prepared a similar exhibit at trial but that trial counsel told her that it would not be necessary. (PCR Tr.340). Dr. Draper testified that all of the environmental risk factors identified by Dr. White would have impacted Defendant's development "because he did not have the grounding necessary to be able to live within these conditions in the community without having adverse [e]ffects from it." (PCR Tr.309-10, 313-14, 322). Dr. Draper testified that Defendant was influenced by his peers in the community and became "indoctrinated . . . into the criminal world" and the community violence. (PCR Tr.310-12, 315-16). Dr. Draper agreed that Defendant's attachment disorder did not cause him to kill people. (PCR Tr.363).

The motion court denied this claim, first noting that "Dr. White's social profile was not readily available at the time of trial" and that "[Defendant] has not been able to show that there were any such social profiles being done by experts at the time of the . . . trial in 2007." (PCR D222, pp.43, 46). The motion

court added that "this Court can confidently say presentation of such [a LifePath] would not have helped [Defendant] at his trial" and that "the inclusion of Dr. White's information on the chart was not necessary." (PCR D222, p.45). The motion court also noted that "Dr. Draper never indicated she needed a report from a sociologist about the community of Pine Lawn for her own testimony." (PCR D222, p.45). The motion court concluded that "[Defendant] has not established that, if [Dr. White's] report were provided to Dr. Draper, that the outcome of the trial would have been different." (PCR D222, pp.46-47).

B. Counsel were not ineffective for not providing Dr. Draper with Dr. White's findings, nor was Defendant prejudiced as a result.

The motion court did not clearly err in finding that counsel were not ineffective for failing to provide Dr. Draper with Dr. White's findings. (PCR D222, pp.43, 45-46). First, as previously argued, counsel were not ineffective for failing to obtain a sociologist's cultural profile of Pine Lawn and opinion as to the impact upon the community's residents because Defendant failed to establish that such conduct fell below the prevailing professional standards at the time of Defendant's trial. (PCR D222, pp.43, 46). *See* Point X at 89-90.

But even if counsel should have obtained findings from Dr. White, Defendant failed to establish that counsel were ineffective for failing to provide those findings to Dr. Draper to incorporate into her testimony. Trial counsel

testified that Dr. Draper never indicated that she needed sociological information or anything from Dr. White specifically and that they would have attempted to provide her with more information if she had made such a request. (PCR Tr.184-85, 535, 570). Indeed, Dr. Draper testified at trial that Defendant's relatives had informed her that "[Defendant] had lived in a very violent neighborhood" with "high crime" and that getting into fights "was a way of life in that community." (Tr.2240-41, 2253-54). The motion court explicitly found after the postconviction hearing that "the inclusion of Dr. White's information on [Dr. Draper's] chart was not necessary." (PCR D222, p.45). Trial counsel were not ineffective for failing to provide additional information to Dr. Draper that she never requested or indicated was necessary to form her expert opinion regarding Defendant's development. (PCR D222, p.45).

Additionally, the motion court did not clearly err in finding that Defendant failed to establish that he was prejudiced by counsel's alleged error. (PCR D222, pp.46-47). Dr. Draper testified at trial that, in addition to Defendant's "severe, disorganized attachment" disorder, which impaired Defendant's ability to make good decisions, Defendant's environment, including the amount of violence in his neighborhood, constituted a "major factor[ ]" in producing Defendant's violent behavior and "brought about [Defendant's] inability to make good decisions." (Tr.2223-25, 2233-37, 2239-40, 2252, 2262-63, 2270). Dr. Draper's trial testimony was thus not significantly different from her

postconviction testimony that the environmental risk factors identified by Dr. White would have impacted Defendant's development "because he did not have the grounding necessary to be able to live within these conditions in the community without having adverse [e]ffects from it" and that Defendant was influenced by his peers in the community and became "indoctrinated . . . into the criminal world" and the community violence. (PCR Tr.309-16, 322). Moreover, Defendant failed to establish that the jury would not have inferred, without the benefit of Dr. Draper's postconviction testimony, that Defendant's lack of bonding with a parental figure made him more vulnerable to influence by his peers on the streets. Finally, even after being provided with Dr. White's findings, Dr. Draper still agreed that Defendant used his free will to kill multiple people. (PCR Tr.363). The motion court did not clearly err in finding that Defendant failed to establish that he was prejudiced as a result of trial counsel's alleged error in failing to provide Dr. Draper with Dr. White's findings.

XIII. (Defendant's Absence from the Hearing)

The motion court did not clearly err in granting the State's motion to recall Defendant's writ to attend the postconviction hearing because Defendant did not have a right to attend.

The motion court did not clearly err in denying Defendant's motion to disqualify the prosecutor's office because he failed to prove that the prosecutors had a personal, rather than official, interest in his case.

A. The record regarding this claim.

In Defendant's amended motion, he requested to be present at the evidentiary hearing in order to confer with postconviction counsel about the hearing testimony and in order to testify. (PCR D132, pp.87-89). Defendant alleged that his absence would deny him the right to a full and fair evidentiary hearing, effective assistance of counsel, due process of law, the right to confront witnesses against him, and the freedom from cruel and unusual punishment. (PCR D132, pp.91-93).

The motion court initially ordered that Defendant be present for the evidentiary hearing. (PCR D179).

On May 16, 2018, the State filed a motion to recall the writ of habeas corpus for Defendant's presence at the hearing. (PCR D183). In support, the motion cited the fact that Defendant had been convicted of murdering two individuals in separate incidents, that he had been sentenced to death for both murders,

and that he was "remorseless." (PCR D183, p.1). The motion alleged that transporting, holding, and monitoring Defendant "places an undue burden on [jail] personnel" and "presents an unwarranted risk to the safety of jail personnel, court personnel, other inmates, and the attorneys in the case." (PCR D183, p.1). The motion cited Rule 29.15(i) for the proposition that "[a]t any hearing ordered by the court the movant need not be present." (PCR D183, p.2).

In a hearing on the State's motion, the prosecutor stated, "[W]e have information that . . . [Defendant] assaulted a jail guard" when he was previously in the jail's custody for the postconviction hearing in his other case. (PCR Writ Tr.3). A second prosecutor told the court, "Your Honor, the information that our office is receiving from the Department of Justice Services today is that when [Defendant] was here for his previous PCR hearing, . . . he did engage in fights at that time. Additionally, the information they provided us was that in 2017, it's believed that he attacked a guard while in the Missouri Department of Corrections." (PCR Writ Tr.4). The second prosecutor said, "[W]e're trying to get more details . . ., but that's what they have told us today." (PCR Writ Tr.4). The first prosecutor also noted that the Department of Justice Services "have obviously expressed their concerns of having [Defendant] here . . . ." (PCR Writ Tr.4).

Postconviction counsel noted in response that she had "real objections to the state just lobbing out that [they] have been told this and that about

[Defendant]." (PCR Writ Tr.5). Postconviction counsel said, "I'm not saying [the prosecutor] is lying. Maybe the person who told her is lying." (PCR Writ Tr.6). Postconviction counsel stated that she had no knowledge that Defendant had allegedly assaulted a guard, and she claimed that he had not been charged with a new offense for such conduct. (PCR Writ Tr.6). Postconviction counsel also noted that nothing had been brought up during the other postconviction hearing about Defendant having been assaultive in the jail. (PCR Writ Tr.6). Postconviction counsel further argued that "[t]here was no discussion, no record made of any of the prosecutors, clerks, or anyone else in the courtroom being intimidated or afraid of [Defendant]" or "of [Defendant] disrupting the court in any way." (PCR Writ Tr.7).

The motion court asked whether the State's motion would prohibit Defendant from testifying via deposition, and postconviction counsel replied, "No, Judge, other than again, his meaningful participation in the case is more than just testifying before the Court." (PCR Writ Tr.9). The motion court told postconviction counsel that it would grant leave for them to supplement the record if needed due to Defendant's absence. (PCR Writ Tr.10).

The prosecutor asked the court to reserve ruling on the motion so that they would have "time to provide documentation to the Court from the jail," and the court agreed to do so. (PCR Writ Tr.11). The court noted that "if it supports what [the prosecutors] ha[ve] provided, . . . I do have a concern about the

safety," in part because Defendant's first case had already been disposed of. (PCR Writ Tr.12).

The State filed a supplement to its motion to recall Defendant's writ. (PCR D188). The supplement stated, "There are no documented incidents of assaultive behavior by [Defendant] during his stay at Department of Justice Services in January 2017." (PCR D188, p.1). The supplement also stated, "Missouri Department of Corrections records through February 4, 2018, do not indicate that [Defendant] assaulted a guard." (PCR D188, p.1). But the supplement stated that "MDC records do show that [Defendant] physically assaulted a fellow inmate in September 2016 by repeatedly punching him in the head" and that Defendant had "multiple conduct violations in 2017." (PCR D188, p.1).

The supplement also included a signed statement from the Justice Center's Superintendent of Security. (PCR D189). The statement asserted, "We are greatly concern [sic] with the serious security risk [Defendant] poses to staff, inmates[,] and the general public." (PCR D189, p.1). The superintendent's statement alleged, "[Defendant] has been assaultive to corrections staff at the Missouri Department of Corrections." (PCR D189, p.1). The statement also noted that Defendant was "classified as an escape risk and secure move when previously housed . . . in the Justice Center" and that Defendant would "require increased security whenever he is moved in or out of this facility." (PCR D189,

p.1). The statement requested that "other alternatives . . . be made outside of housing or transporting [Defendant] into this facility." (PCR D189, p.1).

The motion court granted the State's motion to recall Defendant's writ and ordered that Defendant's testimony could be submitted via deposition. (PCR D191).

Postconviction counsel then filed a motion to disqualify the Office of the St. Louis County Prosecuting Attorney from representing the State in this case. (PCR D192). The motion alleged that the prosecutors' allegations during the hearing on the State's motion to recall Defendant's writ "were both false as evidenced by Respondent's Supplement . . . and were misrepresentations to the Court in an effort to prejudice the Court against [Defendant] prior to the evidentiary hearing in this matter." (PCR D192, p.3). The motion alleged that the St. Louis County Prosecutor's Office "has thereby demonstrated a personal interest in convicting and upholding the convictions against [Defendant] and a personal animus against [Defendant]." (PCR D192, p.3).

During the hearing on Defendant's motion to disqualify, postconviction counsel conceded that "the Court has the discretion to bring [Defendant] or not to these post-conviction cases . . . ." (PCR Tr.12).

In arguing that there was no basis for disqualification, the prosecutor stated that "[i]t was the jail that had raised the issue and requested that [Defendant] not be brought in," that "[d]uring the discussion in chambers, [the prosecutors]

were receiving information and [the prosecutor] was relaying that information to the court," but that "[the prosecutor] asked the Court to reserve making a decision on the motion until [the prosecutors] could verify or provide documentation to those incidents," and that they then filed a supplement "indicating that there was no documentation for those events." (PCR Tr.17).

The motion court denied Defendant's motion to disqualify the St. Louis County Prosecutor's Office from representing the State in this case. (PCR D196).

The motion court ordered that Defendant's deposition be submitted on or before August 1, 2018, approximately two months after the evidentiary hearing, but that the date for submission could be extended "for good cause shown." (PCR D197; PCR Tr.9, 660). The court subsequently granted an extension to October 1, 2018, for the submission of Defendant's deposition so that Defendant had sufficient time to "review counsel's notes and other deposition testimony" before being deposed. (PCR D208; PCR D210). Defendant ultimately decided not to submit his deposition as evidence in the case. (PCR D213).

B. Defendant had no right to be present at the postconviction hearing.

"Even when a hearing is granted, not all rights guaranteed to a criminal defendant at trial are extended to the Rule 29.15 hearing." *Edwards v. State*, 200 S.W.3d 500, 515 (Mo. banc 2006). "A Rule 29.15 motion is a civil proceeding

and, as such, there is no right to be present under either the rule or the constitution." *State v. Basile*, 942 S.W.2d 342, 362 (Mo. banc 1997); *see also* Rule 29.15(i) ("At any hearing ordered by the court the movant need not be present."); *Leisure v. State*, 828 S.W.2d 872, 878 (Mo. banc 1992) ("The confrontation clause does not apply to a post-conviction relief hearing."); *State v. Finerson*, 826 S.W.2d 367, 370-71 (Mo.App.E.D. 1992) (denying the defendant's claim that his due process right to be present at all critical stages of the proceedings was violated by the trial court's denial his request to attend the postconviction hearing).

Additionally, "[t]here is no right to effective assistance of counsel at a Rule 29.15 hearing." *Edwards*, 200 S.W.3d at 515; *see also Winfield v. State*, 93 S.W.3d 732, 738 (Mo. banc 2002) ("There is no recognized constitutional right to counsel in a post-conviction proceeding."); *Barton v. State*, 486 S.W.3d 332, 336 (Mo. banc 2016) (citing *Martinez v. Ryan*, 566 U.S. 1, 9 (2012)) ("[N]either this Court nor the federal courts have held that this Sixth Amendment right [to counsel] extends to the post-conviction process."); *Martin v. State*, 386 S.W.3d 179, 186 (Mo.App.S.D. 2012) ("Nothing in *Martinez* directly affects Missouri's longstanding principle that a petitioner does not have a constitutional right to the effective assistance of post-conviction counsel . . . ."). Thus, Defendant's claim that *Martinez* recognized "the right to effective assistance of postconviction counsel" and that Defendant should therefore have

been allowed to attend the hearing is without merit. (Def's Br.106). The motion court did not clearly err in recalling Defendant's writ to attend the postconviction hearing.

C. The evidence did not support Defendant's claim that the prosecutors had a personal, rather than official, interest in Defendant's case.

"Disqualification of a prosecutor is only called for when he has a personal interest of a nature which might preclude his according the defendant the fair treatment to which he is entitled." *State v. Stewart*, 869 S.W.2d 86, 90 (Mo.App. W.D.1993); *see also* § 56.110, RSMo Cum. Supp. 2014. Defendant failed to prove that the prosecutors had a personal interest against Defendant. The prosecuting attorneys made it clear, both during the hearing on the State's motion to recall Defendant's writ and during the hearing on Defendant's motion to disqualify, that they were merely relaying information that they had received from the jail and that they were seeking to exclude Defendant from the hearing based on the jail's safety concerns. (PCR Writ Tr.4, 11; PCR Tr.17). Moreover, the prosecutors sought and obtained leave from the court "to provide documentation . . . from the jail," in order to verify their allegations, and after doing so, promptly corrected their earlier statements by informing the court that the records did not support the information that they had relayed to the court. (PCR Writ Tr.11; PCR Tr.17; PCR D188). The motion court, therefore,

did not clearly err in finding that the evidence of the prosecutors' conduct did not manifest a personal, rather than official, interest in Defendant's case. *See State v. McIntosh*, 333 S.W.2d 51, 58 (Mo. 1960); *State v. Choate*, 722 S.W.2d 643, 644-47 (Mo.App.S.D. 1986).

XIV. (PET Scan)

The motion court did not clearly err in finding that trial counsel were not ineffective for deciding not to obtain a PET scan of Defendant's brain because their strategic decision was reasonable under the circumstances and it is not reasonably probable that the outcome of the penalty phase would have been different if Defendant's PET scan results had been presented.

A. The record regarding this claim.

Defendant's amended motion alleged that counsel were ineffective for failing to present the results of a PET scan of Defendant's brain. (PCR D131, p.93). The amended motion alleged that counsel were ineffective for failing to follow their brain imaging expert's recommendation to obtain a PET scan in order to "determine if [Defendant] had brain tumors or other abnormalities that could explain [Defendant's] behavior." (PCR D131, pp.95, 97).

Trial counsel testified that, due to Defendant's family history and Defendant's own experiences with headaches, they arranged for Defendant to undergo an MRI scan. (PCR Tr.105, 499). The MRI results showed that Defendant had "a structurally normal brain." (PCR Tr.106, 499). Dr. David Preston agreed that the MRI results showed that Defendant's brain was "essentially normal." (PCR Tr.107-08, 500; PCR Ex.33). But Dr. Preston further stated: "The history of head trauma and drug abuse is of interest. It is

not uncommon for such persons to have a normal brain MRI but have abnormal brain PET . . . . I would suggest having a brain FDG/PET performed." (PCR Ex.33).

Trial counsel testified that "[they] talked about" arranging for a PET scan, but that they decided not to pursue it. (PCR Tr.108, 500-01). Trial counsel explained that there was no guarantee that the results of the scan would be favorable and that "[i]t would have made things probably even worse for Dr. Gelbort's testimony" if another scan showed "normal" results because juries tend to give brain scans more weight than results of a neuropsychological evaluation. (PCR Tr.85-86, 108-09, 179, 189, 572). Trial counsel further testified that there was no way to obtain a PET scan without the State knowing about it, due to Defendant's incarceration at the time, and that the State would use a "normal" result against Defendant. (PCR Tr.190, 572-73). Trial counsel also testified that they had had "some struggles trying to get PET scans done" because there was opposition by some in the medical community, including Washington University in St. Louis and St. Louis University, to performing PET scans for forensic purposes. (PCR Tr.109, 189, 191).

Dr. Ruben Gur, a licensed clinical neuropsychologist and a professor of neuropsychology and neuroimaging for the University of Pennsylvania, testified at the evidentiary hearing that a PET scan showed abnormalities in several areas of Defendant's brain. (PCR Tr.367-71, 375). Specifically, Dr. Gur

testified that Defendant's cortex, which is responsible for processing information and deciding on a course of action, was significantly more active than normal, while at the same time several areas in his brain that control emotional responses to stimuli were significantly less active than normal. (PCR Tr.375-84). Dr. Gur testified that the results indicated that if Defendant were "challenged or threatened," he could be less capable of controlling an emotional response. (PCR Tr.385-86, 401-02). Dr. Gur testified that Defendant's PET scan would have likely shown the same abnormalities if it had been performed as far back as 2000, unless an intervening event was responsible for causing the abnormalities, such as a severe head injury. (PCR Tr.392, 423). Dr. Gelbort testified that medical records showed that Defendant had been involved in at least two fights while in prison between 2005 and 2015 but that there were no documented neurological problems as a result. (PCR Tr.626, 654). Dr. Gur testified that he would have been available to testify at Defendant's trial. (PCR Tr.396-97).

On cross-examination, Dr. Gur acknowledged that he was not diagnosing Defendant with anything and that it would be inappropriate to offer an opinion on any specific act of Defendant's based solely on the PET scan. (PCR Tr.399, 415). Dr. Gur further acknowledged that he was not testifying that anything found in the PET scan had caused Defendant to take any particular act. (PCR Tr.415). Dr. Gur acknowledged that the PET scan did not show the activity of

Defendant's brain at the times that he had committed murder. (PCR Tr.425). Finally, Dr. Gur agreed that not all people with the same abnormalities committed murder. (PCR Tr.425).

The motion court denied this claim, finding that "[t]rial counsel's decision not to order a PET scan in this case was reasonable and strategic in nature," in that "[t]hey decided not to risk undermining their plea for mercy by pursuing a scan that could show [Defendant's] brain was 'normal.'" (PCR D222, p.68). The motion court also noted that "[i]t does not seem likely that trial counsel could have found an expert in 2007 to interpret the PET scan forensically." (PCR D222, p.68). The motion court further concluded that in light of the "overwhelming evidence of deliberation in [Defendant's] murder of [Victim]," "there is no reasonable probability that Dr. Gur's testimony and the PET scan would have persuaded the jury to impose a punishment less than death." (PCR D222, pp.70-71).

B. Counsel reasonably decided not to attempt to obtain a PET scan, and Defendant was not prejudiced as a result.

Defendant failed to prove that counsel were ineffective for strategically deciding not to obtain a PET scan of Defendant's brain. Counsel testified that they had had "some struggles trying to get PET scans done" and that local entities, including Washington University in St. Louis and St. Louis University, had refused to perform PET scans for forensic purposes. (PCR

Tr.109, 189, 191). Defendant thus failed to establish that a PET scan was reasonably available or that counsel's decision not to seek to obtain one was unreasonable. *See McFadden*, 553 S.W.3d at 308-09 (quoting *Davis v. State*, 486 S.W.3d 898, 906 (Mo. banc 2016); *Strong*, 263 S.W.3d at 652) ("'In a death penalty case, trial counsel has an obligation to investigate and discover all reasonably available mitigating evidence,' . . . [b]ut the 'duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up.'"); *Zink v. State*, 278 S.W.3d 170, 181 (Mo. banc 2009) (quoting *State v. Brown*, 902 S.W.2d 278, 298 (Mo. banc 1995)) ("Counsel has limited time and resources, and if there is a strategy that does not look promising, he may 'choose not to expend his limited resources to that end. This is a reasonable strategic decision.").

Additionally, counsel's strategic decision to forgo obtaining a PET scan after weighing the risks and benefits was not unreasonable. Trial counsel indicated that they were concerned that the results might be unfavorable, which was reasonable given that Defendant's MRI results were "normal" and that Dr. Preston had merely stated that it was "not uncommon," rather than likely, that a PET scan would reveal abnormalities. (PCR Tr.85-86, 106, 108-09, 189, 499, 572; PCR Ex.33). Moreover, trial counsel were concerned that if the results did confirm that Defendant's brain was "normal," it would be used against them by the State because there was no way to prevent the scan from being revealed

to the State. (PCR Tr.190, 572-73). *See Forrest v. State*, 290 S.W.3d 704, 708-09 (Mo. banc 2009) (holding that the motion court did not err in finding that trial counsel strategically decided not to order a PET scan in part because it could not be done "*ex parte* and under seal").

Finally, the results of Defendant's PET scan had limited mitigating value. Dr. Gur conceded during cross-examination that he was not diagnosing Defendant with anything, that it would be inappropriate to offer an opinion on any specific act of Defendant's based solely on the PET scan, that he was not testifying that anything found in the PET scan had caused Defendant to take any particular act, and that not all people with the same abnormalities observed in Defendant's PET scan committed murder. (PCR Tr.399, 415, 425). The motion court did not clearly err in finding that counsel acted reasonably in deciding not to obtain a PET scan or that there is no reasonable probability that the PET scan would have persuaded a jury to impose a sentence less than death. (PCR D222, pp.68, 70-71). *See McFadden*, 553 S.W.3d at 314-15 ("[D]efense counsel strategically decided not to get a PET scan with full knowledge of the possible results, and the motion court did not commit clear error in finding it to be reasonable.").

XV. (Dr. Gelbort)

The motion court did not clearly err in finding that trial counsel were not ineffective for choosing not to call Dr. Gelbort to testify about Defendant's limited brain deficits because they were reasonable to conclude that Dr. Gelbort's testimony would be more harmful than helpful, and it would have been non-meritorious to argue that Defendant's mental age prohibited the imposition of the death penalty.

A. The record regarding this claim.

Defendant's amended motion alleged that counsel were ineffective for failing to call Dr. Gelbort to testify that Defendant suffered from "the mental disease or defect of brain dysfunction," that he had a "low average" IQ, and that his "thinking abilities are impaired." (PCR D131, p.9). In support, the amended motion relied on Dr. Michael Gelbort's 2004 neuropsychological evaluation of Defendant. (PCR D131, pp.13, 17-29). The amended motion further alleged that counsel were ineffective for failing to move that the trial court bar the State from seeking the death penalty or, in the alternative, ask for "an instruction that would require the jury to find that [Defendant] was mentally over the age of eighteen before they considered whether he could be sentence[d] to death." (PCR D131, p.31).

Michael Gelbort, a clinical neuropsychologist, testified that he conducted a neuropsychological evaluation of Defendant in 2004 at trial counsel's request. (PCR Tr.591, 599). Dr. Gelbort testified that the results showed a high likelihood that Defendant had an abnormal brain with specific deficits in problem solving, decision making, and academic skills. (PCR Tr.606-07, 619-20). Dr. Gelbort testified that Defendant's IQ was 85, which was in the low average range, but that he was not intellectually disabled. (PCR Tr.609-11, 635). Dr. Gelbort conceded that Defendant had sufficient cognitive ability to be held responsible for his actions, in that he would have had the capacity to know that shooting Victim was wrong. (PCR Tr.636-37).

Trial counsel testified that in addition to having an MRI conducted to determine if Defendant had any functional or structural brain issues, they hired Dr. Gelbort to conduct a neuropsychological evaluation of Defendant. (PCR Tr.105, 178). Dr. Gelbort found some deficits but no evidence to support a defense of diminished capacity. (PCR Tr.179, 479, 566).

Trial counsel testified that they had called Dr. Gelbort to testify in the first trials of both of Defendant's murder cases, but that they "didn't think he did a very good job on the stand," that "[his] testimony did not go particularly well, and it didn't seem to really have much of an impact with the jury, so [they] decided that [they] were not going to call him again in the second round of trials." (PCR Tr.74, 178, 480-81, 565). Trial counsel testified that Dr. Gelbort

had an "extremely bad" demeanor, was arrogant, and lost credibility as a result of fighting with the prosecutor "a lot" on cross-examination "over incredibly minor things, including the color of the defendant's shirt." (PCR Tr.76, 180-81). Trial counsel testified that "he disintegrated on cross exam" and that some jurors laughed during his testimony. (PCR Tr.481). Counsel Turlington further testified that "[she] ha[d] not found [the presentation of neurological testing] to be extremely effective" in the cases in which she had used such evidence, noting that she had "never had a case where that has been successful in mitigation," and that it amounted to little more than saying that "[Defendant] has poor decision-making skills," which wasn't "particularly strong evidence." (PCR Tr.76, 180-82). Trial counsel testified that the negative impact of Dr. Gelbort's poor demeanor "outweighed the slight benefit of [Defendant] making bad decisions," and that they "made a strategic decision not to call Dr. Gelbort." (PCR Tr.181-83).

The motion court denied this claim, finding trial counsel's "strategic choice of not calling this witness to be reasonable" and that "[Defendant] was not prejudiced by trial counsel's decision not to call Dr. Gelbort in the penalty phase," especially given that Defendant had been previously sentenced to death twice before when Dr. Gelbort had testified on his behalf. (PCR D222, pp.39, 42-43).

B. Counsel were not ineffective for reasonably deciding not to call Dr. Gelbort.

Defendant failed to establish that counsel's strategic decision not to call Dr. Gelbort was unreasonable or that there is a reasonable probability that the outcome of the penalty phase would have changed had he been called. Having previously called Dr. Gelbort in two of Defendant's earlier murder trials, counsel had the opportunity to evaluate his testimony, and they concluded that due to his poor performance and the relatively weak probative value of the limited nature of Defendant's brain deficits, it was more harmful than helpful to call Dr. Gelbort. (PCR Tr.181-83). Indeed, in both of the trials in which Dr. Gelbort testified, Defendant received the death penalty. (PCR Tr.480). Instead, counsel chose to focus on Defendant's developmental issues and lack of moral grounding as a basis for leniency. (PCR Tr.70, 477). The motion court did not clearly err in finding that counsel's strategic decision not to call Dr. Gelbort was reasonable under the circumstances and that Defendant was not prejudiced as a result. *See McFadden*, 553 S.W.3d at 313 (quoting *Davis*, 486 S.W.3d at 912) ("The motion court did not clearly err in failing to find defense counsel ineffective for failing to repeat strategies that did not work at the prior trials, . . . and instead 'choosing to pursue one reasonable trial strategy to the exclusion of another.'").

Additionally, counsel were not ineffective for failing to call Dr. Gelbort in support of a motion to bar the death penalty due to Defendant's mental age. This Court has previously rejected this argument. *See McFadden*, 553 S.W.3d at 312-13; *Tisius*, 519 S.W.3d at 430-31. Counsel were not ineffective for failing to present evidence in support of an argument that Defendant's mental age prohibited the imposition of the death penalty under *Roper v. Simmons*, 543 U.S. 551 (2005), because such an argument would not have been meritorious. *See McFadden*, 553 S.W.3d at 313; *Tisius*, 519 S.W.3d at 431.

XVI. (Bryant/Burns Assault)

The motion court did not clearly err in finding that trial counsel were not ineffective for not presenting evidence that Defendant did not commit the assaults for which he was previously convicted or that Bryant was not seriously injured because counsel reasonably determined that any such admissible evidence could be more harmful than helpful.

A. The record regarding this claim.

Defendant's amended motion alleged that counsel were ineffective for failing to present rebuttal evidence in the penalty phase regarding his convictions for first-degree assault and armed criminal action against Daryl Bryant and Jermaine Burns. (PCR D131, p.103). The amended motion specifically alleged that admission of Bryant's medical records would have tended to counter the impression that he suffered serious physical injury as a result of the shooting. (PCR D131, pp.107-09; PCR D132, p.69). Additionally, the amended motion alleged that counsel should have called Butch Johnson, an investigator for the Public Defender's Office, "to testify about the problems with the state's evidence as presented at the trial on the assaults," such as contrasting witness accounts with the damage caused to the victims and their vehicle. (PCR D131, p.109-13; PCR D132, pp.57-67). The amended motion further alleged that counsel should have called Co-Defendant to testify that

his brother, Kyle Dismukes, had told him that he, not Defendant, had shot Bryant. (PCR D131, pp.113-19).

Butch Johnson testified that while the occupants of the van told police that Defendant shot at them while standing at the front right-hand corner of the van, "the shooter would have been standing to the rear of the . . . van[ ] in order for Mr. Bryant to receive a wound to his buttocks" while sitting in the front passenger seat, based on Johnson's training and experience as a law enforcement officer. (PCR Ex.36, pp.23-24). Johnson testified that the police reports indicated that the bullet that had caused Bryant's injury was found in the seat of the van with fabric on it that was consistent with clothing worn by Bryant. (PCR Ex.36, pp.33-34). Johnson agreed on cross-examination that there were no bullet holes in the van, that the passenger and the sliding door windows had been shattered, that two bullets were found in the van, that both of those bullets were determined to have been fired from the same gun, and that one of those bullets could not have been fired from the rear of the van because it had traveled through the front of the seat before stopping in the arm rest. (PCR Ex.36, pp.41, 45-51).

Johnson also interviewed Co-Defendant, who stated in an affidavit that his brother, Kyle Dismukes, "was the actual shooter of Daryl Bryant." (PCR Ex.36, pp.25-29). A certified death certificate for Kyle Dismukes showed that he died

on November 27, 2003, more than a year after the assault against Bryant and Burns. (PCR Ex.36, pp.29-30; PCR Ex.19).

Johnson also testified that medical records showed that Bryant walked in to the hospital after suffering "a superficial abrasion on his right buttocks," that he "did not have a large amount of bleeding," and that he stayed at the hospital for less than two hours. (PCR Ex.36, pp.31-33). The medical records showed that Bryant was diagnosed with a gunshot wound to his right hip, that he received a prescription for Percocet for his "severe" pain, and that he was discharged with crutches and "post crutch training." (PCR Ex.21, pp.6-7, 12-16; PCR Ex.36, p.60).

Trial counsel acknowledged that they received a packet of information from Johnson regarding his investigation into the assault case, including an affidavit from Co-Defendant, stating that Kyle Dismukes had told him that he was the shooter. (PCR Tr.112-13, 504). Trial counsel testified that they did not challenge the State's evidence that Defendant had committed the assaults because the record of convictions offered by the State showed that another jury had already found Defendant guilty of the offenses beyond a reasonable doubt. (PCR Tr.113, 193-94). Trial counsel further testified that "[s]ometimes it's worse to actually bring the witnesses and evidence forward than it is to just see the conviction on paper." (PCR Tr.505). Trial counsel explained that if they had chosen to challenge the underlying assault case, the State could have

presented live witnesses to the assault, which "would probably have a more dramatic effect than just submitting a certified conviction on paper." (PCR Tr.194, 573-74). Trial counsel also testified that they chose not to present Co-Defendant's allegations that Kyle Dismukes had been the shooter because the jury might have found it "very convenient that Kyle Dismukes does all of these cases and now he is dead" and it "would just highlight another case of the defendant . . . going around shooting people and blaming it on Kyle Dismukes." (PCR Tr.113-14, 194, 574). Trial counsel testified that they were concerned that it was "not believable" and "highly aggravating." (PCR Tr.197).

The motion court denied this claim, finding that "[Defendant] has not shown it was unreasonable trial strategy for trial counsel to handle [Defendant's] prior convictions the way they did." (PCR D222, p.74). The motion court found that "[t]he information in the medical records actually does not prove the injury was not serious." (PCR D222, p.74). The motion court also noted that Co-Defendant's purported testimony that Kyle Dismukes told him that he shot Bryant "sounds like hearsay." (PCR D222, p.72). The motion court concluded that "[g]iven the weakness in the evidence offered to attack the underlying assault conviction and the potential for additional more damaging evidence to be offered by the State, experienced trial counsel was not ineffective for failing to call Mr. Johnson as a witness, or for failing to attack the prior conviction, including through medical records." (PCR D222, p 74).

B. Counsel were not ineffective for reasonably choosing not to present inadmissible, weak, or harmful evidence and highlighting Defendant's prior assault convictions.

Defendant failed to show that counsel were ineffective for not calling Investigator Johnson to testify. Even if admissible, Johnson's testimony that the shooter was standing to the rear of the van rather than to the front would not have established that Defendant was not the shooter. (PCR Ex.36, pp.23-24). Moreover, Johnson's concessions during cross-examination significantly weakened even his conclusion that the shooter was always standing toward the rear of the van. (PCR Ex.36, pp.41, 45-51). There is no reasonable probability that Johnson's testimony would have changed the outcome of the penalty phase.

Additionally, Johnson's interpretation of Bryant's medical records would have been inadmissible hearsay and a violation of the best evidence rule. *See See Tisius*, 519 S.W.3d at 422 ("Out-of-court statements offered for the truth of the matter asserted constitute hearsay and are inadmissible unless they fall under a recognized exception."); *Cooley v. Dir. of Revenue*, 896 S.W.2d 468, 470 (Mo. banc 1995) ("[T]he best evidence rule applies only when the evidence is offered to prove the terms or contents of a writing or recording. The principal reason for the rule is the danger of mistransmission of the contents of a writing when evidence other than the writing itself is offered for the purpose of proving

its terms."). The medical records themselves confirmed that Bryant received medical treatment for a gunshot wound to his hip. (PCR Ex.21, pp.6, 12-13). They also showed that Bryant received a prescription for Percocet for his "severe" pain and that he was discharged with crutches and "post crutch training." (PCR Ex.21, pp.6-7, 12-16). The motion court did not clearly err in finding that "[t]he information in the medical records actually does not prove the injury was not serious" and that Defendant failed to establish that he was prejudiced by counsel's failure to present such evidence. (PCR D222, p.74). *See McFadden*, 553 S.W.3d at 315 ("[T]here was no question the wound was substantial and required hospital treatment.").

To the extent that Defendant claims that trial counsel was ineffective for failing to present Bryant's medical records to show that Defendant's prior convictions did not constitute serious assaultive convictions, it is meritless because it was not necessary for the felony assault to result in serious physical injury in order to qualify as a serious assaultive conviction. (Def's Br.118). *See State v. Kinder*, 942 S.W.2d 313, 331-32 (Mo. banc 1996). Moreover, evidence relating to the seriousness of Bryant's injury would not have affected the jury's finding that Defendant had two serious assaultive convictions for shooting at Burns. (D459, 684-85; Tr.2028-29).

Defendant also failed to overcome the presumption that counsel's strategy in choosing not to present evidence challenging Defendant's prior assault

convictions was reasonable. Trial counsel testified that they did not present evidence rebutting the convictions because the court record offered by the State showed that another jury had already found Defendant guilty of the offenses beyond a reasonable doubt, and that if they had presented rebuttal evidence, the State could have presented live witnesses to the assault, which "would probably have [had] a more dramatic effect than just submitting a certified conviction on paper." (PCR Tr.113, 193-94, 505, 573-74). The motion court did not clearly err in finding that counsel's strategy in not highlighting the evidence underlying Defendant's prior assault convictions was reasonable. (PCR D222, p.74). *See McFadden*, 553 S.W.3d at 316.

Finally, Defendant failed to establish that counsel were ineffective for failing to present evidence of Kyle Dismukes's alleged confession to having shot at Bryant and Burns. Defendant failed to establish that Dismukes's hearsay statement would have been admissible. Statements against penal interest can be admissible in the penalty phase of a trial if their reliability are supported by substantial evidence. *McLaughlin*, 378 S.W.3d at 347. One of the three factors considered when determining whether a statement is sufficiently reliable is whether the confession was corroborated by other evidence in the case. *Id*. at 346-47. "The reason for such caution is that the uncorroborated out-of-court confession of an unavailable witness offered in a criminal case often occurs under circumstances that evoke suspicion as to its reliability." *State v.*

Blankenship, 830 S.W.2d 1, 7 (Mo. banc 1992). "The criminal character of the declarant or the witness reinforced with the requirement that the declarant be unavailable make perjury easier to accomplish and more difficult to punish." *Id*. Defendant failed to present any evidence that would have corroborated Dismukes's confession. The motion court did not clearly err in finding that counsel was not ineffective for failing to present the inadmissible evidence. (PCR D222, p. 72). *See McLaughlin*, 378 S.W.3d at 346.

Moreover, Defendant failed to overcome the presumption that counsel's strategy in choosing not to present the testimony was reasonable. Counsel testified that they chose not to present Co-Defendant's allegations that Kyle Dismukes was the shooter due to their concern that the jury would have viewed such evidence unfavorably, especially after having rejected similar allegations made by Co-Defendant in this case, which he himself repudiated at trial. (PCR Tr.113-14, 194, 197, 574). Counsel's belief that such evidence would have been more harmful than helpful was reasonable, and thus they were not ineffective.

XVII. (Leslie Addison's Murder)

The motion court did not clearly err in finding that trial counsel were not ineffective in deciding not to call Maggie Jones, Margaret Walsh, and Arnell "Smoke" Jackson or present additional evidence of the lighting and distances at the murder scene because doing so could have been reasonably more harmful than helpful.

A. The record regarding this claim.

Eva Addison testified during the penalty phase that before her sister, Leslie Addison, was killed on May 15, 2003, Defendant came over to Maggie Jones's house on Blakemore, told Eva that her older sister, Shonte, had "told on him" for shooting Bryant, and told her that they had to leave Pine Lawn. (Tr.1842-44, 1880-82). After leaving and returning shortly thereafter, Defendant began "arguing with [Eva's sister, Leslie]," "asked [her], 'Do you love your brother," who was deceased, and told her, "B[****], you're going to see him tonight." (Tr.1843-47). Defendant then pulled a gun out, pointed it at Leslie, and "clicked it." (Tr.1848). Eva pushed Defendant away and told him that she'd call the police. (Tr.1848). A man named "Smoke," who had arrived in a different car than Defendant, intervened and told Defendant, "Let's go," "You're already wanted [for murder]." (Tr.1845, 1849). Defendant responded, "I don't give a f***. One of these ho[ ]s got to die." (Tr.1849). Defendant then left in "B.T.'s" car. (Tr.1849-50).

Eva testified that Leslie was scared, so she decided to walk down the street to a skating rink to call for a ride to leave Pine Lawn. (Tr.1850). Eva ran down the alley behind the houses on Blakemore and yelled at Leslie, who had already turned the corner onto Kienlen, to come back because she saw Defendant's vehicle approaching, but Leslie kept walking. (Tr.1850-51, 1854-55). Eva "ran back in the bushes." (Tr.1851). Eva testified that there was nothing obstructing her view, that she could clearly see what happened, and that she had 20/20 vision. (Tr.1855, 1861).

Eva testified that she saw Defendant get out of the vehicle and approach Leslie with a handgun. (Tr.1851). Leslie said, "Please don't shoot me," and she cried, but Defendant put the gun up to her and shot her. (Tr.1852-53). Eva testified that Leslie fell to the ground and that Defendant stood over Leslie and shot her several more times. (Tr.1853-54). After Defendant left in the car, Eva ran back to Maggie Jones's house, distraught. (Tr.1854, 1857).

On cross-examination, Detective Hunnius confirmed that there were no street lights on the side of Kienlen where Leslie was murdered, though there was one on the nearby cross street of Naylor that "lights up the whole area." (Tr.1971-74). Detective Hunnius testified on redirect that there were also lights from the school across the street that shone onto Kienlen. (Tr.1973). Defense counsel elicited from the detective that he would not have been able to conduct his investigation without the use of additional lighting. (Tr.1971,

1975). Defense counsel also elicited that it was 75 feet just from the stop sign at the intersection to where Leslie was murdered, and thus would have been even farther to the bushes where Eva was located. (Tr.1975-77).

During cross-examination of the neighbor who heard Leslie being shot, defense counsel elicited that he couldn't discern that there was a body lying on the ground due to the darkness until the lights from a vehicle shined on it. (Tr.1990-91). The neighbor further confirmed that the only lights around were from the school across the street and a street light on Naylor. (Tr.1992).

Defendant's amended motion alleged that counsel were ineffective for failing to investigate and impeach Eva's testimony about the circumstances of Leslie's murder with testimony from Arnell "Smoke" Jackson, Maggie Jones, and Margaret Walsh. (PCR D131, pp.121-27). Additionally, the amended motion alleged that counsel were ineffective for failing to investigate and present evidence regarding the lighting and distances at the murder scene. (PCR D131, pp.141, 147). Specifically, the amended motion alleged that counsel was ineffective for failing to present photographs showing the lighting at Pine Lawn Elementary School, the area at the time of the murder, and the distance from the bushes where Eva hid to where Leslie's purse was found. (PCR D131, p.147).

Arnell "Smoke" Jackson testified that he was riding in a car on Blakemore before Leslie was murdered when he saw a group of people in an apparent

argument, including Defendant, Eva, and Leslie. (PCR Ex.10A, pp.7-12, 48-50). Jackson didn't know what the argument was about, but he believed that it could end in a fight; Defendant was mad. (PCR Ex.10A, pp.10, 13, 53-54, 58, 60). Jackson told Defendant that he needed to leave before the police were called and he was arrested for having murdered Victim, and Defendant agreed to get into the car with B.T. (PCR Ex.10A, pp.8, 53, 55-57). Jackson then got back into his car and followed behind Defendant's car before turning the opposite direction on Kienlen. (PCR Ex.10A, pp.8, 12-14). Jackson did not see anyone get out of B.T.'s car, but he admitted that he didn't know what Defendant did after he turned the other way. (PCR Ex.10A, pp.14, 55-56). Jackson testified that he told Defendant's lawyer what he knew about that night. (PCR Ex.10A, pp.16-18, 62-63).

Margaret Walsh, a forensic scientist for the St. Louis County Police Department Crime Laboratory, testified that she performed biological screening on four items of clothing in relation to Leslie's murder. (PCR Ex.42, pp.344-48). Testing failed to disclose the presence of blood on any of the clothing. (PCR Ex.42, pp.346-48). Ms. Walsh admitted that she had no way of knowing whether the items she tested were actually worn by Defendant at the time of Leslie's murder. (PCR Ex.42, pp.350-51).

Butch Johnson, an investigator for the Public Defender's Office, testified that he visited the area of Leslie's murder in 2013, approximately ten years

after the murder. (PCR Ex.36, pp.5, 7, 12, 52, 56-57). Johnson testified that he observed "remnants of an old alley . . . that ran along behind the houses off of Blakemore," and he noted that Kienlen had been widened in 2008. (PCR Ex.36, pp.8, 9, 17-18). Johnson took photographs from the alley toward Kienlen, from the approximate location of the murder scene back toward the alley, and of the light then present at the closed school. (PCR Ex.36, pp.11-16; PCR Ex.12-16; PCR Tr.27-28). Photographic records from the Department of Highway and Traffic in St. Louis County were admitted, showing the intersection at some point before Keinlen was widened. (PCR Ex.36, pp.18-20; PCR Ex.17A-G). Johnson admitted that he had no idea what the lighting was like at the scene at the time and that he had not visited the area at night. (PCR Ex.36, p.57).

Trial counsel testified that they talked to Jackson, and that "he didn't have anything helpful to say." (PCR Tr.116, 204-05, 507). Trial counsel also acknowledged that Jackson's testimony would not have been helpful in that it would have corroborated Eva's testimony that Defendant had argued with her and Leslie before Leslie's murder and that Jackson's credibility could have been impeached by his friendship with Defendant and his incarceration for murder. (PCR Tr.205, 508, 580).

Trial counsel testified that they deposed Maggie Jones before the first trial and that she didn't call Ms. Jones as a witness because her testimony that she didn't hear the argument that took place outside of her house wouldn't have

impeached "the real gist of Eva's testimony" that she saw Defendant shoot Leslie. (PCR Tr.118-19). Trial counsel also testified that Ms. Jones had previously testified that she was in a back room of the house with the TV on, explaining why she might not have heard the argument. (PCR Tr.509, 577). Trial counsel also testified that Ms. Jones's testimony would have been more harmful than helpful because it would have corroborated Eva's testimony, in that she had stated that Eva had talked to her after Leslie's murder, during which Eva was "emotional" and told Ms. Jones that she had just seen Defendant shoot Leslie. (PCR Tr.199-200, 577-78).

Trial counsel testified that they didn't think the lab results showing an absence of blood on Defendant's clothing were "material or probative," especially because Defendant wasn't arrested until two days after the murder and there was no evidence that he was wearing the same clothes at that time as at the time of the murder. (PCR Tr.121, 208, 510, 581).

Trial counsel testified that they went to the scene of Leslie's murder multiple times, looked to see where any lights were located, and determined that Eva would have been capable of seeing what she said she saw from where she claims to have been. (PCR Tr.123, 207, 580). Trial counsel also testified that there was nothing presented to them that made them think that Eva could not have seen what she claimed to have seen. (PCR Tr.208, 581).

The motion court denied this claim, finding that "none of the[ ] witnesses' testimony would have produced a viable defense." (PCR D222, pp.75-78). The motion court also found that the testimony would not have changed the outcome of the trial. (PCR D222, pp.77-78). The motion court further found that trial counsel conducted a "reasonable investigation into the lighting and distances at the scene and made [a] reasonable strategic decision on how to use that information at trial." (PCR D222, p.79).

B. Counsel's strategic decisions in their chosen method of challenging Eva's testimony regarding her observation of Leslie's murder were reasonable.

Defendant failed to prove that counsel unreasonably decided not to call Ms. Jones to impeach Eva Addison's testimony. Ms. Jones's testimony was "only minimally helpful" because it did not impeach Eva's testimony about the murder itself and the jury could have reasonably found that Ms. Jones didn't hear the argument preceding the murder only because she was inside the house watching television at the time. (PCR Tr.118-19, 509, 577). *McFadden*, 553 S.W.3d at 306. Additionally, counsel reasonably believed that Jones's testimony could be more harmful than helpful because she would have corroborated Eva's testimony about the shooting, based on her contact with Eva immediately thereafter. (PCR Tr.199-200, 577-78). *See id.*

Defendant similarly failed to prove that counsel unreasonably decided not to call Jackson. Jackson's testimony would not have significantly impeached Eva's testimony and instead would have corroborated that there was an argument between Defendant, Eva, and Leslie before Leslie's murder and that he had to convince Defendant to stop arguing and leave in order to avoid getting arrested by the police. (PCR Ex.10A, pp.7-12, 48-50, 53, 55-57). Counsel were therefore reasonably concerned that Jackson's testimony would be more harmful than helpful, even more so because Jackson was a friend of Defendant's and incarcerated for murder. (PCR Tr.205, 508, 580). *See McFadden*, 553 S.W.3d at 307.

Counsel also reasonably decided not to call Ms. Walsh. Ms. Walsh's testimony, in and of itself, established only that four items of clothing did not have blood on them. (PCR Ex.42, pp.344-48). Without additional evidence that Defendant was wearing the clothing at the time of Leslie's murder, that he had not washed them afterward, and that it was likely that blood would have been deposited on the shooter's clothing, counsel reasonably concluded that Ms. Walsh's testimony would not have provided a viable defense. (PCR Tr.121, 208, 510, 581). Counsel were not ineffective for deciding not to call Ms. Walsh. *See id.*

Finally, Defendant failed to establish that counsel were ineffective for failing to present additional evidence of the lighting at the murder scene and

the distance between where Eva was located and the murder scene. During cross-examination of the State's witnesses, counsel effectively elicited that there were no street lights on the side of Kienlen where Leslie was murdered, that the detective would not have been able to conduct his investigation without the use of additional lighting, that the neighbor couldn't discern that there was a body lying on the ground due to the darkness until the lights from a vehicle shined onto it, and that Eva would have been more than 75 feet away from the murder scene. (Tr.1971-77, 1990-91). Counsel testified that they investigated the murder scene and found that there was nothing to indicate that Eva could not have seen the murder as she described it. (PCR Tr.123, 207-08, 580-81). Additionally, Johnson's testimony "had little, if any, probative value," due in part to the fact that his investigation was conducted during the daytime, approximately ten years after the murder, and he admitted that he was unable to testify as to the state of the scene at the time of the murder. (PCR Ex.36, pp.5, 7, 12, 52, 56-57). *McFadden*, 553 S.W.3d at 308. The motion court did not clearly err in finding that counsel made a reasonable, strategic decision in their chosen method of challenging Eva's ability to observe the murder. (PCR D22, p.79). *See id.*

XVIII. (Time Requirements)

The motion court did not clearly err in finding that Defendant's supplemental claims that were filed approximately four years after the amended motion was filed were untimely because the time limits in Rule 29.15 are reasonable and constitutional.

A. The record regarding this claim.

On December 27, 2017, more than four years after filing the amended motion, postconviction counsel filed a "Memorandum Asserting Ineffective Assistance of Counsel for Failure to Investigate and Adduce Evidence of Movant's Brain Deficiencies During the Guilt Phase." (PCR D162, pp.1-8). The memorandum recognized that two claims—Claims 8(I) and 8(L)—as alleged in the amended motion, applied only to the penalty phase. (PCR D162, p.5). The memorandum expressly sought to expand those claims to apply to the guilt phase of the trial. (PCR D162, pp.7-8). Postconviction counsel referred to this as a "supplemental claim." (PCR D164, pp.1).

The State responded by filing a motion to dismiss the "supplemental claim" as untimely. (PCR D173). The motion to dismiss alleged that Defendant's supplemental claim that counsel was ineffective during the guilt phase for failing to call a neuropsychologist or obtain a PET scan was not raised in the amended motion and was therefore barred from consideration. (PCR D173, pp.5-6).

The motion court sustained the State's motion to dismiss the supplemental claim as untimely. (PCR D178, p.1; PCR D222, p.5).

B. This claim has been waived.

Defendant raises this claim—that the Rule 29.15 time limits are unconstitutional—for the first time on appeal. (PCR D130-32, 162, 164). Having failed to make this claim before the motion court, it is unpreserved and unreviewable. *See White v. State*, 939 S.W.2d 887, 904 (Mo. banc 1997).

C. The Rule 29.15 time limits are constitutional.

It is "a time-worn and oft-rejected charge that the mandatory time limits established by Rule 29.15 are unconstitutional." *State v. Ervin*, 835 S.W.2d 905, 929 (Mo. banc 1992); *see also Deck v. State*, 68 S.W.3d 418, 431 (Mo. banc 2002). "The time limitations contained in Rule 29.15 are reasonable and do not violate the constitution." *Ervin*, 835 S.W.2d at 929. "States have substantial discretion to develop and implement programs for prisoners seeking post-conviction review." *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). "A state may erect reasonable procedural requirements for triggering the right to an adjudication, . . . including reasonable procedures governing post-conviction relief." *Id.* The time limits in Rule 29.15 are reasonable because "[t]hey serve the legitimate end of avoiding delay in the processing of prisoners['] claims and prevent the litigation of stale claims." *Id.* Additionally, while "[c]ourts 'are

solicitous' of post-conviction claims that present a genuine injustice, . . . that policy of openness must be balanced against the policy of 'bringing finality to the criminal process.'" *Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012) (quoting *White*, 939 S.W.2d at 893).

Defendant asks this Court to reconsider its position on the time limitations in Rule 29.15 "in light of *Martinez v. Ryan*, 566 U.S. 1, 7-18 (2012) having recognized that ineffective assistance of postconviction counsel can establish cause for defaulting a postconviction claim." (Def's Br.127). But while *Martinez* permitted federal review of a claim of ineffective assistance of trial counsel that was not raised in an initial-review collateral proceeding due to the ineffective assistance of postconviction counsel, it did not concern the constitutionality of time limits in postconviction proceedings, nor did it comment on what this State has recognized as legitimate interests supporting such time limits. *Martinez*, 566 U.S. at 4-18; *Day*, 770 S.W.2d at 695; *Dorris*, 360 S.W.3d at 269. Reconsideration of the constitutionality of the time requirements in Rule 29.15 in light of *Martinez* is therefore unnecessary. *Cf. Barton*, 486 S.W.3d at 339 ("Whether or not [a movant] has a cognizable federal claim of ineffective assistance under *Martinez*, . . . he does not have a claim of abandonment under Missouri law . . . .").

The motion court did not clearly err in finding that Defendant's supplemental claim that was raised approximately four years after the

amended motion was filed was untimely and barred from review. (PCR D100, pp.13, 17; PCR D178, p.1; PCR D222, p.5). *See Amrine v. State*, 785 S.W.2d 531, 533 (Mo. banc 1990) ([T]he additional grounds alleged in the untimely motions were procedurally waived.").

XIX. (Alleged Abandonment)

The motion court did not clearly err in failing to find abandonment by postconviction counsel because counsel filed a timely amended motion, and Defendant's claim that counsel should have alleged additional claims is one of ineffective assistance of postconviction counsel, which is not cognizable in Missouri courts.

A. Defendant's claim is one of ineffective assistance of postconviction counsel, rather than one of abandonment, which is not cognizable in Missouri courts.

"[I]n general 'abandonment is available when (1) post-conviction counsel takes no action on movant's behalf with respect to filing an amended motion or (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner.'" *Barton*, 486 S.W.3d at 338 (quoting *Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo. banc 2008)). "Claims of abandonment are reviewed carefully to ensure that the true claim is abandonment and not a substitute for an impermissible claim of ineffective assistance of post-conviction counsel." *Eastburn v. State*, 400 S.W.3d 770, 774 (Mo. banc 2013) (quoting *Taylor v. State*, 254 S.W.3d 856, 858 (Mo. banc 2008)). "[A]ny claims of ineffective assistance of post-conviction counsel are 'categorically unreviewable.'" *Id.* (quoting *Hutchison v. State*, 150 S.W.3d 292, 303 (Mo. banc 2004)). "This Court 'has repeatedly held it will not

expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel.'" *Id*. (quoting *Gehrke v. State*, 280 S.W.3d 54, 58 (Mo. banc 2009)).

Where, as here, postconviction counsel files a timely amended motion, an allegation that postconviction counsel nevertheless failed to include additional claims that the movant wished had been raised is "appropriately characterized as a claim of ineffective assistance of post-conviction counsel." (PCR D100, p.13; PCR D130; Def's Br.41). *Eastburn*, 400 S.W.3d at 774; *see also Barton*, 486 S.W.3d at 338. Indeed, Defendant expressly claims that "[he] was denied effective assistance of postconviction counsel." (Def's Br.132). Defendant's claim is therefore not cognizable in Missouri courts, and the motion court did not clearly err in failing to find abandonment by postconviction counsel. *See Barton*, 486 S.W.3d at 339.

"Whether or not [Defendant] has a cognizable federal claim of ineffective assistance under *Martinez*, he does not have a claim of abandonment under Missouri law and was not required to seek further relief in Missouri courts as a necessary step to pave the way for a federal habeas petition." *Barton*, 486 S.W.3d at 339.

XX. (Alleged Concession of Guilt)

Defendant's unpreserved claim that counsel violated his right to maintain his innocence by calling Co-Defendant is without merit because rather than conceding Defendant's guilt, counsel elicited evidence from Co-Defendant that Defendant was not the second shooter, in support of Defendant's theory of innocence.

A. This claim has been waived.

"In actions under Rule 29.15, any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal." *Shockley v. State*, 579 S.W.3d 881, 899 (Mo. banc 2019) (quoting *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. banc 2011)). "Pleading defects cannot be remedied by the . . . refinement of a claim on appeal." *Id.* (quoting *Johnson*, 333 S.W.3d at 471). "Moreover, 'there is no plain error review in appeals from postconviction judgments for claims that were not presented in the post-conviction motion.'" *Id.* (quoting *McLaughlin*, 378 S.W.3d at 340).

While Defendant's Rule 29.15 motion alleged that trial counsel were ineffective for calling Co-Defendant "and eliciting harmful testimony from him while on the stand," it did not allege the same grounds for error now alleged on appeal in this claim—that counsel violated Defendant's right to maintain his innocence by effectively conceding Defendant's guilt. (PCR D130, pp.25-37; Def's Br.42). Therefore, this claim was never ruled on by the motion court, it is

not preserved for appeal, and it should not be addressed by this Court. *See Shockley*, 579 S.W.3d at 900.

B. Counsel's decision to call Co-Defendant in order to elicit evidence that Defendant was not the second shooter did not violate Defendant's right to maintain his innocence.

Even if this claim were preserved, it would be meritless. In *McCoy v. Louisiana*, the United States Supreme Court held that "[w]hen a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1509 (2018). But in contrast to the defense attorney in *McCoy*, who told the jury that the defendant "committed three murders" and that "he's guilty," trial counsel here elicited evidence from Co-Defendant that Defendant was not the second shooter, supporting Defendant's theory of innocence. *Id*. at 1505. (Tr.1631-36). While calling Co-Defendant also resulted in the admission of testimony that Defendant shot Victim, this did not amount to a concession by defense counsel that Defendant was guilty. (Tr.1631, 1648, 1672-73, 1680). Instead, counsel argued to the jury that it needed to consider Co-Defendant's prior statements exonerating Defendant. (Tr.1768-72). Rather than violating Defendant's right to maintain his innocence, counsel's decision to call Co-Defendant thus fell

squarely within the category of "strategic choices about how best to *achieve* a client's objectives" that remain entrusted to counsel. *Id*. at 1508.

CONCLUSION

For the foregoing reasons, Respondent submits that the motion court did not clearly err and its judgment denying Defendant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with Missouri Supreme Court Rule 84.06(b) and contains 27,551 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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