**Summary of SC98259, *Jesse D. Driskill v. State of Missouri***
Appeal from the Laclede County circuit court, Judge Matthew P. Hamner
Argued and submitted February 3, 2021; opinion issued June 1, 2021, and modified on the Court's own motion August 31, 2021

**Attorneys:** Driskill was represented by Amy M. Bartholow of the public defender's office in Columbia, (573) 777-9977. The state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man found guilty of first-degree murder and sentenced to death appeals from the circuit court's judgment denying him postconviction relief. In a 6-0 decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the judgment. There is sufficient evidence to support the circuit court's finding that no due process violations occurred, and the man has failed to establish his trial counsel were ineffective or that this Court's postconviction time limitations are unconstitutional.

**Facts:** Jesse Driskill was charged with two counts of first-degree murder, one count of first-degree burglary, one count of forcible rape, one count of forcible sodomy and five counts of armed criminal action after law enforcement found an elderly couple dead in their home in Laclede County. One of the victims had been sexually assaulted. Driskill was found guilty as charged and was sentenced to death. After this Court affirmed his convictions, Driskill sought postconviction relief, alleging multiple claims of ineffective assistance of counsel and several claims that the state failed to disclose exculpatory or impeachment evidence in violation of his due process rights. The circuit court denied postconviction relief. Driskill appeals.

**AFFIRMED.**

**Court en banc holds:** (1) There is sufficient evidence to support the circuit court's finding no violation of the United States Supreme Court's 1963 decision in *Brady v. Maryland* occurred as a result of the state's alleged failure to disclose a purported deal with Calvin Perry in exchange for his trial testimony about what Driskill told him about the murders. While the evidence indicates Perry had a subjective hope of receiving favorable treatment in exchange for his testimony and he received a time-credit that resulted in his early release from prison following his testimony, Driskill failed to establish there was a mutual understand or tacit agreement between the state and Perry.

(2) Driskill's trial counsel were not ineffective for failing to elicit testimony from Jessica Cummins that she did not notice blood on Driskill when she picked him up following the murders. This Court will not find trial counsel ineffective for pursuing one reasonable trial strategy over another. Throughout the trial, there was evidence that Driskill's clothing was bloody after the murders occurred. Despite such evidence, Driskill's clothing tested negative for blood. Although trial counsel could not remember their specific strategic rationale, trial counsel

testified the decision was made not to question Cummins regarding blood on Driskill. Trial counsel, however, did seek to undermine Cummins' credibility on cross-examination. Had trial counsel questioned her regarding the blood, they would have been asking the jury to believe Cummins on an important issue while attempting to establish she otherwise was not credible.

(3) Driskill failed to establish bad faith in the alleged destruction of a fiber and hairs in one of the victim's hands so as to establish a *Brady* violation occurred. When evidence is only potentially useful – at most, it could have been tested and the results may have exonerated the defendant – due process is not violated unless the defendant can show the state acted in bad faith. The fiber and hairs in the victim's hand did not possess exculpatory value that was apparent before destruction. The orange fiber appeared to be a carpet strand, and the hairs appeared to be consistent with that of the victims' cats. Although the evidence was lost or misplaced, there is no evidence this occurred out of animus toward Driskill or to hinder his defense.

(4) Driskill's trial counsel were not ineffective for failing to present expert testimony that DNA evidence was potentially contaminated. The selection of witnesses is presumptively a choice of trial strategy. The record establishes trial counsel were aware the laboratory analyst tested Driskill's boxers and the victim's vaginal swab at the same time and DNA was found in the reagent blank. Prior to trial, trial counsel consulted with an expert about the possibility of contamination. But because they were concerned the state could have corrected the potential error before trial, they instead chose to cross-examine the analyst. Furthermore, the expert would not have been able to testify with any certainty that contamination actually had occurred; rather, only that contamination was possible. Trial counsel's strategic decision not to present such inconclusive testimony was reasonable.

(5) Trial counsel were not ineffective for failing to impeach Jessica Wallace. It was reasonable trial strategy for counsel to focus on her delayed contact with the police rather than impeaching her inconsistent statements about whether she picked up Driskill following the murders. Furthermore, it was reasonable for trial counsel to cast doubt in closing argument about a passing reference from one witness that one victim's pubic area was shaved instead of questioning the precise manner in which the perpetrator attempted to cover up the crime.

(6) Trial counsel were not ineffective for failing to investigate and impeach Codi Vause's testimony that Driskill told her he had tied up one of the victims. Although the autopsy report showed no ligature marks on the victim, it would not contradict Vause's testimony that Driskill had told her he tied up the victim. Additionally, there is no reasonable probability impeaching Vause would have changed the trial's outcome, as her testimony was largely consistent with other witnesses' testimony and her reference to the victim being bound was fleeting.

(7) Trial counsel were not ineffective for failing to introduce evidence that Vause purportedly used the victims' last name during the 911 call. The detective's incident report states the caller identified Driskill as "the person responsible for the [victims' last name] case." Nevertheless, the 911 recording had been destroyed, and the appearance of the victims' last name is potentially the product of the detective's or dispatcher's familiarity with the case or the detective's summary of what the dispatcher relayed to him. Accordingly, the contents of the recording are mere speculation and cannot establish prejudice.

(8) Trial counsel were not ineffective for failing to show Driskill's clothing and shoes to the jury. The decision to introduce evidence is a question of trial strategy. Trial counsel introduced the forensic test results showing there was no blood on Driskill's clothing or shoes. Their decision that the forensic results constituted better evidence than showing Driskill's actual clothing was reasonable trial strategy.

(9) Trial counsel were not ineffective for failing to investigate and introduce evidence as to the size of the run of the cigarettes found on Driskill following the murders. Although the actual number of cigarettes in the run was more than 43,000 packs, such evidence would not negate the inference that Driskill took the package from the victims' home. The circumstantial evidence provided by the matching run numbers would not be enhanced nor diminished by establishing the exact quantity in the run; therefore, Driskill was not prejudiced by trial counsel's failure to present such evidence.

(10) Trial counsel were not ineffective for failing to object to the prosecutor's comments during jury selection that the crime was "horrible." The statements occurred in the context of the state questioning potential jurors about whether, knowing the facts of the case, they equally could consider imposing a death sentence or a sentence of life imprisonment. Contrary to Driskill's suggestion, the prosecutor's repeated statements that jurors may be able to think of crimes they considered more horrible did not serve to inform the jury that Driskill's case was among the worst and warranted the death penalty. Rather, the statements recognized the nature of the crime and served to inquire whether potential jurors fairly could consider the legally available penalties. Accordingly, the prosecutor's statements were not improper.

(11) Trial counsel were not ineffective for failing to call an expert witness to testify during the penalty phase about Driskill's complex post-traumatic stress disorder. Trial counsel consulted multiple mental health experts prior to trial and then decided to limit the number of such experts testifying at trial. Trial counsel preferred to present mitigation evidence, when possible, from lay witnesses because their experience and studies have shown juries respond better to lay witnesses. Furthermore, the expert's proffered testimony was largely cumulative of other evidence presented and was found not to be credible by the circuit court because the expert did not ask Driskill about the offenses. Accordingly, it was reasonable for trial counsel not to call the expert to testify regarding Driskill's PTSD.

(12) Trial counsel were not ineffective for failing to call additional mitigation witnesses during the penalty phase. The proffered testimony was largely cumulative of that presented by other witnesses or otherwise had the potential to be harmful to Driskill. Accordingly, such witnesses' testimony would not have changed the outcome of the trial.

(13) The postconviction time limitations set by this Court's rules are constitutional. The time limitations are reasonable, serving the important purposes of avoiding delay in the processing of defendants' claims and preventing the litigation of stale claims. To the extent Driskill asserts counsel cannot provide effective assistance within Rule 29.15's time limits, such allegations are cursory and attempt to transform his argument into an ineffective assistance of postconviction counsel claim, which is categorically unreviewable.