No. 21-_____

In The Supreme Court Of The United States

VINCENT MCFADDEN,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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2020 WL 1861425
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Supreme Court of Missouri,
en banc.

Vincent MCFADDEN, Appellant,
v.
STATE of Missouri, Respondent.

No. SC 97737
|
Opinion issued April 14, 2020
|
Rehearing Denied June 30, 2020

Synopsis

Background: Following reversal of convictions for first-degree murder and armed criminal action and death sentence after first trial, 191 S.W.3d 648, and affirmance of convictions and death sentence following retrial, 369 S.W.3d 727, defendant filed motion for postconviction relief. The Circuit Court, St. Louis County, David Lee Vincent, J., denied petition. Defendant appealed.

Holdings: The Supreme Court, Mary Rhodes Russell, J., held that:

trial counsel's decision to call codefendant was not ineffective assistance;

letters exchanged between defendant and codefendant during their incarcerations were admissible;

evidence that defendant's fingerprints were "on file" was not inadmissible evidence of prior crime;

proposed witness testimony regarding victim's alleged bad character was inadmissible in penalty phase;

defendant failed to demonstrate that trial counsel rendered ineffective assistance regarding mitigating evidence;

trial counsel's decision to not order scan of defendant's brain was not ineffective assistance;

prosecutor's comments in closing argument in penalty phase were not improper; and

prosecutor's office was not required to be disqualified in postconviction relief proceeding.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, The Honorable David Lee Vincent III, Judge

Attorneys and Law Firms

McFadden was represented by William J. Swift of the public defender's office in Columbia, (573) 777-9977.

The state was represented by Garrick Aplin of the attorney general's office in Jefferson City, (573) 751-3321.

Opinion

Mary R. Russell, Judge

***1** Vincent McFadden appeals the circuit court's judgment overruling his Rule 29.15 motion for postconviction relief from his death sentence for the first-degree murder of Todd Franklin ("Victim"). He claims the circuit court committed multiple errors affecting the guilt, penalty, and postconviction relief phases of his case. McFadden asserts, among other claims, that the circuit court erred in failing to find defense counsel ineffective for: (1) calling Michael Douglas ("Codefendant") to testify during trial, (2) failing to present evidence of Victim's bad character during the penalty phase, and (3) failing to object to the State's introduction of letters exchanged between McFadden and Codefendant. Because the circuit court's findings of fact and conclusions of law are not clearly erroneous, the judgment denying postconviction relief is affirmed.

Background

McFadden was charged with first-degree murder and armed criminal action. The evidence, viewed in the light most

favorable to the verdict, [1] demonstrated that Victim and his friend, Mark Silas, were walking in Pine Lawn when they encountered McFadden and Codefendant. McFadden and Codefendant asked Victim if he had a gun; Victim responded that he did not. Codefendant then pulled out a gun and fired a shot, and Victim and Silas ran across the street to Victim's neighbor's yard. McFadden and Codefendant followed.

Codefendant then shot Victim twice, and Victim fell to the ground. McFadden took the gun from Codefendant, walked toward Victim, kicked him, and uttered derogatory phrases. McFadden then shot Victim three times. McFadden and Codefendant ran away, and the neighbor called 911. Victim was alive during each of the five shots, but he eventually died at the scene from the wounds.

An investigation ensued, during which a cigar with McFadden's thumbprint was found at the end of the neighbor's driveway, near Victim's body. During an interview shortly after the shooting, Silas identified McFadden as one of the shooters. The neighbor, as well as individuals at the neighbor's house on the day of the shooting, identified McFadden from a photograph lineup as the second shooter. McFadden was arrested 10 months later.

During trial, the defense called Codefendant as a witness. Codefendant testified he had previously stated that he and his brother – and not McFadden – had shot and killed Victim. Codefendant testified that these previous statements were lies and that McFadden was the second shooter. The jury found McFadden guilty of first-degree murder and armed criminal action.

During the penalty phase, the State presented evidence that: McFadden had prior convictions; he killed his girlfriend's sister, Leslie Addison; he attempted to prevent his girlfriend, Eva Addison, from identifying him as her sister's murderer; and he was in possession of 17 bags of crack cocaine at the time he was arrested.

In mitigation, five members of McFadden's family, McFadden's friend, and a St. Louis juvenile officer testified regarding McFadden's childhood and the environment in which he grew up. The defense also called Dr. Wanda Draper, a human development expert, who testified McFadden had developed a "severe disorganized attachment" disorder because he lacked a reliable parental figure during his childhood. She further testified McFadden's environment partially caused his violent behavior.

***2** The jury found five statutory aggravators – four serious assaultive convictions and depravity of mind – and it recommended a sentence of death. The circuit court sentenced McFadden accordingly, imposing the death penalty for first-degree murder and life imprisonment for armed criminal action. This Court affirmed the convictions and sentences on direct appeal. *State v. McFadden*, 369 S.W.3d 727, 755 (Mo. banc 2012). [2] McFadden filed an amended Rule 29.15 motion for postconviction relief, and the circuit court held an evidentiary hearing. The circuit court entered judgment denying McFadden's claims. McFadden appeals. [3]

Standard of Review

A circuit court's judgment denying postconviction relief will be affirmed unless its findings and conclusions are clearly erroneous. Rule 29.15(k); *Meiners v. State*, 540 S.W.3d 832, 836 (Mo. banc 2018). Findings and conclusions are clearly erroneous only when "this Court is left with a definite and firm impression that a mistake has been made." *Mallow v. State*, 439 S.W.3d 764, 768 (Mo. banc 2014).

To obtain postconviction relief on the basis of ineffective assistance of counsel, a movant must satisfy the two-prong *Strickland* standard. *Anderson v. State*, 564 S.W.3d 592, 600 (Mo. banc 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A movant must first demonstrate that counsel's performance was deficient. *Id.* Performance is deficient if it fails to rise to the level of skill and diligence that would be demonstrated by a reasonably competent attorney under similar circumstances. *Id.*

A movant must then prove he was prejudiced by counsel's deficient performance. *Id.* at 601. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Reasonable probability requires "a probability sufficient to undermine confidence in the outcome." *Tisius v. State*, 519 S.W.3d 413, 420 (Mo. banc 2017). In death penalty cases, "a defendant must show with reasonable probability that the jury, balancing all the circumstances, would not have awarded the death penalty." *Id.*

Analysis

I. Alleged Guilt Phase Errors

A. The Decision to Call Codefendant to Testify

McFadden argues his counsel were ineffective in calling Codefendant to testify because, prior to his testimony at trial, Codefendant's plea counsel told McFadden's counsel that Codefendant would never testify contrary to his guilty plea that he and McFadden shot Victim.[4] Despite this information, counsel called Codefendant, who testified he and McFadden shot Victim. McFadden alleges counsel were ineffective for calling Codefendant to testify because (1) Codefendant's testimony was harmful to the defense's case, especially in light of Silas' testimony that he did not see McFadden shoot Victim, and (2) by calling Codefendant to testify, counsel effectively conceded McFadden's guilt.

***3** Although counsel were aware that Codefendant might testify McFadden was the second shooter – testimony that would be harmful to the defense's case – counsel recognized that Codefendant's testimony to that effect could be impeached with his prior inconsistent statements that Codefendant's brother – and not McFadden – was the second shooter. McFadden argues Silas' testimony sufficiently established that McFadden did not shoot victim, eliminating any need to call Codefendant. But Silas' testimony about this issue was unclear at best. Silas testified at trial that he was walking in Pine Lawn with Victim when they encountered McFadden and Codefendant. The remainder of much of Silas' testimony consisted of claims of lack of memory. At various points, he testified that he did not know if someone was shot and that he simply heard shots and ran. In a recorded statement to police on the day of the incident, Silas reported McFadden was the second shooter. After the jury heard this recording, Silas testified he fabricated this statement in an effort to leave the police station. Accordingly, the record reflects Silas' inconsistent and wavering testimony did not establish that McFadden did not shoot victim.

At the postconviction hearing, counsel testified they believed calling Codefendant would aid McFadden's case, as his testimony was the only way for the jury to hear the theory that Codefendant's brother may have been the second shooter. Indeed, counsel elicited other helpful statements from Codefendant, including testimony that Codefendant entered a plea and did not receive the maximum sentence even though the State was seeking the death penalty for McFadden's role in the same murder. As counsel made an informed, strategic decision to call Codefendant as a witness, the circuit court did not clearly err in finding counsel's decision reasonable. *Johnson v. State*, 333 S.W.3d 459, 467 (Mo. banc 2011).

McFadden also argues that, by calling Codefendant to testify, counsel violated his right to maintain his innocence by effectively conceding guilt. But this claim is not preserved, as it was not raised in his Rule 29.15 motion. *Shockley v. State*, 579 S.W.3d 881, 899 (Mo. banc 2019). As "there is no plain error review in appeals from postconviction judgments for claims that were not presented in the post-conviction motion," this Court cannot address this claim. *Id.*

B. Failure to Impeach Codefendant with His Rule 24.035 Motion

McFadden argues the circuit court clearly erred in failing to find counsel ineffective for not using Codefendant's *pro se* Rule 24.035 motion to impeach Codefendant's testimony. In that motion, Codefendant asserted he was not present when Victim was shot.

Although the circuit court took judicial notice of Codefendant's Rule 24.035 motion, postconviction counsel failed to ask counsel for an explanation why they did not impeach Codefendant with the motion. It is presumed 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). Accordingly, McFadden "failed to provide the motion court with any basis for concluding that counsel did not have a strategic purpose." *Helmig v. State*, 42 S.W.3d 658, 676 (Mo. App. 2001).

Further, as the circuit court found, it was reasonable for counsel not to question Codefendant about the motion, as the motion's substance did not support the defense's strategy. The defense sought to prove McFadden's innocence through evidence that Codefendant and his brother killed Victim. A statement by Codefendant that Codefendant was not involved in the shooting would be inconsistent with the defense's position. Although McFadden may be correct that it would have been reasonable strategy for counsel to impeach Codefendant using the motion, "[i]t is not ineffective assistance of counsel to pursue one reasonable trial strategy to

the exclusion of another reasonable trial strategy." *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006).

Because McFadden has failed to overcome the presumption that counsel's decision not to impeach Codefendant was reasonable trial strategy, the circuit court did not clearly err in denying this claim.

C. Failure to Object to the State's Introduction of Letters Exchanged between McFadden and Codefendant

***4** McFadden argues that the circuit court clearly erred in failing to find counsel ineffective for not objecting to the admission of letters that McFadden and Codefendant exchanged while both individuals were in jail. McFadden asserts the letters written by Codefendant were inadmissible as hearsay and irrelevant evidence. Further, McFadden claims the letters he wrote were inadmissible as irrelevant.

Hearsay is an out-of-court statement offered as "evidence to prove the truth of the matter asserted." *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). Generally, hearsay is excluded because "the out-of-court statement is not subject to cross-examination, is not offered under oath, and the fact-finder is not able to judge the declarant's demeanor and credibility as a witness." *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000). When a declarant testifies live and under oath, "the dangers of hearsay are largely non-existent." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). For this reason, prejudice cannot be found from the admission of hearsay evidence if the declarant "was also a witness at trial, testified on the same matter, and was subject to cross-examination." *State v. Tindle*, 395 S.W.3d 56, 63 (Mo. App. 2013).

When the circuit court admitted the letters into evidence, it expressly ruled the letters could not be read to the jury unless Codefendant testified. Codefendant later testified, during which he admitted exchanging letters with McFadden. Because Codefendant testified at trial regarding the letters and was subject to cross-examination on the matter, McFadden was not prejudiced by the admission of the letters written by Codefendant.

McFadden also asserts both sets of letters were inadmissible because they were irrelevant. To be admissible, evidence must be both logically and legally relevant. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010). Evidence is logically relevant when it "tends to make the existence of a material fact more or less probable." *Id.* Evidence is legally relevant when its probative value outweighs its costs, such as "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id.* The State asserts the letters were admitted to establish that McFadden was attempting to persuade Codefendant to conceal McFadden's involvement in the shooting, showing McFadden's consciousness of guilt. For example, one of McFadden's letters asked Codefendant to "[j]ust hold fast," and one of Codefendant's letters stated, "[T]ell your lawyer to put me on the stand because I know you wasn't there and I'm willing to testify on your behalf." The letters showed McFadden was communicating with Codefendant, making more probable the State's argument that McFadden persuaded Codefendant to cover up McFadden's involvement in the shooting.

McFadden further argues the phrases in the letters suggesting gang affiliation – such as "Love-N-Loyalty;" "Love is love. Loyalty is royalty;" and "Yung Hood" – caused unfair prejudice. But these phrases are vague in nature and not so prejudicial as to outweigh the letters' probative value. *See State v. Davidson*, 242 S.W.3d 409, 415 (Mo. App. 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."). Accordingly, any objection by counsel regarding the relevance of the letters would have been meritless.

***5** Because McFadden has failed to prove that counsel's failure to object to the admission of the letters resulted in prejudice, the circuit court did not clearly err in denying these claims.

D. Failure to Object to the State's Introduction of Identification and Fingerprint Evidence

McFadden argues the circuit court clearly erred in failing to find counsel ineffective for not objecting to the State's introduction of evidence demonstrating (1) Silas identified McFadden using a photograph on the wall at the police station and (2) fingerprints on a cigar wrapper found at the crime scene matched "on file" fingerprints belonging to McFadden. McFadden argues this evidence was inadmissible because it created the inference he had a criminal record or was in trouble with the police. "[P]roof of the commission of

separate and distinct crimes is not admissible, unless such proof has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial." *State v. Shilkett*, 356 Mo. 1081, 204 S.W.2d 920, 922-23 (Mo. 1947).

1. Failure to Object to Identification Evidence

At trial, the State played Silas' recorded statement to police, in which he identified McFadden by using the photograph from the police station wall. A police officer and detective also testified Silas used the photograph to identify McFadden. These references to the photograph were not made to indicate McFadden had committed prior bad acts or uncharged crimes. There were no references to the photograph as a "wanted" photograph and no explanation was provided for the photograph's presence. There was no evidence linking McFadden's photograph to other crimes he may or may not have committed. *See State v. Carr*, 50 S.W.3d 848, 857 (Mo. App. 2001) (requiring defendant, who alleged the State's use of the term "mug shots" and reference to photographs on file with the police department indicated prior criminal activity, to demonstrate photographs maintained by the police department were solely of persons who committed prior crimes, or that the average juror believes same, to satisfy burden of involvement in prior criminal activity); *Nunn v. State*, 755 S.W.2d 269, 272 (Mo. App. 1988) (finding an officer testifying he saw defendant's photograph at roll call was not suggestion that defendant had a criminal record when there was no actual evidence of other crimes).

Even if the references to the photograph on the wall demonstrated McFadden committed prior crimes, "otherwise inadmissible evidence may be admitted ... if it tends to establish ... the identity of the person charged with commission of the crime on trial." *State v. Primm*, 347 S.W.3d 66, 70 (Mo. banc 2011). Because the references to the photograph were for the purpose of identification, there would have been no merit to an objection to the admission of this evidence. *See State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998). The circuit court did not clearly err in failing to find counsel were ineffective for not objecting to the State's presentation of evidence that Silas identified McFadden in a photograph on the wall at the police station.

2. Failure to Object to the Match of On-file Fingerprints

A fingerprint examiner obtained a fingerprint from a cigar wrapper found near Victim's body. The examiner testified that, after a comparison to prints on file in the Automated Fingerprint Identification System (AFIS), he determined it was a match to McFadden's fingerprints. "Fingerprint cards, in and of themselves, do not constitute evidence of a prior crime." *State v. Morrow*, 968 S.W.2d 100, 111 (Mo. banc 1998). This Court finds the on-file fingerprints in this case to be analogous. The examiner's testimony was neutral. He did not testify that McFadden's fingerprints on file were obtained pursuant to an arrest, conviction of a crime, or negative interaction with law enforcement. The examiner merely testified about the procedure used.

***6** Because the evidence of the on-file fingerprint was referenced in the context of explaining the procedure for the match and did not, absent something more, raise an inference of prior criminal activity, there would have been no merit to the objection. The circuit court did not clearly err in failing to find counsel ineffective for not objecting to evidence that the fingerprint found at the murder scene matched one of McFadden's on-file fingerprints.

II. Alleged Penalty Phase Errors

A. Failure to Introduce Certain Evidence Regarding Victim's Bad Character

During the penalty phase, the State offered testimony by Victim's mother, girlfriend, and sister, all of whom portrayed Victim as an upstanding individual. McFadden argues the circuit court clearly erred in failing to find counsel ineffective for not presenting certain evidence to rebut this portrayal of Victim. As a result of the absence of certain rebuttal evidence, McFadden claims the jury believed him to be more deserving of the death penalty. Specifically, McFadden argues counsel should have obtained and introduced a copy of Victim's guilty plea to the felony of second-degree drug trafficking. He further argues counsel should have called Tanesia Kirkman-Clark to testify.

1. Victim's Guilty Plea Court Record

At the postconviction evidentiary hearing, McFadden submitted a certified court record, which indicated that Victim had pleaded guilty to second-degree drug trafficking for

possessing six or more grams of cocaine base. Although introduction of this record would have rebutted the evidence of Victim's good character by demonstrating his involvement with drugs, counsel were not ineffective for failing to present evidence that was cumulative to other evidence presented at trial. *Forrest v. State*, 290 S.W.3d 704, 709 (Mo. banc 2009). During trial, counsel presented evidence that Victim possessed cocaine at the time of his death and further emphasized this point during closing argument. During the cross-examinations of Victim's mother and girlfriend, counsel elicited that both witnesses were unaware of Victim's involvement with drugs.

Although evidence that Victim possessed cocaine is not the equivalent of evidence of a second-degree drug trafficking conviction, McFadden has failed to prove there is a reasonable probability that the jury – which heard evidence regarding Victim's history of cocaine possession – would not have recommended the death penalty had Victim's conviction record been admitted into evidence. For this reason, the circuit court did not clearly err in denying McFadden's ineffective assistance of counsel claim for counsel's failure to present evidence of the guilty plea court record.

2. Kirkman-Clark's Testimony

McFadden next argues the circuit court clearly erred in failing to determine counsel were ineffective by not calling Kirkman-Clark to testify. To prevail on a claim of ineffective assistance of counsel for failure to call a witness during the penalty phase of trial, a movant must establish, among other requirements, that "the witness could be located through reasonable investigation." *Barton*, 432 S.W.3d at 757. McFadden argues *Gennetten v. State*, 96 S.W.3d 143, 148 (Mo. App. 2003), in which the court held counsel ineffective for failing to locate and present an expert witness who would have presented a viable defense for movant, is analogous. But *Gennetten* can be distinguished on its facts, as counsel in that case did not attempt to contact or locate the witness at all. *Id.* at 151. Here, counsel testified they attempted to contact and locate Kirkman-Clark but were unsuccessful. As McFadden did not prove that Kirkman-Clark could have been located through reasonable investigation, he failed to demonstrate counsel were deficient in their attempt to locate Kirkman-Clark.

*7 Even if Kirkman-Clark could have been located through reasonable investigation, McFadden has failed to demonstrate he was prejudiced by counsel's failure to call her as a witness. Because McFadden is arguing counsel were ineffective in failing to call a witness during the penalty phase, "a 'viable defense' is one in which there is a reasonable probability that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor resulting in the jury voting against the death penalty." *Deck v. State*, 381 S.W.3d 339, 346 (Mo. banc 2012).

McFadden asserts Kirkman-Clark would have rebutted evidence of Victim's good character through her testimony that Victim dealt drugs, carried a gun, and was involved in a drive-by shooting. In her deposition, Kirkman-Clark testified that Victim sold drugs, which she learned by witnessing him receive a phone call and observing another individual waiting for him. As these facts alone do not establish that Victim was selling drugs, Kirkman-Clark's testimony to that effect would have been an inadmissible, speculative conclusion. *See State v. Boyd*, 706 S.W.2d 461, 465 (Mo. App. 1986) ("[T]he general rule provides that a lay witness must be restricted to statements of fact, not opinions or conclusions."). Kirkman-Clark further testified she had heard Victim was involved in a drive-by shooting of her mother's house. As Kirkman-Clark recognized during her deposition, this testimony would have been inadmissible hearsay. *See Tisius*, 519 S.W.3d at 422. Accordingly, testimony by Kirkman-Clark that Victim was a drug dealer and was involved in a drive-by shooting would have been inadmissible, and counsel is not ineffective for not presenting inadmissible evidence. *Id.*

McFadden has failed to establish the remainder of Kirkman-Clark's testimony would have produced a viable defense. Although she testified Victim carried a gun, she later stated the gun was only for protection. Her testimony actually could have negatively impacted McFadden's defense, as she repeatedly emphasized Victim's good character, maintaining that he "was nice," "respectable" and "liked to ... make people laugh." As Kirkman-Clark's testimony would have had only minimal probative value in demonstrating Victim's violent tendencies and bad character, the circuit court did not clearly err in determining there was not a reasonable probability that McFadden would not have received a death sentence had she testified.

B. Failure to Call Additional Expert and Lay Witnesses in Mitigation

McFadden argues the circuit court clearly erred in failing to find counsel ineffective for not calling four additional lay witnesses and two additional expert witnesses.

When representing a defendant in a death penalty case, "trial counsel has an obligation to investigate and discover all reasonably available mitigating evidence." *Davis v. State*, 486 S.W.3d 898, 906 (Mo. banc 2016). Such mitigating evidence may include "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). At the same time, the duty to investigate does not require counsel "to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008) (quoting *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)).

At the postconviction hearing, counsel testified the defense's mitigation theory was that McFadden grew up in a bad neighborhood with a home environment that lacked guidance and support. During the penalty phase at trial, counsel called seven lay witnesses, each of whom emphasized the difficulties McFadden experienced growing up in Pine Lawn. Two of McFadden's aunts and an uncle testified he was a smaller-sized child who was bullied by other children at school and in the neighborhood. McFadden's father testified that, when McFadden was around seven years old, he often had bruises, black eyes, and scratches. McFadden's grandmother testified that he did not have a consistent home and stayed with various family members. Lynette Hood, a friend of McFadden's who lived in Pine Lawn, testified that Pine Lawn is a violent neighborhood and that she often heard gunshots. She stated McFadden was shot in the leg, which led to a decline of his mental health and wellbeing. A St. Louis juvenile officer testified that Pine Lawn is a "violent," "depressed," and "difficult place" to live. He further stated McFadden did not have adequate structure in his home life. Counsel also called an expert witness, Dr. Draper, who testified regarding the effect of McFadden's home and community life on his development.

1. Failure to Call Additional Lay Witnesses

***8** McFadden now claims counsel should have called four additional lay witnesses who lived in Pine Lawn: Kirkman-Clark, Elwyn Walls, Sean Nichols, and Willabea Blackburn. At the postconviction hearing, they testified that Pine Lawn culture consists of gangs, drugs, and violence. This testimony would have been cumulative to the testimony of the seven lay witnesses and Dr. Draper. "Counsel is not ineffective for not presenting cumulative evidence." *Deck*, 381 S.W.3d at 351. Further, these witnesses would have been subject to potentially damaging cross-examination regarding McFadden's gang involvement and responsibility in creating the violent culture. Accordingly, McFadden failed to demonstrate that, had the additional witnesses been called to testify, their testimonies would have outweighed the potentially aggravating evidence elicited by the State. For these reasons, the circuit court did not clearly err in failing to find counsel ineffective for not calling these additional lay witnesses.

2. Failure to Call Dr. White

McFadden also claims counsel were ineffective in failing to call Dr. Norman White, or another sociologist with similar expertise, to testify regarding how the cultural environment in which McFadden grew up impacted his development. McFadden also argues counsel were ineffective in failing to provide Dr. Draper with Dr. White's report.

Postconviction counsel asked Dr. White to study Pine Lawn to gain an understanding of McFadden's life as an adolescent in the 1980s and 1990s. Dr. White reviewed Dr. Draper's report, watched a video compilation of interviews addressing life in Pine Lawn, read Pine Lawn newspaper clippings, and interviewed Pine Lawn residents.

Although Dr. White's testimony would have further supported the defense's mitigation theory, Dr. White was unable to opine how growing up in Pine Lawn actually impacted McFadden's decision to murder Victim. Because the defense presented ample evidence of the Pine Lawn culture and its effects on McFadden's childhood and development – including testimony by another expert, Dr. Draper – additional expert testimony on this topic would have been of limited assistance. *See Deck*, 381 S.W.3d at 351.

As for McFadden's claim that counsel were ineffective in failing to provide Dr. Draper with Dr. White's report, counsel testified at the postconviction hearing that Dr. Draper never

indicated she needed additional information to inform her opinion. Further, the record indicates that, even if Dr. Draper had reviewed Dr. White's report prior to testifying at trial, her testimony would not have substantively changed. At trial, Dr. Draper testified the violent environment in which McFadden lived impaired his ability to make decisions. Similarly, at the postconviction hearing, Dr. Draper testified the environmental factors identified by Dr. White, such as crime and violence in the community, had an adverse effect on McFadden's development. Dr. Draper's opinion that McFadden used his free will to kill multiple people did not change after reviewing Dr. White's report. Because McFadden failed to demonstrate that introduction of Dr. White's findings into evidence – either through Dr. White's own testimony or through furnishing his report to Dr. Draper – would have produced a viable defense, the circuit court did not clearly err in failing to find counsel ineffective for not introducing Dr. White's findings into evidence.

3. Failure to Call Dr. Gelbort

McFadden similarly argues the circuit court clearly erred in failing to find counsel ineffective in not calling Dr. Gelbort, or a similarly qualified neurological expert, to testify regarding McFadden's mental capacity. McFadden argues Dr. Gelbort's testimony should have been presented to support a pretrial motion or, alternatively, to support the defense's argument during the penalty phase that the jury was required to find McFadden was mentally at least 18 years old before sentencing him to death.

To the extent McFadden argues a mental age of younger than 18 entitles him to be treated as a juvenile for sentencing purposes and precludes imposition of the death penalty, despite that he was 23 years old at the time he committed the murder, this Court has rejected that argument. *See Tisius*, 519 S.W.3d at 430-31. *Tisius* held that even though the United States Supreme Court "recognized the potential for a defendant's mental age to differ from his or her biological age," it "nonetheless, implemented a bright line rule as to the minority age for imposition of the death penalty" and "trial counsel were not ineffective for failing to object on grounds that [the defendant's] mental age prohibited imposition of the death penalty." *Id.* at 431. Accordingly, even if counsel had called Dr. Gelbort to testify regarding McFadden's mental capacity, his testimony could not have affected McFadden's death penalty eligibility, as McFadden incorrectly suggests.

***9** To the extent McFadden argues counsel were unreasonable in deciding not to call Dr. Gelbort as an expert during the penalty phase, his claim also fails. In 2004, counsel asked Dr. Gelbort to conduct a neuropsychological evaluation of McFadden. Dr. Gelbort testified the results indicated McFadden had brain abnormalities affecting his ability to solve problems, make decisions, and excel academically.

Dr. Gelbort testified in the first trial involving the murder of Victim as well as the trial involving the murder of Leslie. According to counsel, Dr. Gelbort's testimony was not particularly helpful in those cases, as he had "extremely bad" demeanor on the witness stand and lost credibility with the jury. Further, Dr. Gelbort was unable to testify that McFadden's brain abnormalities caused him to kill Victim, and, in both cases, the juries recommended death. Counsel testified they made a strategic decision not to call Dr. Gelbort as an expert again, concluding the negative impact of Dr. Gelbort's poor demeanor outweighed any potential benefit of his testimony. Instead, counsel chose to call Dr. Draper as well as lay witnesses to testify regarding the effect of Pine Lawn culture on McFadden's development. Such "strategic choices made after thorough investigation of law and facts relevant to plausible opinions are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. Counsel reasonably chose not to pursue a strategy that had failed in prior trials, *Baumruk v. State*, 364 S.W.3d 518, 536 (Mo. banc 2012), and instead chose "to pursue one reasonable trial strategy to the exclusion of another." *Davis*, 486 S.W.3d at 912. For these reasons, the circuit court did not clearly err in failing to find counsel ineffective for not calling Dr. Gelbort as a witness.

C. Failure to Present Brain Scan Evidence

McFadden argues counsel were ineffective in failing to order a PET (positron emission tomography) scan of his brain and in failing to call Dr. Ruben Gur, a clinical psychologist, to testify about the scan's results.

At the postconviction hearing, counsel testified McFadden underwent an MRI scan, which came back normal. Dr. David Preston, a medical doctor working with counsel at the time, then recommended ordering a PET scan. Counsel testified they considered arranging a PET scan but were unaware of any experts who forensically interpreted the scans, as the medical community at that time was opposed to the use of PET scans in criminal cases. Even if counsel had identified a place to have a PET scan performed, counsel testified they

were hesitant to order the scan due to the concern that it was impossible to do so without the State knowing, and any "normal" result could be used against McFadden. These concerns were valid reasons to avoid pursuing the scan. *See Forrest*, 290 S.W.3d at 709 (holding counsel was not ineffective for failing to obtain a PET scan based on fears that the scan would not be "*ex parte* and under seal" and potentially would "provide[ ] harmful information that would undermine other mitigating evidence").

Further, the record indicates any potential benefit obtained from conducting a PET scan would have been negligible. During the postconviction hearing, Dr. Gur testified regarding a PET scan he performed on McFadden years after the murder. According to Dr. Gur, the scan showed abnormalities indicating McFadden likely had difficulty controlling an emotional response when "challenged or threatened." But during cross-examination, Dr. Gur conceded that the abnormalities in McFadden's scan were not necessarily related to his decisions to kill others and that not all individuals with similar abnormalities are murderers. As this Court stated in *Zink v. State*, 278 S.W.3d 170, 182 (Mo. banc 2009), "the mitigating value of the PET scan evidence is limited because ... there is no generally accepted scientific link between [a movant's] brain abnormalities and his diagnosed personality disorders."

***10** As counsel's time and resources are limited, "if there is a strategy that does not look promising, he may choose not to expend his limited resources to that end." *Id.* at 181. Here, counsel balanced the potential risks of ordering a PET scan with the minimal potential benefits, and the circuit court did not clearly err in finding counsel's decision not to order the scan reasonable.

D. Failure to Present Evidence Rebutting that McFadden Previously Committed Assaults

McFadden argues the circuit court clearly erred in failing to find counsel ineffective for not rebutting aggravation evidence, which showed that McFadden was previously convicted of two counts each of first-degree assault and armed criminal action for attacking Daryl Bryant and Jermaine Burns. Specifically, McFadden asserts counsel should have: (1) called Butch Johnson, an investigator with the public defender's office, to testify; (2) presented evidence of Bryant's medical records; and (3) presented evidence of Codefendant's affidavit.

1. Failure to Call Johnson

McFadden argues Johnson should have been called to rebut police report statements regarding how the assaults occurred. Occupants of a van in which Bryant and Burns were passengers told police that McFadden shot at them while standing at the front of the van. But Johnson testified at his deposition that the location of the bullets indicated the shooter stood at the back of the van. Importantly, Johnson's testimony regarding the location of the shooter would not have established that McFadden was not the shooter. Further, his concessions during cross-examination undermined his conclusion that the shooter stood at the rear of the van, as Johnson agreed at least one of the two bullets found could not have been fired from the van's rear. The circuit court concluded Johnson was not qualified to give opinions regarding the evidence in the assault case because "[h]is observations, conclusions, and opinions were based on personal speculation rather than physical evidence." This Court "defers to the motion court's superior opportunity to judge the credibility of witnesses." *Barton*, 432 S.W.3d at 760. As there is not a reasonable probability that Johnson's testimony would have provided McFadden with a viable defense, the circuit court did not clearly err in failing to find counsel ineffective in not calling Johnson to testify.

2. Failure to Present Evidence of Bryant's Medical Records

McFadden also argues counsel were ineffective for failing to present evidence of Bryant's medical records to undermine any conclusion that Bryant suffered serious physical injury as a result of the assault. But there was no question the wound was substantial and required hospital treatment. The medical records confirmed that Bryant received a prescription for "severe" pain and that he was discharged with crutches. Further, an injury need not be serious to constitute felony assault. Even if the medical records supported the conclusion that the injury was not severe, introducing them into evidence would not have impacted the jury's finding that McFadden was convicted of two counts of felony assault. *See State v. Kinder*, 942 S.W.2d 313, 332 (Mo. banc 1996) ("[F]or purposes of evaluating a statutory aggravator, the determination of whether a prior conviction is a serious assault is a matter of law for the court, and the jury only finds as a matter of fact that a prior conviction actually occurred."). For these reasons, the circuit court did not clearly err in failing

to find counsel ineffective for not presenting evidence of Bryant's medical records.

3. Failure to Present Evidence of Codefendant's Affidavit

***11** McFadden asserts counsel should have presented evidence of Codefendant's affidavit, in which Codefendant indicated that his brother – and not McFadden – assaulted Bryant and Burns. At the evidentiary hearing, counsel testified they were concerned the jury would view this evidence unfavorably, as the jury heard and rejected similar evidence during the guilt phase. According to counsel, such evidence would have actually been aggravating because "[i]t makes it look like Vincent McFadden just blames everything on someone else."

Counsel testified that, as a matter of strategy, they wanted to limit evidence of the prior assault convictions, as the State could have put on even more prejudicial and inflammatory evidence to support the convictions. The circuit court did not clearly err in finding counsel used reasonable trial strategy in deciding not to present evidence of Codefendant's affidavit.

E. Failure to Present Additional Evidence to Impeach Eva Addison's Testimony

McFadden argues the circuit court clearly erred in failing to find counsel ineffective in the penalty phase for not calling several additional lay witnesses and failing to present photographs and measurements of the crime scene to impeach Eva Addison's testimony that she saw McFadden kill her sister, Leslie Addison. Eva testified that, before McFadden killed Leslie, McFadden confronted Eva and argued with Leslie at Maggie Jones' house. McFadden left in a vehicle, and Leslie walked away from Jones' house because she was scared. Eva testified she eventually observed McFadden get out of the vehicle, approach Leslie, and shoot her. Eva then ran back to Jones' house.

"Ordinarily, the failure to call a witness will not support an ineffective assistance of counsel claim because the choice of witnesses is presumptively a matter of trial strategy." *Tisius*, 519 S.W.3d at 427. This presumption applies to counsel's decision not to impeach a witness. *Barton*, 432 S.W.3d at 750. "A trial strategy decision may only serve as a basis for ineffective counsel if the decision is unreasonable." *McLaughlin v. State*, 378 S.W.3d 328, 337 (Mo. banc 2012).

As McFadden is again claiming counsel were ineffective in failing to call certain witnesses during the penalty phase, "a 'viable defense' is one in which there is a reasonable probability that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor resulting in the jury voting against the death penalty." *Deck*, 381 S.W.3d at 346. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

1. Failure to Call Jones

If called, Jones would have testified that she did not hear the Addisons and McFadden fighting on the night Leslie was murdered and that Eva did not tell her they had been fighting. McFadden argues this would have impeached Eva's claim that she fought with McFadden outside the house the night Leslie was murdered.

Counsel testified they made the strategic decision not to call Jones at this trial because whether Eva and McFadden fought the night of Leslie's murder was not a key issue in this case. Further, Jones' testimony was only marginally persuasive because she admitted she was in her bedroom the entire evening watching television, making it possible that she would not have heard the fighting. Jones' testimony could have actually bolstered other aspects of Eva's testimony, as Jones testified that the night Leslie was murdered she spoke with Eva, who told her she had seen McFadden shoot Leslie multiple times. As Jones's testimony would have actually supported Eva's testimony that McFadden killed Leslie, McFadden has failed to demonstrate her testimony would have produced a viable defense. *See Deck*, 381 S.W.3d at 346.

2. Failure to Call Jackson

***12** McFadden also contends counsel were ineffective in failing to call his friend, Arnell "Smoke" Jackson. At a deposition, Jackson testified he was riding in a car near Jones' home before Leslie was killed. When he saw McFadden leave Jones' home, he followed McFadden and never saw him get out of the car or shoot Leslie. But Jackson stopped following McFadden after the car McFadden was in turned the other

way, and Jackson conceded he did not know what actions McFadden took after this point.

As counsel concluded, Jackson "didn't have anything helpful to say," as his testimony would not have undermined Eva's testimony that McFadden shot Leslie. On the contrary, Jackson's testimony would have corroborated Eva's testimony by placing McFadden at the crime scene. Further, Jackson would have been especially vulnerable to impeachment based on his lengthy criminal record – including murder – as well as his friendship with McFadden and admission he tried to persuade McFadden to leave Jones' house because McFadden was wanted for Victim's murder. The circuit court did not clearly err in finding defense counsel used a reasonable trial strategy in deciding not to call Jackson as a witness. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

3. Failure to Call Walsh

Margaret Walsh is the technician who performed blood analysis testing on the clothing McFadden was wearing when he was arrested for Leslie's murder. McFadden claims Walsh's failure to find blood on his clothes, when Leslie was shot at close range, weakens Eva's testimony that he shot Leslie. But McFadden was not arrested until two days after the shooting, and Walsh admitted she did not know whether the items she tested were actually worn by McFadden at the time of Leslie's murder. Counsel testified at the postconviction hearing that, after considering the limited impeachment value, they decided against calling Walsh as a witness. The circuit court did not clearly err in finding defense counsel used a reasonable trial strategy in not calling Walsh, absent a showing McFadden was wearing the same clothes at the time of shooting or had not washed them. [5]

4. Failure to Present Evidence of Lighting and Distance

McFadden argues counsel were ineffective for failing to present additional evidence of the lighting at the murder scene and the distance between where Eva reported she was standing and the location where the shooting occurred.

***13** Officer Jeff Hunnius, a crime scene investigator, took photographs of the scene the night of the murder. On cross-examination, he testified that there were no streetlights on the side of the street where the shooting occurred and that he had to use the camera's flash when taking photographs. Counsel also elicited that the distance from the stop sign to the intersection where the shooting occurred was 75 feet, meaning Eva's location in the bushes would have been even farther away. Similarly, during cross-examination of a neighbor who heard the shooting, counsel elicited testimony that the neighbor could not tell there was a body on the ground because it was too dark. The neighbor further confirmed there were no streetlights where the shooting occurred.

McFadden now argues counsel should have introduced additional photographs and measurements to further undercut and impeach Eva's claim she could see the murder from the bushes. In support, at the postconviction hearing, McFadden presented the deposition testimony of Johnson, who took photographs of the area and concluded the lighting was bad. But this testimony would have had little, if any, probative value, as these photographs were taken in daylight 10 years after the murder, and Johnson was unable to testify the lighting and other aspects of the scene had not changed. Further, counsel testified they went to the scene of the murder several times, observed the lighting, and determined Eva would have been capable of observing the shooting. As counsel made a strategic decision not to present additional evidence of the murder scene after a thorough investigation of the pertinent facts, the circuit court did not clearly err in finding counsel utilized a reasonable trial strategy. *Zink*, 278 S.W.3d at 178.

F. Failure to Object to Arguments

McFadden argues counsel were ineffective for failing to object to certain penalty phase arguments made by the State. Specifically, McFadden contends counsel should have objected to arguments that: (1) McFadden would have killed Eva except he was arrested; (2) in an earlier time, the Victim's and Addison families would have been given the opportunity for personal retribution, but, instead, McFadden received a fair trial; (3) the jury should think of the terror that Victim, Victim's mother, Leslie, and Eva felt; (4) McFadden believes in the death penalty; and (5) the jury should hold, hug, and love Victim and Leslie, but "don't let them down."

1. Statement that McFadden Would Have Killed Eva

In the State's closing argument in the penalty phase, the State argued: "He threatens to kill Eva. That's aggravating: you're going to kill a witness because she witnesses you killing her

sister. He wants to kill her. He just didn't get a chance to kill her because he got caught in St. Charles." McFadden argues this statement was speculative argument that misled the jury. But "[a] prosecutor is allowed to argue the evidence and all reasonable inferences from the evidence during closing arguments." *State v. Brown*, 337 S.W.3d 12, 14 (Mo. banc 2011). The evidence suggested McFadden threatened Eva. Specifically, Eva testified McFadden said he would kill her if she continued to claim McFadden killed Leslie. As the State's assertion was not outside the evidence and was a reasonable inference drawn from the evidence, any objection would have been meritless, and counsel were not ineffective for failing to object.

2. Statement Involving Personal Retribution

In the State's rebuttal closing argument, it argued:

> Now, ladies and gentlemen, we live in a civilized society. But there was a time when civil society wasn't so civilized and we would have given the [Victim's family] and the Addison family an opportunity for retribution.
>
> We would have let them hunt him down like he deserves. But we don't live in that society. We gave him a fair trial. We put on evidence. He had a right to a lawyer, a jury of his peers.

***14** McFadden argues these statements lessened the jury's sense of responsibility for imposing death. But taken as a whole, the State's argument explained that due process rights for defendants have overtaken a previously uncivilized form of retribution. As this Court held in McFadden's direct appeal, "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. Again, any objection to this argument would have been meritless, as the prosecutor's statement did not lessen the jury's sense of responsibility for imposing death. Counsel were not ineffective for failing to object to this statement.

3. Three Additional Statements

In the State's rebuttal closing argument, the State made the following three statements to which McFadden now alleges counsel were ineffective for failing to object:

First: "Think of the terror that Leslie went through. Think of the terror that [Victim] went through. Think of the terror that [Victim's wife], when she came home, went through. Think of the terror that Eva went through when she watched her sister get killed. Think of that."

Second:

> That day, those days, those two days in Pine Lawn, there was one juror that was there. And he was the foreman. He didn't have any evidence, any rule of law. There was no trial.
>
> [McFadden], at that time, decided the death penalty was appropriate. Because, ladies and gentlemen, if there's one person that believes in the death penalty in this courtroom, it's [McFadden].

Third: "Ladies and gentlemen, 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."

As to each of these statements, McFadden alleges the State argued facts outside the record and injected passion, prejudice, caprice, and emotion, prejudicing the jury. But the State argued inferences from evidence presented in this case. *Brown*, 337 S.W.3d at 14. The circumstances present in this case involved emotionally charged facts. "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." *State v. Rhodes*, 988 S.W.2d 521, 528 (Mo. banc 1999). For this reason, counsel were not ineffective for failing to object to these statements.

As each of these statements made during the penalty phase was proper, the circuit court did not clearly err in failing to find counsel ineffective for not objecting to these statements.

III. Alleged Errors in the Postconviction Relief Phase

A. Overruling Motions to Compel Codefendant to Answer Deposition Questions

Codefendant appeared for a deposition and invoked the Fifth Amendment as to all questions asked by counsel. Counsel filed a motion to compel answers to the deposition questions, which the circuit court overruled on the ground that answering the questions would violate Codefendant's Fifth Amendment right not to incriminate himself. McFadden also filed a renewed motion to compel before the evidentiary hearing, which the circuit court overruled. McFadden now argues the circuit court clearly erred in overruling the motions to compel Codefendant to answer deposition questions and, in doing so, denied McFadden the opportunity to adequately prepare for the Rule 29.15 evidentiary hearing.

Under the protections of the Fifth Amendment, an individual cannot be 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. 1992). When an answer to a posed question would place the witness in "real danger of further incrimination," the witness can validly exercise the privilege. *Id.*

***15** McFadden claims the Fifth Amendment privilege did not apply here because Codefendant had already pleaded guilty to killing Victim. McFadden is correct 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.*, but McFadden fails to prove he was prejudiced by the circuit court's overruling of his motion to compel. Although McFadden indicates what topics would have been covered during Codefendant's deposition,[6] he does not identify how Codefendant's answers to questions concerning these topics would have supported any of his claims. Indeed, it is unclear how Codefendant's answers to these questions would have impacted McFadden's claims at all, as several of the deposition topics were established by other testimony in the record.[7] As McFadden has failed to meet his burden establishing prejudice, *Goodwin v. State*, 191 S.W.3d 20, 26 (Mo. banc 2006), the circuit court did not clearly err in overruling the motions to compel.

B. Denying McFadden's Requests to Attend the Rule 29.05 Evidentiary Hearing and to Disqualify the Prosecutor

In an amended motion, McFadden requested to be present at the postconviction evidentiary hearing, and the circuit court initially ordered that McFadden be present. The State filed a motion to recall the writ, emphasizing that McFadden had been convicted of murdering two individuals and that he had been sentenced to death for both murders. At the hearing on the motion, the State asserted McFadden had previously assaulted a department of corrections guard and St. Louis County jail guard. Postconviction counsel opposed the motion and informed the circuit court she had no knowledge of McFadden assaulting the guards. The State filed a supplement to its motion to recall the writ, conceding there were no records of McFadden's involvement in assaultive incidents with guards at either the jail or department of corrections. The supplement also stated that the department of corrections' records indicated that McFadden physically assaulted another inmate and that McFadden had "multiple conduct violations." The circuit court sustained the State's motion to recall the writ and ordered that McFadden's testimony be submitted by deposition.

Postconviction counsel then moved to disqualify the St. Louis County prosecutor's office, arguing the State's representations that McFadden had assaulted the guards were made for the purpose of prejudicing the circuit court against McFadden. After a hearing, the circuit court overruled the motion. McFadden now argues the circuit court clearly erred in ordering the writ recalled and in overruling the motion to disqualify the prosecutor's office.

"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). Because a Rule 29.15 motion is a civil proceeding, neither the rule nor the constitution guarantees a movant the right to be present. *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."). McFadden argues the United States Supreme Court's recognition of the right to effective assistance of postconviction counsel indicates that he must be allowed to attend his hearing to ensure effective assistance. *See Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). But this argument is without merit, as "[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 Barton v. State*, 486 S.W.3d 332, 336 (Mo. banc 2016) ("[N]either this Court nor the federal courts have held that this Sixth Amendment right [to counsel] extends to the post-conviction process."). Because McFadden had no right to attend the hearing, the circuit court did not clearly err in sustaining the State's motion to recall the writ ordering McFadden's attendance at the hearing.

***16** As for McFadden's claim that the circuit court clearly erred in overruling the motion to disqualify the prosecutor's office, disqualification of a prosecutor is appropriate when a conflict of interest prohibits the attorney's participation in the underlying case. *State v. Lemasters*, 456 S.W.3d 416, 420 (Mo. banc 2015). A prosecutor's office "must be disqualified if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness" of the process. *Id.* at 423. During the hearings, the prosecuting attorneys indicated their belief that McFadden had a history of assaulting jail and prison guards was derived from information received from the St. Louis County jail. Further, in their supplement to the motion, the prosecuting attorneys corrected their earlier statements that McFadden had a history of assaulting jail and prison guards. For these reasons, the record indicates the prosecutor's office was impartial and had no conflict of interest in McFadden's case. There was no appearance of impropriety. The circuit court did not clearly err in overruling McFadden's motion to disqualify the prosecutor's office.

C. Memoranda of Law Claims

More than four years after filing the amended motion, postconviction counsel filed a memorandum titled "Memorandum Asserting Ineffective Assistance of Counsel for Failure to Investigate and Adduce Evidence of Movant's Brain Deficiencies During the Guilt Phase." In the memorandum, postconviction counsel recognized the two claims regarding Dr. Gur and Dr. Gelbort in the amended motion applied only to the penalty phase but requested those claims also apply to the guilt phase. In response, the State filed a motion to dismiss, asserting the claims alleged in the memorandum were barred because they were not raised in the amended motion. The circuit court sustained the State's motion to dismiss, finding the claims untimely. Several months later, McFadden filed a letter complaining postconviction counsel failed to include these claims in his Rule 29.15 amended motion.

McFadden now asserts two arguments regarding the claims asserted in the memorandum. First, McFadden argues the circuit court clearly erred in treating the claims as untimely. Next, McFadden argues the circuit court clearly erred in failing to find that postconviction counsel abandoned him when postconviction counsel did not include the memorandum claims in the amended motion.

1. Failure to Find the Claims Timely

To the extent McFadden argues the Rule 29.15 time limits are unconstitutional, "unreasonably short," and should be reconsidered by this Court, this claim has been waived, as McFadden failed to make this claim before the circuit court. *See White v. State*, 939 S.W.2d 887, 904 (Mo. banc 1997) ("Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear, or otherwise, is not discernable.").

To the extent McFadden asserts this Court's rules required the circuit court to find the claims timely, his argument also fails. Rule 29.15 provides that a postconviction relief motion shall be filed within 90 days after the date the mandate of the appellate court issues. The rule also provides a specific timeframe for filing an amended motion. *See* Rule 29.15(g). 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). Such time limitations are reasonable and constitutional because "[t]hey serve the legitimate end of avoiding delay in the processing of prisoners['] claims and prevent the litigation of stale claims." *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). McFadden attempted to amend his claim more than four years after postconviction counsel timely filed the amended motion – long after the deadlines provided in Rule 29.15. Accordingly, the circuit court did not clearly err in finding the added claims were untimely pursuant to Rule 29.15.

2. Failure to Find Postconviction Counsel Abandoned McFadden

McFadden next argues the circuit court clearly erred in failing to find postconviction counsel abandoned him by not asserting in the amended motion that the claims regarding Dr. Gur and Dr. Gelbort should apply to the guilt phase.

***17** In general, an abandonment claim is limited to two circumstances, 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. This Court reviews claims of abandonment 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). If a movant claims ineffective assistance of postconviction counsel, such claims are "categorically unreviewable." *Id.*

Because postconviction counsel timely filed an amended Rule 29.15 motion, McFadden's assertion that postconviction counsel failed to include additional claims is "more appropriately characterized as a claim of ineffective assistance of post-conviction counsel." *Id.* As this Court has made clear abandonment does not encompass perceived ineffective assistance of postconviction counsel, *id.*, the circuit court did not clearly err in failing to find abandonment.

Conclusion

The circuit court's findings of fact and conclusions of law are not clearly erroneous. The judgment denying McFadden postconviction relief is affirmed.

All concur.

All Citations

--- S.W.3d ----, 2020 WL 1861425

Footnotes

1 *State v. Taylor*, 134 S.W.3d 21, 24 (Mo. banc 2004).

2 This Court initially reversed McFadden's convictions on direct appeal, *State v. McFadden*, 216 S.W.3d 673, 678 (Mo. banc 2007), and the case was retried.

3 This Court has jurisdiction because McFadden received a death sentence. Mo. Const. art. V, sec. 10. Many of the arguments now raised are similar to those McFadden asserted on direct appeal and in *McFadden v. State*, 553 S.W.3d 289, 312 (Mo. banc 2018), McFadden's appeal of the denial of postconviction relief from his conviction and death sentence for the first-degree murder of Leslie Addison. Portions of those opinions are incorporated without further attribution.

4 The same two counsel represented McFadden in both trials for the murder of Victim.

5 McFadden cites *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004), for the proposition that counsel can be found ineffective for failing to impeach witnesses with their prior inconsistent statements about the circumstances surrounding the crime when the defendant's mental state "was the key issue in contention between the parties" and the prior inconsistent statements "related directly to the central issue of whether [the defendant] acted with deliberation or in a fit of rage or out of self-defense." In such circumstances, there is a reasonable probability this would have affected the outcome of the trial because, if believed, the testimony would have negated an element of the crime for which the defendant was convicted. *Id.* at 58. Unlike in *Black*, McFadden fails to identify prior inconsistent statements Eva made and with which she could have been impeached, nor would the impeaching testimony of these three uncalled witnesses have related "directly to the central issue." Rather, and again unlike in *Black*, counsel made a strategic decision not to call additional lay witnesses after weighing their impeachment value against the damaging cross-examination to which they would have been subjected.

6 McFadden asserts the following topics would have been covered during Codefendant's deposition: (1) Codefendant's guilty plea of murder for killing Victim and 20-year prison sentence; (2) Codefendant's deposition by phone years earlier during which he refused to be sworn; (3) McFadden's letter that was delivered to Codefendant at the jail; (4) Codefendant's Rule 24.035 motion; (5) Codefendant's letter written years earlier to McFadden's attorneys; (6) information regarding perjury charges; (7) Codefendant's discussion with prosecutors before his testimony in the retrial of this case; and (8) the presence of Roderick Jones and "Little Tony" when Victim was shot.

7 For example, the record indicates: Codefendant pleaded guilty to murdering Victim, he refused to be sworn during a previous deposition by trial counsel, he wrote a letter to trial counsel, and he filed a Rule 24.035 motion.

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IN THE SUPREME COURT OF MISSOURI

OPINION RELEASE

JANUARY SESSION, 2020

COURT EN BANC

No. SC97737

Vincent McFadden,

Appellant,

vs.

State of Missouri,

Respondent.

APPEAL FROM:

Original Proceeding In

Circuit Court of St. Louis County

or

_____.

Date opinion filed April 14, 2020.

****

Appellant's Motion for Rehearing overruled 6/30/2020.

DATE MAILED: 6/30/30 Opinion release sheet e-mailed to Thomson Reuters.

No. SC97737
St. Louis County Case No. 12SL-CC04870

In the Supreme Court of Missouri

January Session, 2020

Vincent McFadden,
Appellant,
v. APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

State of Missouri,
Respondent.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis County rendered, be in all things affirmed, and stand in full force and effect in conformity with the opinion of this Court herein delivered.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 2020, and on the 14th day of April, 2020, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 30th day of June, 2020.

SEAL OF THE SUPREME COURT OF MISSOURI

Clerk

Deputy Clerk

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

FILED
JAN 14 2018
JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

VINCENT MCFADDEN,

Movant,

vs.

STATE OF MISSOURI,

Respondent.

Cause No. 12SL-CC04870
(Underlying criminal case 2103R-00005-02)
(Underlying direct appeal SC88959)

Division No. 9

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, JUDGMENT, AND DECREE OF COURT ON MOVANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT THE JUDGMENT OR SENTENCE PURSUANT TO RULE 29.15

This matter comes before the Court on Motion by Movant brought under Rule 29.15 to Vacate, Set Aside, or Correct the Judgment and Sentence in Cause Number 2103R-00005-02. Movant appears by his attorneys, Assistant Public Defenders Jeannie Willibey and Valerie Leftwich. Respondent appears by Assistant Prosecuting Attorneys Kelly Snyder and S. Bart Calhoun. The cause was taken as submitted after an evidentiary hearing was conducted on May 21-24, 2018.

Any finding of fact herein equally applicable as a conclusion of law is adopted as such; and any conclusion of law equally applicable as a finding of fact is adopted as such. This Court has carefully and thoughtfully reviewed each claim in the *pro se* and Amended Motion, the proposed findings of fact filed by both parties, and has adopted in whole or part many of the findings contained therein without further attribution or acknowledgment.

FINDINGS OF FACT

A. PROCEDURAL BACKGROUND

1. Movant has been tried and convicted of the murders of two people: Leslie Addison and Todd Franklin. He was tried twice for each murder. Each of the first trials was reversed and

remanded on direct appeal. Each of the second trials was affirmed on direct appeal. For each of the four trials, the jury sentenced Movant to death. Here is an approximate timeline of events:

July 3, 2002:	Murder of Todd Franklin
May 15, 2003:	Murder of Leslie Addison
March 2005:	First jury trial for the murder of Todd Franklin (reversed)
March 2006:	First jury trial for the murder of Leslie Addison (reversed)
July 2007:	Second jury trial for the murder of Todd Franklin (affirmed; the basis for this PCR)
March-April 2008:	Second jury trial for the murder of Leslie Addison (affirmed)
January 2017:	PCR hearing for the second trial for the murder of Leslie Addison (affirmed)
May 2018:	PCR hearing for the second trial for the murder of Todd Franklin (the subject of this Order)

2. Movant was initially indicted on March 5, 2003, for one count of Murder in the First Degree and one count of Armed Criminal Action for offenses occurring on July 3, 2002. The indictment alleged Movant was a prior offender. An information in lieu of indictment was filed on or about March 1, 2005.

3. Various public defenders entered their appearance for Movant: Michael Mettes entered on or about June 25, 2003; Michelle Monahan entered on or about September 5, 2003; John Tucci entered on or about January 29, 2004; and finally trial counsel Karen Kraft and Sharon Turlington entered their appearance on behalf of Movant on or about March 12, 2004.

4. The State filed Notices of Aggravating Circumstances on or about February 20, 2004, and February 8, 2005.

5. On or about November 4, 2004, trial counsel filed approximately ten separate motions on behalf of Movant attacking the State's intention of seeking the death penalty. On December 22, 2004, and January 7, 2005, trial counsel filed five additional motions on behalf of Movant. Movant's counsel filed a number of motions for endorsement of witnesses prior to trial.

6. On or about March 9, 2005, after three days of voir dire and three days of the guilt

phase of trial, a jury found Movant guilty of all charges in case 2103R-00005-01. Trial counsel had filed motions for judgment of acquittal on or about March 8, 2005. On March 11, 2005, the jury returned a verdict of death following the penalty phase of the trial. Thereafter trial counsel filed a motion for a new trial or judgment of acquittal on April 1, 2005.

7. On or about April 22, 2005, the Court overruled trial counsel's motion for new trial and sentenced Movant to death on the charge of Murder in the First Degree, and a consecutive sentence of life for Armed Criminal Action.

8. The Missouri Supreme Court overturned Movant's conviction and sentence on May 16, 2006, in *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006). The cause was remanded for a new trial.

9. After remand, trial counsel for Movant filed an additional motion prior to the start of the second trial and filed approximately six motions during trial and after.

10. On or about July 11, 2007, after two days of voir dire and three days of the guilt phase of trial, the jury found Movant guilty of all charges in case 2103R-00005-02. Trial counsel had filed motions for judgment of acquittal on or about July 10 and 11, 2007, and a motion regarding the statutory aggravators on or about July 13, 2007. On or about July 13, 2007, after completion of the penalty phase, the jury returned a verdict of death. Trial counsel thereafter filed a motion for judgment of acquittal or new trial on or about August 2, 2007.

11. On September 14, 2007, the Court overruled trial counsel's motion for new trial and sentenced Movant to death on the charge of Murder in the First Degree, and a consecutive sentence of life for Armed Criminal Action.

12. In all, defense counsel filed more than thirty motions on behalf of Movant during the course of his two murder trials for the death of Todd Franklin.

13. On May 29, 2012, Movant's conviction and death sentence on the second trial concerning the death of Todd Franklin were affirmed by the Missouri Supreme Court in *State v. McFadden*, 369 S.W.3d 727 (Mo. banc 2012). The mandate was issued by the Court on July 31, 2012. Movant's petition for writ of certiorari was denied by the United States Supreme Court on November 5, 2012.

14. Movant filed his timely *pro se* motion raising three grounds for relief pursuant to Supreme Court Rule 29.15 in St. Louis County Circuit Court on October 26, 2012. This was eighty-seven days from the mandate. The case was assigned to Judge Seigel (Division 3).

15. On September 10, 2013, Judge Seigel appointed the Eastern Appellate/PCR Office for the State Public Defender to represent Movant. Valerie Leftwich of the Capital Appellate/PCR Office for the State Public Defender entered his appearance on September 13, 2013. Robert Lundt with the same office entered his appearance for Movant on October 3, 2013, and requested an additional thirty (30) days in which to file an amended motion. Judge Seigel granted the request for additional time the same day. Mr. Lundt requested permission to withdraw as counsel for Movant on August 4, 2014, and leave was granted August 8, 2014. Jeannie Willibey, Assistant Public Defender entered her appearance on behalf of Movant on August 13, 2014.

16. On December 9, 2013, Movant through appointed counsel filed his 207-page First Amended Motion for Post-Conviction Relief pursuant to Rule 29.15 asserting sixteen grounds for relief and requesting an evidentiary hearing. This was ninety days after the Public Defender's Office was appointed.

17. Prior to filing the Amended Motion, appointed counsel filed on or about November 7, 2013, a Motion for Order to compel witness Michael Douglas to provide answers to questions asked at his deposition taken on October 24, 2013. That motion was heard and denied

on or about November 18, 2013, as said questions would be a violation of Douglas's Fifth Amendment rights. Movant renewed this motion on or about January 2, 2018, and it was again denied on or about January 12, 2018.

18. Due to Judge Seigel's retirement, the PCR proceeding was reassigned to Judge Warner (Division 15) on or about December 31, 2014. Judge Warner recused himself on or about May 11, 2017, and the matter was reassigned to Judge Vincent, Division 9, on or about May 16, 2017, for hearing and determination.

19. On or about December 27, 2017, Movant filed a motion for leave to endorse additional witnesses in support of Claims 8(I) and 8(L) of the Amended Motion. As this was actually an attempt to add an additional claim to the Amended Motion, it was denied as untimely on or about January 12, 2018.

20. On or about December 27, 2017, Movant filed a motion for the Court to rule on objections made during depositions, and this was denied on or about January 12, 2018. On or about December 27, 2017, Movant filed a motion for leave to endorse Dr. Gur in lieu of Dr. Preston, who was retired, and that motion was granted on or about January 4, 2018.

21. On or about May 16, 2018, Respondent filed a motion to recall the writ and thereby prevent Movant from attending in person his PCR hearing. This motion was granted on or about May 18, 2018. Movant thereafter filed a motion to preclude the St. Louis County Prosecutor's Office from representing the State of Missouri on or about May 18, 2018, and that motion was denied on or about May 21, 2018.

22. On May 21 through 24, 2018, this Court held an evidentiary hearing on the claims from the amended motion and left the evidence open for the depositions of Tanesia Kirkman Clark (who was unable to attend the hearing due to medical reasons) and Movant himself (who did not

attend the hearing in person). That telephonic deposition of Tanesia Kirkman Clark occurred on June 29, 2018, and a video recording and transcript of that deposition has been submitted to the Court and accepted into evidence. Movant ultimately decided not to testify via deposition and informed the Court of this decision through counsel.

23. Upon the motion of the parties, the Court takes judicial notice of its file and transcripts in this matter. In addition, the Court takes judicial notice of the files and transcripts in St. Louis County Circuit Court cause numbers 2103-R00005-02 (the underlying trial for the pending PCR matter concerning the death of Todd Franklin), 2103-R02642-02 (the second trial concerning the murder of Leslie Addison), 2104R-02658 (Movant's assault trial with victims Jermaine Burns and Darryl Bryant), 2106CC-04287 (the PCR for the assault trial), and 13SL-CC02170 (the PCR for criminal file concerning the death of Leslie Addison). The Court has not considered and on its own motion strikes from the file any materials not admitted during the hearings on this matter and not taken judicial notice of. The parties were granted until November 11, 2018, to prepare proposed findings of fact and conclusions of law. This deadline was later extended at the request of the State to November 16, 2018.

B. APPLICABLE LAW

1. To be entitled to post-conviction relief for ineffective assistance of counsel, Movant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984): first, Movant must show that his attorney failed to exercise the level of skill and diligence that a reasonably competent attorney would exercise in a similar situation and, second, that trial counsel's failure prejudiced him. *Id.* at 687. Both of these prongs must be shown by a preponderance of the evidence in order to prove ineffective assistance of counsel. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006).

2. A Movant must overcome a strong presumption that counsel's conduct was reasonable and effective to meet the first prong of the *Strickland* test. *Anderson*, 196 S.W.3d at 33. To overcome this presumption, Movant must point to "specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance." *Id.* At a 29.15 hearing, trial counsel is presumed to have undertaken adequate investigation and made adequate strategic decisions. *Taylor v. State*, 126 S.W.3d 755, 758 (Mo. banc 2004), citing *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996).

3. Prejudice is shown when the Movant establishes "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998). Regarding a sentence to death, a defendant must show with reasonable probability that the jury, balancing all of the circumstances, would not have awarded the death penalty. *Anderson*, 196 S.W.3d at 34.

4. *Strickland* instructs that "[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." 466 U.S. at 689.

5. The duty to investigate does not force lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). To prevail on a claim of ineffective assistance of counsel for failing to call a witness, Movant must show that (1) trial counsel knew or should have known of the existence of the witness, (2) the witness could be located through reasonable investigation, (3) the witness would testify, and (4) the witness's testimony would have produced a viable defense. *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo.

banc 2004).

6. Trial strategy decisions may only serve as a basis for ineffective counsel if they are unreasonable. *McLaughlin v. State*, 378 S.W.3d 328, 337 (Mo. banc 2012). The choice of one reasonable trial strategy over another is not ineffective assistance. *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005). Strategic choices made after a thorough investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable. *Anderson*, 196 S.W.3d at 33; *State v. Kenley*, 952 S.W.2d 250, 266 (Mo. banc 1997).

7. Further, trial counsel is deemed vested with broad discretion in conducting his client's defense and is presumed competent. *Schneider v. State*, 787 S.W.2d 718, 720-21 (Mo. banc 1990); *State v. Roberts*, 948 S.W.2d 577, 604 (Mo. banc 1997). Counsel is not ineffective for failing to put on cumulative evidence and "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." *Worthington*, 166 S.W.3d at 573.

8. A decision not to call a witness is presumed trial strategy unless clearly shown to be otherwise. *State v. Clay*, 975 S.W.2d 121, 143 (Mo. banc 1998). Trial counsel is not obligated to shop for an expert witness who might provide more favorable testimony. *Taylor*, 126 S.W.3d at 762. "Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable." *Kenley*, 952 S.W.2d at 266. "While defense counsel could have continued to consult additional experts in the hope of finding one that might support [the defense], counsel is not required to consult additional experts in the hope of finding one who might provide more helpful testimony." *Worthington*, 166 S.W.3d at 575. To prevail on a claim of ineffective assistance of counsel for failure to locate and call an expert witness, the movant must show that (1) such an expert witness existed at the time of trial, (2) the expert witness could be located through

reasonable investigation, and (3) the expert witness's testimony would have benefited the defense. *Zink v. State*, 278 S.W.3d 170, 179 (Mo. banc 2009). Counsel's trial strategy is not a basis for ineffectiveness. *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009). The failure to develop or introduce cumulative evidence does not constitute ineffective assistance of counsel. *McLaughlin*, 378 S.W.3d at 343.

9. In proving that counsel was ineffective for failing to impeach a witness, a defendant has the burden of showing that the impeachment would have provided him with a defense or would have changed the outcome of the trial, and he must also overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. *Barton v. State*, 432 S.W.3d 741, 750 (Mo. banc 2014).

10. Counsel cannot be ineffective for failing to make non-meritorious objections. *Storey v. State*, 175 S.W.3d 116, 132 (Mo. banc 2005). To justify relief on a post-conviction motion, the failure to object must have been of such character as to deprive the defendant substantially of his right to a fair trial. *Ervin v. State*, 80 S.W.3d 817, 822 (Mo. banc 2002). The movant must prove that a failure to object was not strategic and that the failure to object was prejudicial. *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998).

11. To prevail on a claim of ineffective assistance of appellate counsel, the movant must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005). The claimed error must have been sufficiently serious to create a reasonable probability that, if it were raised, the outcome of the trial would have been different. *Id.*

12. Allegations in a post-conviction motion are not self-proving and Movant bears the burden of proving grounds for relief by a preponderance of the evidence. *Malady v. State*, 762

S.W.2d 442, 443 (Mo. App. 1988). Movant's failure to present evidence at a hearing to provide factual support for a claim in his or her post-conviction motion constitutes abandonment of that claim. *See id.*; *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. banc 1998); *Cole v. State*, 223 S.W.3d 927, 931 (Mo. App. 2007).

C. EVIDENCE ADDUCED AT TRIAL REGARDING AMENDED MOTION CLAIMS

1. Movant has been tried and convicted in four separate trials. In each case the jury returned penalty phase a verdict of death. Trial Counsel Sharon Turlington and Karen Kraft represented Movant during all four trials and penalty phases.

2. In St. Louis County Circuit Cause number 2103R-00005-01, Movant was convicted in 2005 of Murder in the First Degree for the shooting of Todd Franklin. During the penalty phase of the trial, the State put on evidence of the murder of Leslie Addison. Movant's trial counsel called thirteen penalty phase witnesses including psychologist Dr. Michael Gelbort and child development expert Wanda Draper. The jury returned a verdict of death. The Missouri Supreme Court overturned Movant's conviction and sentence on May 16, 2006, in *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006). The cause was remanded for a new trial.

3. In St. Louis County Circuit Cause number 2103R-00005-02, Movant was convicted in 2007 of Murder in the First Degree for the shooting of Todd Franklin. During the penalty phase of the trial, the State put on evidence of the murder of Leslie Addison. Movant's trial counsel called eight penalty phase witnesses including child development expert Wanda Draper. The jury returned a verdict of death. The Missouri Supreme Court affirmed Movant's conviction and sentence on May 29, 2012, in *State v. McFadden*, 369 S.W.3d 727 (Mo. banc 2012).

4. In 2006, Movant was convicted of Murder in the First Degree for the shooting of Leslie Addison, cause number 2103R-02642-01. During the penalty phase of the trial, the State put

on evidence of the murder of Todd Franklin. Movant's trial counsel called eleven penalty phase witnesses including psychologist Dr. Michael Gelbort and child development expert Wanda Draper. The jury returned a verdict of death. The Missouri Supreme Court overturned Movant's conviction and sentence in *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007). The cause was remanded for a new trial.

5. In St. Louis County Circuit Cause number 2103R-02642-02, Movant was convicted in 2008 of Murder in the First Degree for the shooting of Leslie Addison. During the penalty phase of the trial the State put on evidence of the murder of Todd Franklin. Movant's trial counsel called six penalty phase witnesses. No expert witnesses were called in mitigation. The jury returned a verdict of death. The Missouri Supreme Court affirmed Movant's conviction and sentence on January 29, 2013, in *State v. McFadden*, 391 S.W.3d 408 (Mo. banc 2013). A post-conviction relief motion was filed, heard and denied. *See McFadden v. State*, 13SL-CC02170 (Order of J. DePriest entered March 17, 2017). The Supreme Court of Missouri affirmed this denial of post-conviction relief. *McFadden v. State*, No. SC96453 (July 17, 2018).

D. TRIAL COUNSEL

1. Movant was represented throughout his four trials and sentencing by Assistant Public Defenders Sharon Turlington and Karen Kraft. Both attorneys were employed by the Missouri State Public Defender System and worked out of the Eastern District, Capital Division offices located in the City of St. Louis. Ms. Turlington continues to serve in that office as the District Defender. Ms. Kraft retired in September of 2016 as the District Director of the Eastern District Capital Division of the Office of Public Defender.

2. Ms. Kraft has been a licensed attorney since at least 1984. She was hired by the St. Louis City Public Defender's office in 1984 and remained with that office until 1989. In 1989, Ms.

Kraft transferred into the Capital Division of the Office of State Public Defender. In January 1996, Ms. Kraft was promoted to Director of the Capital Division of the Public Defender's Office. In the twenty-seven years she was with the Capital Division she tried twenty-eight death penalty cases to verdict.

As further stated in Ms. Kraft's sworn testimony during the 2017 Leslie Addison PCR hearing (13SL-CC02170), while with the city public defender's office, Ms. Kraft tried sixty to seventy jury trials including at least two murder trials where the death penalty was sought by the State. She was one of the first five attorneys to be selected to try cases in the Eastern District of Missouri exclusively involving the death penalty. During her thirty-three year career with the public defender system she tried close to one hundred jury trials, including the twenty-eight death penalty cases, and represented many other defendants in capital cases that did not go to trial.

Throughout her tenure as a public defender, Ms. Kraft has received training including capital litigation training in locations across the country. She has conducted some of that training herself in her capacity as Director of the Capital Division for the Missouri State Public Defender's Office.

As further stated in Ms. Kraft's sworn testimony during the Leslie Addison PCR hearing, she has received training from the National Legal Aid and Defenders Association, California Public Defender System, Missouri State Public Defender System, Santa Clara University training on the death penalty, and other national seminars on the death penalty. She has been a regular lecturer/trainer/teacher for the Missouri Public Defender System and national conferences. Ms. Kraft has received the Clarence Darrow Award from the Public Interest Law Group of St. Louis University and the Lew Kollias Award from the Missouri Association of Criminal Defense Attorneys.

Ms. Kraft is one of the most experienced and accomplished death penalty attorneys to have

practiced in the State of Missouri.

3. Ms. Turlington has been a public defender for approximately twenty-six years and is currently the District Defender for the Capital Division of the Eastern Capital litigation office for the Missouri State Public Defender's Office. Ms. Turlington has held the District Defender title approximately four years. Ms. Turlington has been with the Capital Division for approximately twenty-one years and has tried fourteen to fifteen death penalty cases. She has also represented a number of capital defendants whose cases did not go to trial. Prior to joining the Capital Division, Ms. Turlington was a public defender for the City of St. Louis for approximately five years, where she tried fifty or more non-capital cases.

Ms. Turlington is also one of the most experienced and accomplished death penalty attorneys to have practiced in the State of Missouri.

4. Experienced trial counsel conducted more than twenty discovery depositions of State's witnesses, provided multiple boxes of records to their experts, received hundreds of pages of discovery from the State and filed more than thirty motions for ruling by the Court.

E. CLAIMS ALLEGED IN THE AMENDED MOTION

1. **Claim 8(A)** of Movant's Amended Motion asserts a violation of the United States and State of Missouri Constitutions by the denial of Movant's Motion to Compel witness Michael Douglas to answer questions posed at his deposition under a theory that it deprived Movant of a full and fair investigation and hearing, and that there was a "reasonable probability" that the deposition would have resulted in evidence which would have supported the other claims in the Amended Motion. No details are provided.

Michael Douglas was deposed on or about October 24, 2013, while incarcerated. He was represented by counsel at the deposition. Douglas invoked his Fifth Amendment rights and refused

to be sworn in or answer questions. In December 2005, Douglas had pled guilty to Murder Second Degree and Armed Criminal Action for acting in concert with Movant in the shooting death of Todd Franklin. Douglas had been sentenced to twenty years in prison.

Movant's counsel filed a motion on or about November 7, 2013, requesting the Court order Douglas to answer the questions posed at the deposition. That motion was denied. Movant's counsel renewed the motion in January 2018, and the motion was again denied.

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. Even if the Court had ordered Douglas to answer the questions posed at the deposition, Movant is unable to show how this prejudiced him; Movant only speculates that it did and other evidence supporting his post-conviction claims might have been discovered. Speculation is not enough.

Additionally, to the claim in the Amended Motion that Douglas's answers "would not have incriminated" him, the Court notes it is impossible for Movant's counsel to know this. First, Douglas was represented by his own attorney during the deposition, and invoked his Fifth Amendment rights upon advice of counsel. Additionally, while Douglas had already pled guilty to the murder of one particular person at the state level, it is impossible to know what other sort of criminal conduct for which he may have implicated himself. Some crimes are ongoing and the statute of limitations may not have run, and there are crimes for which there are no statute of limitations in both the federal and state systems.

There was no Rule 29.15 violation for the denial of Movant's request to force Douglas to answer deposition questions. There is no Constitutional violation—to the contrary, the decision regarding the deposition recognizes and respects Constitutional rights. To the extent Claim 8(A) can possibly be construed to allege some sort of ineffective assistance of counsel, there has been no

evidence produced to indicate prejudice or a different outcome. Claim 8(A) is denied.

2. **Amended motion claim 8(B)** asserts ineffective assistance of trial counsel for failure to object and preserve eight issues for appeal. This would seem to be coextensive with the claim in the *Pro Se* PCR motion of "Ineffective assistance of counsel because trial counsel failed to object to the prosecution'simproper (sic) statments (sic)."

First: Movant claims ineffective assistance of counsel for trial counsel failing to object in voir dire when the prosecutor allegedly implied that unless the jury unanimously agreed that mitigation outweighed aggravation, you opened third door to death penalty.

This matter was essentially addressed on direct appeal in *State v. McFadden*, 369 S.W.3d 727 (Mo. banc 2012), when the Supreme Court found that "[t]his Court previously has rejected McFadden's claim that the trial court plainly erred in not declaring a mistrial *sua sponte* when the State informed the jury that a verdict for life imprisonment requires a unanimous jury." *Id.* at 746. Then the Supreme Court cited two cases where it was determined that such an argument had not harmed the defendant.

> During voir dire of the underlying trial at issue here, the prosecutor stated,
>
> > But if all twelve do not unanimously agree that the good stuff outweighs the bad, well, then, you're at that third door. And as you may have guessed, that third door is the death penalty door. Now, the law never says that you have to vote for the death penalty. The law never says that you have to do that. Okay? There's nothing that says that if the state does this, this, this, then you have to vote for death. You always have that option not to.

(Trial tr. p. 49.) This Court notes that the prosecutor accurately stated the law regarding the law never forcing a jury to impose a death sentence, and also notes that the jury was instructed on the law regarding the imposition of the death penalty, instructions they are presumed to have followed. Movant has not shown by a preponderance of the evidence that the outcome would have been

different had there been an objection to the prosecutor's statements. Counsel was not ineffective for failing to object to the death penalty door statement.

Second: Movant claims ineffective assistance of trial counsel for failure to object during voir dire when the prosecutor allegedly misstated the law by saying that for life without parole, the jury must be unanimous.

This matter was addressed on direct appeal where the Supreme Court found that "[t]his Court previously has rejected McFadden's claim that the trial court plainly erred in not declaring a mistrial *sua sponte* when the State informed the jury that a verdict for life imprisonment requires a unanimous jury." 369 S.W.3d at 746. Then the Supreme Court cited two cases where it was determined that such an argument had not harmed the defendant.

In the underlying trial at issue here, the transcript and the PCR testimony of Ms. Kraft reflect that voir dire was conducted in small batches of about a dozen potential jurors at a time, and that the statement about a unanimous jury was made twice during the first small group. After the first statement, there was no objection, and after the second, defense counsel *did* object and was sustained. After the prosecutor made the statements, defense counsel made her statements about the law to the panel and, as Ms. Kraft testified, "I would have objected to anybody I thought could not consider life." (PCR Tr. p. 539.) Movant has not claimed that the statement was made in any group other than the first group of twelve, and Movant has not provided any evidence that any one of the first group of twelve was actually seated on the jury.

Regardless of when the statements were made, whether they were objected to, and how many groups of venire panel members heard them, Movant has failed to show that he was prejudiced as a result—that the outcome would have been different. Counsel was not ineffective for failing to object to this argument.

Third: Movant claims ineffective assistance of trial counsel for failure to object during voir dire when prosecutor referred to penalty phase as "little mini trial," thereby allegedly trivializing the penalty phase.[1]

During voir dire, the prosecutor stated,

> If you open that first door because you found, unanimously, guilt, then the jury comes back for, like, a little mini trial. You come back the same day or the next morning because you're sequestered. It's pretty quickly. Put you back in. You're going to hear additional evidence. That additional evidence is going to bear on punishment.

(Trial tr. pp. 65-6.) This followed earlier statements by the prosecutor that "I hope you are all taking this very seriously," (Trial tr. p. 60) and "soul search yourself and see if the answers to your questions are really how you believe," (Trial tr. p. 61) and "Think serious about the answers" (Trial tr. p. 61).

During the PCR hearing, Ms. Kraft agreed that she in no way took the comments about a "mini trial" to mean that the prosecutor was trivializing the process. Rather, it sounded as if the prosecutor was explaining to the jury the process of a guilt phase and a penalty phase in terms they could understand. This Court agrees with that interpretation. Even if trial counsel had objected to this statement, it is not clear what the basis for that objection would have been and Movant has not provided any reason to believe such an objection would have been meritorious. Movant has not shown that trial counsel failed to exercise the level of skill and diligence of a reasonably competent attorney in a similar situation, and Movant has not shown that a failure to object in this instance has prejudiced him. Counsel was not ineffective for failing to object to the mini trial statement.

Fourth: Movant claims ineffective assistance of trial counsel for failure to move to strike the

[1] The Court notes, somewhat ironically, that when this case was on direct appeal, the Appellant's own brief stated that, "When the State charges an aggravator, it must prove it unanimously beyond a reasonable doubt. Whether that proof looks like a mini-trial depends on the aggravator." *McFadden v. State*, SC88959, Appellant's Brief filed July 21, 2008, p. 101.

entire voir dire panel when prosecutors allegedly told venire members that their answers didn't matter by telling a venireperson that he (the prosecutor) was not going to speak to the venireperson because she was not going to be on the jury, and then, when discovering he had made the comments to the incorrect venireperson, continuing by attempting to explain how a jury is selected.

This issue was addressed on direct appeal where the Supreme Court found that "McFadden fails to identify a single venireperson who was either improperly excluded from his jury or improperly included in his jury based upon voir dire questioning." 369 S.W.3d at 746.

During voir dire, the prosecutor said to one particular venireperson "I see a hand. I'm not going to talk with you, ma'am, because of matters we've discussed when you came into court earlier," and "You're not going not be on this jury, ma'am." (Trial tr. p. 737.) At that point, outside of the hearing of the panel members, it was pointed that the prosecutor was mistaking one venireperson for another, and the prosecutor then went back in front of the venire panel and said,

> PROSECUTOR: I made a mistake, ma'am. You are not the juror that I'm referring to, okay. However, where you are, I will ask you to answer – I mistook you for another juror.
> VENIREPERSON: Thank you.
> PROSECUTOR: You look kind of like another juror that I mistook you for. Ma'am, I apologize, okay? Let me say this: In this process, the way we pick the jury is that out of the first 30 people, 14, 20, 25, 30, how it generally works is that the State has to ---
> DEFENSE COUNSEL: Judge, I'm going to object –
> THE COURT: Counsel, just go ahead and proceed with the question of the panel member.
> VENIREPERSON: Well, it's irrelevant, whatever my question is, so.
> THE COURT: Miss Middleton, it isn't irrelevant. I want to just ask you, ma'am....

(Trial tr. pp. 738-9.)

During the PCR hearing, Ms. Kraft agreed that the Court had "cleaned it up," and that she does not know of any potential juror who was improperly included or excluded as a result of the voir dire process. (PCR tr. p. 539.)

This Court notes that it has not located an instance where the prosecutor actually told a potential juror that his or her answer did not matter—that is a conclusion that Movant alleges based on the encounter indicated above. The case of the mistaken identity was identified, corrected, and voir dire progressed. The trial court explicitly told the venireperson that her question "isn't irrelevant." Trial counsel did in fact object at the point that the prosecutor started to explain how a jury was selected, and the prosecutor was told to continue with questioning. Movant has not identified for this Court exactly what the objection to this vein of questioning should have been, and has not explained how this failure to object (even though defense counsel did object at one point) prejudiced Movant. Point denied.

Fifth: Movant claims ineffective assistance of trial counsel for failure to object to relevance during guilt phase to the admission of letters seized by prison officials and written by Movant. These letters and envelopes were trial exhibits 401, 402, 403, 405, 407, and 409.

During trial, portions of those letters were admitted, and some portions of the letters were redacted as irrelevant. The letters had also been discussed in chambers, off the record. Ms. Kraft agreed in the PCR hearing that the letters and statements in those letters could be admissible for other reasons besides the admissions of Movant, including things like motive. The letters and envelopes were admitted partially for use as exemplars for the handwriting expert to allow the expert to determine whether the same person was the author of each letter. Ms. Kraft agreed that it was part of her trial strategy to let a lot of those letters in, because one part of her strategy was to show that Movant had not told Douglas what to say and there the defense was able to use the contents of those letters to cross examine Douglas and show prior inconsistent statements that indicated Movant did not commit the murder. Ms. Kraft further agreed that sometimes as a matter of strategy, she may not make an objection because the evidence may not really hurt the defense and the defense has a way of

using it their advantage and arguing it at closing, which was the case with some of the letters.

Trial strategy decisions may only serve as a basis for ineffective counsel if they are unreasonable. 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. Trial counsel is deemed vested with broad discretion in conducting his client's defense and is presumed competent.

Here, the theory of defense for the guilt phase was that Movant was not the shooter. Rather, it was a man named Kyle Dismukes. By allowing portions of the letters come into evidence, defense counsel was attempting to shore up their argument that Mr. Dismukes was the shooter with Douglas, not Movant, and that Movant had not told Douglas what to say before he made the statements. Additionally, had Douglas testified on the stand that Movant was in fact the shooter, then there were inconsistent statements in the letters the defense could use in cross-examination.

Movant has not shown that his attorneys failed to exercise the level of skill and diligence that reasonably competent attorneys in a similar situation would, and Movant has failed to show prejudice. Counsel was not ineffective for failing to object (although certain portions were actually redacted) to relevance as to the letters written by Movant.

Sixth: Movant claims ineffective assistance of trial counsel for failure to object to hearsay during guilt phase to admission of letters seized by prison officials and written by Michael Douglas. These would be exhibits 502, 503, 504, 505, and 506.

Much of the discussion regarding the letters authored by Movant applies to this discussion of the letters authored by Michael Douglas. The defense was trying to establish at trial that the real shooters of Todd Franklin were Michael Douglas and Kyle Dismukes, not Movant. That is the defense Movant himself wanted. Michael Douglas was called as a defense witness in furtherance of this strategy. Letting the letters come in, absent redacted portions, furthered the defense theory

because the defense argued they showed that Movant had not coached Douglas's testimony regarding Kyle Dismukes being the shooter, and allowed for the impeachment of Douglas should he have chosen to testify that Movant was in fact the shooter.

Movant has failed to show the strategy was unreasonable and has failed to establish prejudice. Counsel was not ineffective for failing to object to the admission of the letters authored by Douglas.

Seventh: Movant claims ineffective assistance of trial counsel for failure to object during the prosecutor's guilt phase closing argument about an alleged misstatement of the law that supposedly encouraged the jury to ignore the law. This refers to the prosecutor's statement that, "It doesn't matter what Silas says in court. His statement has been set in stone."

This issue was raised on direct appeal where the Supreme Court affirmed the conviction and found no error in the guilt phase closing argument. 369 S.W.3d at 747-50. The Supreme Court noted that, "[c]losing argument is designed to advise the jury and opposing counsel of each party's position and to advocate to the jury what that party believes the jury should do," and that the "entire record is considered when interpreting a closing argument, not an isolated segment." *Id.* at 747. The State is allowed to comment on the witnesses' credibility during closing argument. *Id.*

During trial, Mark Silas testified that neither he nor Todd Franklin was being chased, that he did not remember who pulled a gun out, did not remember seeing anyone with a gun, did not know if he saw Todd Franklin get shot, did not remember telling police that the shooter was Movant, and did not remember if he saw a picture of Movant on the wall at the police station that he identified as Movant, the shooter, and so on in similar fashion. Mr. Silas was impeached by the State with his statements to police and the prosecutor's office, where he stated what he saw and heard about the events surrounding the murder of Todd Franklin and identified Movant as the shooter.

During the guilt phase closing argument in the underlying trial, the prosecutor discussed Mr. Silas's trial testimony and asserted that Mr. Silas told the truth the night he was questioned at the police station, and was lying on the witness stand. The State argued the reason for that was because Mr. Silas was afraid for his family. The prosecutor continued by arguing that Mr. Silas's recorded statement at the police station, where he identifies Movant's photo as the shooter, is the one to believe:

> If you listen to the tape: That's the guy that shot Todd. Okay? That's what Silas is saying, okay? It doesn't matter what Silas says in court. His statement has been set in stone. We all know what it was. And if you listen to it, it just flows. It flows. It tells how they met. And it's the same thing that Douglas wrote in his letter: how they met you know, in the field and they walk across. It's the same thing.

(Trial tr. p. 1747.)

The prosecutor's statements were not an encouragement for the jury to ignore the law. They were arguments for why the jury should believe and find credible Mr. Silas's statements to the police shortly after the murder instead of Mr. Silas's statements on the witness stand during trial. This is proper argument and an objection against that would have been meritless. The Court notes that in order to be entitled to relief, Movant must allege and show that had trial counsel made an objection, the court would have sustained the objection, and that Movant sustained prejudice as a result of trial counsel's failure. Movant has not made this showing. Counsel was not ineffective for failing to object to this argument.

Eighth: Movant claims ineffective assistance of trial counsel for failure to object during the prosecutor's guilt phase closing argument to an alleged misstatement of the law that the jury could not come back with a murder second degree conviction.

During closing, the prosecutor argued,

> Michael goes over, gives him [Movant] the gun. He [Movant] walks over. He's

> thinking, I'm going to use this gun to shoot that man. I'm going to use this gun to shoot that man. I got a gun in my hand. He's down on the ground. I'm aiming the gun at him. I'm pointing the gun at him. I fire. I want to shoot him again. I fire. It's cool reflection for any length of time (snapped fingers). No matter how brief, no matter how you look at the evidence. If you want to think there's another shooter? I don't care. No matter who you believe in this case, you cannot come back with murder second degree. That's absurd. Huge victory. That's what they want. Hold the guy fully accountable.

(Trial tr. p. 1780.) At this point, the defense objected to the argument about what is "victory," which was sustained, and the prosecutor continued, "That's not murder second degree, folks. Any length of time, no matter how brief." (Trial tr. p. 1780.)

This issue was addressed on direct appeal where the Supreme Court found that "the State attempted to demonstrate an inability to justify any conviction except for first-degree murder based on the evidence presented to the jury." 369 S.W.3d at 749.

The State's arguments regarding murder first degree versus murder second degree are proper argument to a jury about why they should find Movant guilty of one over the other. An objection was in fact made and sustained regarding what the defense would consider "victory," and any further objection about the statements being somehow contrary to law would have been meritless. Movant has failed to demonstrate prejudice and counsel was not ineffective for failing to object further to such argument.

3. **Amended motion claim 8(C)** claims ineffective assistance of trial counsel for calling Michael Douglas as a witness during the guilt phase.

At the time of trial, Douglas had already pled guilty to murder second degree for the shooting of Todd Franklin, and during his plea had admitted that he committed the crime with Movant. Prior to trial, Douglas had made statements both that Movant was the shooter and that Movant was not the shooter, and that the second shooter was actually Kyle Dismukes. Some of these prior statements

were made during a telephone conversation and in letters. Douglas testified during direct examination at trial that he himself shot Todd Franklin before handing the gun to Movant so that Movant could shoot Todd Franklin as well. Douglas admitted on cross examination that he and Movant were the only two people to shoot Todd Franklin. Defense counsel did elicit from Douglas that Kyle Dismukes was present at the scene of the shooting, that Douglas had previously made statements that Dismukes was the shooter, and that Douglas and his companion were not the first shooters, but rather someone had shot at them initially. It also came out during trial that Douglas did not believe Movant being on trial was fair, and that Douglas had an out date.

Movant's defense theory during the guilt phase of trial was actual innocence—that Movant was not the shooter. As trial counsel recognized, this theory "was not the optimal defense to have in this case, but that's what [Movant] wanted." (PCR tr. p. 58.) Trial counsel had to make a decision whether to call Douglas. There saw two possible outcomes for Douglas's testimony: one, that he would testify that Movant was not the shooter, but rather that Kyle Dismukes was the shooter; or two, that Movant was the shooter. In that second situation, trial counsel planned to use Douglas's prior inconsistent statements where Douglas had stated Movant was not the shooter. Trial counsel testified this was part of their trial strategy, and the only way they had to get in the theory that Kyle Dismukes was the shooter. Trial counsel testified that some of the statements they elicited from Douglas on the stand were in fact helpful to their defense. This would include Douglas's prior statements that Movant had had nothing to do with the murder, that Kyle Dismukes was the shooter, and the fact that Douglas was someday going to get out of prison for murdering Todd Franklin whereas the State was seeking the death penalty for Movant's role in the same murder.

Trial counsel acknowledged that it was a tough decision as to whether to call Douglas, but they did think about it and have a reason for why they called him. Douglas had made statements that

were helpful to their defense, and that is why they wanted to put them on. Trial counsel had no other evidence they could present to show the shooter was Kyle Dismukes. The witnesses that the state presented all identified Movant as the shooter. Trial counsel also noted that they had not called Douglas during the first Todd Franklin trial, and the result there was a finding of guilty of murder first degree and the death penalty, so part of their decision to call him during this second Todd Franklin trial was an effort to do something more and different in this situation.

Here, trial counsel made a strategic choice to present evidence through Douglas. They understood the possible pitfalls and benefits, and made a reasonable decision based on the information they had and the defense they pursued. Movant has not demonstrated that counsel's strategy was unreasonable, and trial counsel was not ineffective for calling Douglas as a defense witness.

4. **Amended motion claim 8(D)** claims ineffective assistance of trial counsel for failing to object to alleged evidence of uncharged crimes through witness Heather Burke, latent print examiner. This would seem to be included in the claim in the *Pro Se* PCR motion of "Ineffective assistance of counsel because trial counsel failed to object to uncharged crime and bad acts evidence."

Ms. Burke testified at trial she processed a cigar found at the scene, found a fingerprint, ran it through the Automated Fingerprint Identification System, and determined it was a match to one of the candidates suggested by the computer. The fingerprint matched those on a card that had been labeled with Movant's name. It was an older card, and so Ms. Burke herself physically rolled Movant's prints on a new card. She compared the print from the cigar to Movant's prints on the new card and again determined a match. She also compared the prints from the old card with those on the new card and determined a match. In other words, the testimony about an old card was to explain

why she re-rolled Movant's fingerprints to confirm her analysis. On cross examination, trial counsel made the point that the act of putting a cigar in one's pocket could smudge or affect the print, and the print from the cigar at issue was not smudged. This was to support an argument that the print was not consistent with the cigar having been in Movant's pocket and fallen out the night in question.

An expert is permitted to testify as to what they did to reach their conclusions. There were no references to any other actual arrests or crimes. On direct appeal, the Missouri Supreme Court noted that fingerprint cards, in and of themselves, do not constitute evidence of a prior crime, and in this case, "[t]he fingerprint examiner's testimony was neutral; she testified as to the procedure she used to identify the fingerprint she found. There was no testimony by the fingerprint examiner that [Movant] was fingerprinted pursuant to an arrest or conviction . . . ." *State v. McFadden*, 369 S.W.3d 727, 741 (Mo. banc 2012).

It is hard to imagine how an objection to the fingerprint cards would have been meritorious in this situation. Movant has not shown that failure to object to the fingerprints here was of such a character to deprive the defendant substantially of his right to a fair trial. Movant has not shown the failure to object was not strategic nor has he shown it was prejudicial. Point denied.

5. **Amended motion claim 8(E)** claims ineffective assistance of trial counsel for failing to object to alleged evidence of uncharged crimes through the "wanted poster." This would seem to be included in the claim in the *Pro Se* PCR motion of "Ineffective assistance of counsel because trial counsel failed to object to uncharged crime and bad acts evidence."

At trial, Mark Silas spent most of direct examination saying he did not recall much of anything. He was shown a photo of Movant, which was a redacted "Wanted" poster of Movant. It was redacted due to the objections of trial counsel. Mr. Silas was asked, "Isn't that the picture you pointed to on the wall at the Pine Lawn Police Station and said, That's JR, the second person

that shot Todd?", to which he responded, "Not that I remember." (Trial tr. pp. 1059-60.) Mr. Silas did testify that the person in the photo shown to him was Movant. (Trial tr. p. 60.)

Officer Leon Stone laid additional foundation for the playing of Mr. Silas's recorded statement to police, and testified at trial that when Mr. Silas saw Movant's photograph on the wall of the room where the interview was occurring, Mr. Silas said that was the person who shot Todd Franklin. Detective Mezenworth also testified that Mr. Silas picked out the photo hanging on the wall at the police department as Movant and that Movant was the shooter. At no point during the trial was the photograph identified as a "Wanted" poster, and there was nothing presented as to why Movant's photo was on the wall of the police station.

On direct appeal, the Missouri Supreme Court considered that three witnesses testified at trial that they viewed Movant's photograph at the police station, and found that the comments made by the witnesses "were not made to indicate [Movant] had committed prior bad acts or uncharged crimes, merely that they saw his photograph in the police station. There was no evidence linking [Movant's] photograph to other crimes he may or may not have committed." *McFadden*, 369 S.W.3d at 741. The witnesses made these statements during their identification of Movant as the perpetrator of Todd Franklin's murder, and tended to establish the identity of the person charged with the commission of the crime on trial. *Id.* As such, the evidence that Movant's photograph was displayed at the police station did not constitute evidence of uncharged crimes. *Id.*

Here, Mr. Silas did not appear to be a willing, forthcoming witness for the State, but rather "forgot" many portions of the shooting and his interview after. This Court notes that from review of the record it does not appear that there would have been valid grounds for exclusion of Movant's photo during trial. At any rate, Movant has not shown that failure to object to the photograph here was of such a character to deprive the defendant substantially of his right to a fair trial and has not

shown prejudice from failure to object. Point denied.

6. **Amended motion claim 8(F)** claims ineffective assistance of trial counsel for failing to impeach Dr. Raj Nanduri and Michael Douglas.

In considering the failure to impeach claim, the court is mindful that the mere failure to impeach a witness does not entitle Movant to relief on a claim of ineffective assistance of counsel. The court presumes that counsel's decision not to impeach a witness is a matter of trial strategy. In proving that counsel was ineffective for failing to impeach a witness, a defendant has the burden of showing that the impeachment would have provided him with a defense or would have changed the outcome of the trial, and he must also overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. *Barton v. State*, 432 S.W.3d 741, 750 (Mo. banc 2014).

Dr. Nanduri

Specifically, PCR counsel claims trial counsel should have impeached Dr. Nanduri regarding whether Todd Franklin was already dead when the second shooter shot him through statements involving seepage versus hemorrhage.

Dr. Nanduri testified at trial that, to a reasonable degree of medical certainty, Todd Franklin died of multiple gunshot wounds, with the head and chest wounds being fatal. Dr. Nanduri testified, when asked if all five gunshot wounds contributed to his death, "I think [Todd Franklin] sustained all of them when he was alive. And he lost blood. And definitely would have contributed to his demise." (Trial tr. p. 1519.) When asked whether Todd Franklin was alive when each gunshot was inflicted, Dr. Nanduri said, "I believe he was." (Trial tr. p. 1507.) When asked if each of the five gunshot wounds contributed to Todd Franklin's death, Dr. Nanduri testified, "Yes, in a way." (Trial tr. p. 1507.)

Dr. Nanduri testified during her deposition that there was a distinction between seepage and

hemorrhage: hemorrhage is an active process, which happens when a person is alive, and seepage would be a slow gravitational kind of leakage that happens probably in the postmortem state. Seepage would not cause soft tissue swelling or dissecting. Dr. Nanduri further stated during the deposition that she could not say there was no seepage, because it's all blood and there will not be any color difference, and that some amount of blood is going to come out when a person dies, so she cannot distinguish between that and the blood from hemorrhage. Since there was bleeding in the soft tissue, that led her to her conclusion that Todd Franklin was alive when he sustained his gunshot wounds. She also testified that Todd Franklin had a gunshot wound to the top of his head that caused a lot of bleeding and subarachnoid hemorrhage; that he had a gunshot wound to the back of his neck which caused a lot of bleeding and he was drowning in blood; that he lost a lot of blood from the gunshot wound to his chest; that there was a lot of blood in the soft tissue surrounding the wound in the chest; and that the wound to the neck caused a lot of bleeding in the soft tissue.

Trial counsel Sharon Turlington testified during the PCR hearing that, "our defense was not that [Movant] went back later after Todd Franklin's heart would have stopped beating and shot him, and therefore, it would have been seepage as opposed to hemorrhage. All of the testimony was that whoever did the shooting, the bullets that entered him would have all entered his body within a very short period of time, in which seepage would not have been a lot of the issue," (PCR tr. pp. 69-70) and that the seepage versus hemorrhage point "didn't really fit in with any theory that we were putting forth, so I think that's why it wasn't really raised as impeachment." (PCR tr. p. 70.) Trial counsel further acknowledged that if she had elected to raise the seepage versus hemorrhage information on cross examination, the prosecutor could then redirect Dr. Nanduri with all of her testimony about all of the blood she found in each wound, highlighting each of the injuries even more. This is generally not helpful to the defense.

Here, Movant has not shown that an impeachment of Dr. Nanduri in the way they suggested would have provided Movant a defense, or that it would have changed the outcome of trial. Such an impeachment attempt did not even fit in with defense's theory. Nor has Movant overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. It was not ineffective assistance of counsel to fail to impeach Dr. Nanduri as alleged.

Michael Douglas

PCR counsel further claims trial counsel should have impeached Michael Douglas by using information in his Pro Se Form 40, namely that Douglas was not at the scene of the crime and had witnesses who would support that.

Michael Douglas testified at trial that Movant was the second shooter, consistent with the statements Douglas agreed to during his plea to the second degree murder of Todd Franklin. Douglas was impeached extensively with his prior statements that Movant was not the second shooter, but rather it was the then-deceased Kyle Dismukes. Defense counsel at trial did not attempt to use Douglas's Pro Se Form 40 to impeach him with statements that he was not at the scene of the crime.

Of course, Movant's defense was one of actual innocence—that Movant did not shoot Todd Franklin at all. Douglas's statements that Movant was not the second shooter supported that defense. A statement that Douglas was not at the scene of the crime would not have supported Movant's defense. Additionally, attempting to enter evidence that Douglas at one point claimed during his own appeal a self-serving alibi not only would easily allow a jury to conclude that was a lie because of its self-serving nature, it also would put a third story into the mix (that Douglas was not there, in addition to (1) Movant was the shooter, and (2) Movant was not the shooter), possibly making it even less likely that the jury would buy the version that Movant was not the second shooter.

Movant does not claim that trial counsel did not impeach Douglas at all, but rather that they did not impeach Douglas in a very particular way with one particular document.

Here, Movant has not shown that an impeachment of Douglas with the Form 40 would have provided Movant a defense, or that it would have changed the outcome of trial. Actually such an impeachment would have been contrary to Movant's defense. Nor has Movant overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. It was not ineffective assistance of counsel to fail to impeach Douglas as alleged.

7. **Amended motion claim 8(G)** claims ineffective assistance of appellate counsel for not raising the issue of the admissibility of the taped statement of Mark Silas.

As mentioned above, when Mark Silas testified at trial, he spent most of his time "forgetting" and "not knowing" what happened the night of the murder of Todd Franklin. Mr. Silas did admit being at the scene the night Todd Franklin was shot, being with Todd Franklin, and coming across Movant and another individual. Mr. Silas admitted Todd Franklin and Movant were talking. Mr. Silas admitted he heard shots and ran, but denied knowing if anyone got shot. He denied being chased. When asked if he saw Todd Franklin get shot, he responded, "No. I don't know." (Trial tr. p. 1045.) When asked if he was close to where the shooting was, Mr. Silas responded, "I guess. If there was some shooting, I guess so. I was over in the area." (Trial tr. p. 1046.) Mr. Silas admitted the police picked him up and took him to the police station shortly thereafter.

When the prosecutor showed Mr. Silas a tape that he purported to have played for Mr. Silas weeks before and asked Mr. Silas if it appeared to be the tape that was played, Mr. Silas said, "I guess so. I guess. I don't know if it's a tape or not." (Trial tr. p. 1047.) Mr. Silas also testified he remembered the prosecutor kept playing a tape, that it was his (Mr. Silas's) voice on the tape, and that the police officer's voice was on the tape asking him questions about what Mr. Silas saw

concerning the shooting of Todd Franklin. Mr. Silas admitted the taping was being done with his consent. When asked various specific questions about what was on the tape, sometimes Mr. Silas said "I don't remember," sometimes he said "No. I don't recall." When asked if he remembered making statements, sometimes he flat out denied remembering what happened. Later, Mr. Silas became unwilling to even admit that he heard shots, when he says, "Whatever. I don't know what you mean by – as soon as I heard the shots or fireworks, I took off running." (Trial tr. p. 1059.) When confronted with the fact that his recorded statement has him describing the gun used as a revolver, Mr. Silas says, "I don't know what you're talking about." (Trial tr. p. 1059.) Mr. Silas also identified Movant in court, and identified Movant's photo from the redacted "Wanted" poster, though he testified he did not remember if he saw that photo at the police station.

Officer Leon Stone laid additional foundation for the playing of Mr. Silas's recorded statement to police during his testimony. He testified as to the date and time of the statement, who was present, and that it fairly and accurately depicted the conversation recorded. Detective Mezenworth also testified as to statements Mr. Silas had made to him about the identity of the shooter.

The taped statement of Mr. Silas was played for the jury, during redirect examination, over the objections of trial counsel as to hearsay and lack of foundation.

As it happens, the Missouri Supreme Court on direct appeal in this case did recount the foundational requirements for admission of a tape recorded statement to be that (1) the device was capable of recording accurately; (2) the operator of the recording device was competent to operate it; (3) the recording is authentic and correct; (4) changes, additions and deletions have not been made to the recording; (5) the recording has been preserved in an acceptable manner; (6) the speakers are identified; and (7) the conversation was voluntary and without inducement. *McFadden*, 369 S.W.3d

at 752. Additionally, prior inconsistent statements are admissible at trial, and Mr. Silas did make actual outright denials of certain points of his statement, did make internally inconsistent statements during his trial testimony, and spent most of his time professing his lack of memory as to the murder and surrounding events.

Appellate counsel Janet Thompson handled capital appeals for multiple decades in Missouri and is one of the most experienced appellate attorneys in the Capital Division of the Missouri State Public Defender's Office. She testified she tried to raise those claims on appeal that she thought had the most chance of success in the Missouri Supreme Court and in the federal court. Regarding the recorded statement of Mark Silas, Ms. Thompson was aware that prior inconsistent statements are admissible under Missouri law (see § 491.074 RSMo), and that admission of evidence is discretionary with the court. Ms. Thompson believed there were stronger points and stronger arguments to make when drafting her appeal.

To prevail on a claim of ineffective assistance of appellate counsel, the movant must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005). The claimed error must have been sufficiently serious to create a reasonable probability that, if it were raised, the outcome of the trial would have been different. *Id.*

That is not the case here. Even if appellate counsel had raised on appeal the points about the admissibility of the recorded statement of Mark Silas, there is no reasonable probability that the outcome would have been different. Proper foundation had been laid, a hearsay exception applied, and Movant has failed to show prejudice. Point denied.

8. **Amended motion claim 8(H)** claims ineffective assistance of trial counsel for failing to investigate and call Dr. Norman White or a similarly qualified expert during the penalty phase. Movant alleges Dr. White could have testified in the penalty phase of the trial regarding how Movant's growing up in the "war zone" of Pine Lawn and the surrounding areas impacted Movant's childhood and how it affected his decision-making ability at the time of these murders. Post-conviction counsel further asserts that this failure was not a matter of trial strategy.

Dr. White did testify at Movant's post-conviction hearing in 2017 for the murder of Leslie Addison. Sadly, Dr. White passed away prior to the instant post-conviction hearing, and his previously sworn testimony from the 2017 PCR was admitted at this PCR. Discussions of Dr. White's testimony in this Order refer back to his sworn testimony in 2017.

Prior to the testimony of Dr. White at the post-conviction hearing, the State was granted a continuing objection to his testimony on the basis that it contained inadmissible self-serving hearsay, that this witness did not qualify as an expert to offer an opinion as to the effects this upbringing may have had on Movant or the offenses for which he was convicted, and that his testimony amounted to nothing more than speculation. While the State's objection may well have merit, this Court need not decide the admissibility of such evidence to determine the ineffectiveness issue of trial counsel's failure to call such a witness during the penalty phase of Movant's trial. However, this Court notes that Dr. White's testimony does not meet either the *Frye* or *Daubert* standards. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharms.*, 515 U.S. 869 (1995). The *Frye* standard was the one required for expert testimony in Missouri prior to August 28, 2017, at which point the *Daubert* standard became law. *See* § 490.065 RSMo. Dr. White's testimony was of dubious value given his lack of specific knowledge of this case or that of the murder of Todd Franklin. There is insufficient information in the record to conclude that his testimony is supported

by sufficient facts or data, the product of reliable principles and methods, and that Dr. White had reliably applied the principles and methods to the facts of the case. Nor is there foundation to support a claim that Dr. White's methods were generally accepted in the scientific community at any point in time.

Dr. White testified that he had been retained to create a "profile" around growing up in Pine Lawn and how it "impacted" Movant. The profile was not to be about Movant per se, but about the environment he grew up in. He spoke to Movant on four occasions in prison. He spoke to convicted murderers George Wells and Thurmon Shelton, and spoke with others in the Pine Lawn area suggested by Movant or post-conviction counsel. He then drafted a report and a power point he has used for various lectures. Dr. White was also writing a book about at-risk communities such as Pine Lawn and the "risk immersion" term he created when discussing such areas.

Dr. White testified regarding many problems individuals encountered growing up in the Pine Lawn area that were not related to Movant. Descriptions of police misconduct, drug dealing, gangs, and violence were given through the hearsay statements of non-witnesses as well as other witnesses in the hearing. Dr. White indicated that this was the first "social profile" he has compiled in his career and that he had never testified in court before this hearing. He acknowledged that he had been paid up to $16,000 for his work and was, at the time of his testimony, charging $240 per hour to Movant's counsel. He acknowledged that Movant's gang activities and conduct contributed to his risks in life. Dr. White admitted that growing up in a community like Pine Lawn did not predestine any individual to become a murderer.

Dr. White never discussed the facts of these offenses with Movant. Nor did Movant admit to Dr. White that he killed Leslie Addison or Todd Franklin. Therefore, 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 Todd Franklin. While Movant discussed his life as a gang member, Dr. White was unaware that Movant was the prime suspect in another murder and shooting. Nor was he informed that from 2000 to 2004 there were three murders in Pine Lawn and that Movant had been arrested in all three cases.

During the instant PCR, trial counsel Sharon Turlington testified that, "Basically, the theory of mitigation was that [Movant] came from a very bad background. He had a very, very poor home life. He basically did not have a chance in life. You know, it would have been basically along those lines." (PCR tr. p. 58.) This is consistent with the theory of mitigation presented at Movant's other trials. The trial team did conduct interviews with residents from the community, including what it was like to live in that environment, and there was a witness who testified about routinely hearing gunshots and feeling unsafe in their own home. Trial counsel additionally recalled interviewing various family members and presented the testimony of Dr. Draper, which included not only child development issues, but also information about the surrounding environment.

The witnesses Movant called during the mitigation phase of this second Todd Franklin trial had testified previously during the first Todd Franklin trial, and trial counsel made decisions as to whether to call them based on how they testified in the first case and how helpful it was. Part of the strategy of re-calling them was that the witnesses had testified well the first time. Trial counsel worked very hard to keep out evidence of Movant's gang membership and criminal activities while involved in gangs. If a sociologist such as Dr. White had been called to testify, he would have been subject to cross examination. And he could have been asked about his knowledge of Movant's involvement in gangs, gang activity, and other crimes committed by Movant. This is information that would not have been helpful or mitigating to the defense, in the opinion of trial counsel. Any time that Movant calls an expert as a witness, there may be good information that comes out, but also

bad information, and the two must be balanced. It is a matter of strategy.

At the time of the second Todd Franklin trial in 2007, trial counsel was not aware of any sociologists being called in a death penalty case to put on evidence of at-risk communities, and was not aware of any other death penalty cases in Missouri where a capital defender called a sociologist to testify about at-risk communities. The ABA published guidelines at the time also did not recommend using that kind of evidence. Dr. White agreed that much of the information and research concerning at-risk communities was not available when this trial took place. It has only been in more recent times that such evidence has been considered by defense teams in capital cases.

Defense counsel's testimony demonstrates that they conducted a thorough investigation of Movant's childhood, family, his development, criminal background, and environment through his family and Dr. Draper. They discussed calling a gang expert but decided such a witness could be more aggravating than mitigating in the eyes of the jury. It is clear that they specifically decided not to call an expert they regarded as detrimental to the defense but rather introduce that evidence through family members not subject to the same impeachment that cross examination would bring through such an expert.

In considering this claim, it bears repeating that "[g]enerally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable." *Kenley*, 952 S.W.2d at 266. "[D]efense counsel is not obligated to shop for an expert witness who might provide more favorable testimony." *Id.* at 268. "While defense counsel could have continued to consult additional experts in the hope of finding one that might support [the defense], counsel is not required to consult additional experts in the hope of finding one who might provide more helpful testimony." *Worthington*, 166 S.W.3d at 575. A post-conviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at

trial. *Strickland* instructs that "[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." 466 U.S. at 689.

Rather than demonstrating that his counsel's strategy was unreasonable, Movant has provided an alternative trial strategy. To support this alternative strategy he presented the testimony of Dr. Norman White. Much of Dr. White's testimony is rife with hearsay and speculation, lacked the acceptance of the scientific community and lacked the scientific basis or sufficient facts; product of reliable principles or methods reliably applied to the facts of the case, to be admissible as an expert opinion.

In many aspects, Dr. White's theories served to reinforce the negative stereotype that Movant was a drug dealing, intimidating and violent gang member who committed at least two murders without regard for his actions. Cultural evidence was in some respects cumulative to the evidence offered by Movant's family and friends, but in other aspects it was contradictory to that of his family.

Movant has not demonstrated that counsel's strategy was unreasonable, only that an alternate strategy existed. This strategy was not readily available at the time of the trial. Nor does this Court find such a strategy to be reasonable. Much of what Dr. White testified to would expose the jury to very damning evidence about other crimes in which Movant was the prime suspect. In light of the execution style killing of both Leslie Addison and Todd Franklin, 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 Movant receiving a different sentence.

The strength of an expert is not found in the cost per hour or the education he possesses to

render his opinion, but rather in the reasonableness of his testimony. Dr. White's conclusions drawn without taking into account Movant's version of the murder is not reasonable. Based upon this overwhelming evidence, this Court concludes that Dr. White's testimony would have had little or no effect on the jury's verdicts.

Based upon the evidence presented by trial counsel in the penalty phase, the jury considered the mitigating factors submitted by trial counsel without the additional evidence potentially revealed in cross-examination. Movant has offered no credible evidence that there is a reasonable probability that the addition of this expert witness would have changed the outcome of the guilt or penalty phase of his trial. The testimony of Dr. White has failed to convince this Court that testimony from different experts, or new experts, would have in any way altered the outcome of his trial. The fact the jury did not render the verdict trial counsel had hoped does not render their investigation or choice of expert ineffective. Point 8(H) is denied.

9. **Amended motion claim 8(I)** claims ineffective assistance of trial counsel for failing to call Dr. Michael Gelbort or a similarly qualified expert during the penalty phase. Movant claims that the jury should have heard from a neuropsychology expert about Movant's brain functioning, low-average IQ, and processing deficits.

Dr. Gelbort testified during the penalty phase of the first two of Movant's four death penalty trials and did not call him as a witness during the third or fourth death penalty trial. The jurors in every single trial sentenced Movant to death, regardless of whether Dr. Gelbort testified.

Dr. Gelbort was hired by trial counsel and performed a four to five hour neuropsychological exam of Movant in 2004, which included a battery of different tests. During the PCR hearings for both this matter and the Leslie Addison matter and the two trials in which Dr. Gelbort did testify, his conclusions were that Movant had a full scale IQ in the low-average range, had impulse control

problems, and had impairments in the areas of the brain that give rise to decision-making abilities. Dr. Gelbort did not and would not diagnose the Movant as intellectual disabled (mentally retarded), and does not believe Movant has a mental disease or defect that would absolve Movant of responsibility for the murders of Todd Franklin or Leslie Addison. Dr. Gelbort believes Movant's alleged deficits result in slowed thinking, but agrees that these deficits did not cause Movant to commit murder, and would not cause Movant to commit this particular crime or any other. At the time of Dr. Gelbort's evaluation of Movant in 2004, Dr. Gelbort concludes Movant had the capacity to know murdering a person was wrong.

Dr. Gelbort, a PhD, has testified in scores of trials in different states, and every time he has testified in a capital case, he has testified for the defense. Dr. Gelbort never asked Movant about the murders of Leslie Addison or Todd Franklin, and never asked Movant what he was thinking when he shot and killed his victims. Dr. Gelbort did not review or consider Movant's MRI, which was normal, or Movant's later PET scan in coming to his conclusions at trial related to the neuropsychology testing.

Postconviction counsel did ask Dr. Gelbort whether he would recommend a PET scan, and Dr. Gelbort thought that would probably be valuable. Postconviction counsel also provided Dr. Gelbort with a report of Dr. Gur regarding Dr. Gur's analysis of Movant's PET scan, and Dr. Gelbort opined the PET scan results were consistent with the neuropsychological testing results. It is not clear that Dr. Gelbort actually possesses the training and background to make such a conclusion about a PET scan, but perhaps he does. Postconviction counsel also provided a copy of Dr. Draper's report to Dr. Gelbort, and Dr. Gelbort believed that having a consistent home life was important for brain development. There was no foundation laid for that opinion. Postconviction counsel provided a copy of Dr. White's report to Dr. Gelbort, and Dr. Gelbort stated that the environment around

Movant was challenging. This conclusion is not one that requires an "expert" opinion.

The MRI scan of Movant's brain came back as normal. Sharon Turlington agreed that, in her experience, juries tend to give that more weight than neuropsychological testing. If Dr. Gelbort would have been a witness during this trial, the fact that the MRI was normal could have been elicited on cross examination, and that was taken into consideration by trial counsel. Ms. Turlington agreed that oftentimes when she is deciding whether to call an expert witness, she may not be sure how good of a witness they will be or how they will perform on cross examination, but that was not the case with Dr. Gelbort because they had called him during the first two of Movant's trials. And in her opinion, Dr. Gelbort did not make a good witness for the defense:

> I wouldn't say that it was completely not helpful, it just wasn't—it didn't hurt, but it was just testimony that was like, because of his neurological deficits, [Movant] made poor decisions. It doesn't really go much beyond that, so it isn't particularly strong evidence. The real issue was that Dr. Gelbort was—his demeanor, and he got in a lot of fights with the prosecutor while he was cross examined, and he came across and just very arrogant . . . . His demeanor was extremely bad, and it outweighed the slight benefit of [Movant] making bad decisions.

(PCR tr. pp. 180-81.) Ms. Turlington explained that she has put on neuropsychological testimony in multiple cases. "When that's all you've got, it's never been successful," she said, and "when you couple that with getting into an extreme amount of argument with the prosecutor over incredibly minor things, including the color of the defendant's shirt, I think that no one gave anything that he had to say much credibility by the time he was finished, and so for that reason, I think we made a strategic decision not to call Dr. Gelbort." (PCR tr. pp. 182-83.) During the Leslie Addison PCR, Ms. Turlington pointed out that Dr. Gelbort's testimony "didn't seem to really help that much because there's obviously an argument that, well, a lot of people can't make great decisions but they don't kill someone. So basically after not really helping and not adding a lot, we decided not to put him on again."

During the Leslie Addison PCR, Karen Kraft twice used the word "horrible" to describe Dr. Gelbort's trial testimony. Regarding the second Leslie Addison trial, trial counsel decided not call Dr. Gelbort because they "thought he did horrible on the witness stand," and because they "thought he did a horrible job in his testimony previously and it didn't work." Ms. Kraft believed the way Dr. Gelbort appeared in court and the way he handled himself on the stand "was a huge problem." She believed Dr. Gelbort probably did the prosecution more good than he did for the defense, and the prosecutor was able to effectively cross examine him. Every time Dr. Gelbort testified, the prosecutor got more information that was useful to the prosecutor than was useful for mitigation. The testimony in the previous trials offered by Dr. Gelbort "hadn't worked before, and we just decided to try a different tact."

Movant was informed of trial counsel's decision not to call Dr. Gelbort, and he was in agreement with that decision. As Ms. Kraft explained during the Leslie Addison PCR, "We consider experts in every case. We don't always use them." By the third trial, the witnesses trial counsel called during the mitigation phase were people they believed from their previous testimony did well on direct and cross examination.

Having reviewed the previous trial testimony of Dr. Gelbort and having observed his testimony in the post-conviction hearing, this Court agrees with the assessment of trial counsel and finds their strategic choice of not calling this witness to be reasonable. Dr. Gelbort, in the opinion of trial counsel, had an attitude and performed horribly on the stand during a previous trial. It is true that Dr. Gelbort comes across as an elitist and does not particularly endear himself to his audience. While trial counsel found nothing wrong with his actual testing or conclusions, they believed his presentation to the jury was not helpful to Movant. This was a reasonable conclusion, given that before the trial in question, Movant was sentenced to death twice when Dr. Gelbort testified. Even

when Dr. Gelbort had testified about Movant's deficits, trial counsel felt his testimony was not particularly helpful and that Dr. Gelbort's attitude outweighed any slight benefit of his neuropsychological testing results. Keeping this expert off the stand prevents cross examination of him. Dr. Gelbort had testified twice before on Movant's behalf, and every time he testified he opened himself up to the possibility of more cross examination.

Movant was not prejudiced by trial counsel's decision not to call Dr. Gelbort in the penalty phase. Movant had already been through two trials and sentenced to death both times, regardless of whether Dr. Gelbort testified. There was not a reasonable probability of a different outcome--a life sentence instead of death--had Dr. Gelbort testified.

Post-conviction counsel have failed to show trial counsel were deficient in refusing to call Dr. Gelbort during the penalty phase and failed to show Movant was prejudiced. Point 8(I) is denied.

10. **Amended motion claim 8(J)** claims ineffective assistance of trial counsel for failing to investigate and provide Dr. Wanda Draper with an adequate social history for the penalty phase. Particularly, Movant claims trial counsel should have provided Dr. Draper with the social profile done by Dr. Norman White in anticipation of Dr. Draper's testimony in the penalty phase, so that Dr. Draper could explain how her conclusions dovetailed with Dr. White's testimony.

The most obvious problem with wanting trial counsel to have provided Dr. Draper with Dr. White's social profile or similar social profile is that Dr. White's social profile was not readily available at the time of trial. Trial counsel was not aware of any sociologists being called during death penalty cases at that time to put on evidence of at-risk communities. Dr. White's specific social profile was the first one he had ever created, in 2016, and his testimony at the Leslie Addison PCR was the first time he ever testified in court. Movant has not been able to show that there were any such social profiles being done by experts at the time of the second Todd Franklin trial in 2007.

Additionally, as was covered extensively in section 8(H) of this Order, it seems that Dr. White's profile would not have satisfied the standard for expert testimony and would not have been admissible anyway due to relevance, speculation and hearsay objections. Dr. Draper would not have been able to testify about whatever convergence she believes exists between her testimony and Dr. White's if Dr. White's social profile was inadmissible.

Trial counsel also made a strategic decision as to which experts to call, and if trial counsel had presented something like Dr. White's report to Dr. Draper, it could have opened up cross examination to additional damaging evidence.

Dr. Draper testified during this PCR hearing as to her experience in the field of human development. She reviewed records provided to her by the trial team and met with Movant for approximately three to three and a half hours in 2004. She was provided medical records, birth records, school records, educational records, juvenile records, and police records. Dr. Draper testified on behalf of Movant in the first three of his four trials.[2] She testified at the PCR hearing that she was provided the report of Dr. White in connection with the postconviction proceedings, and his report provided her with additional information regarding the neighborhood in which Movant grew up. Dr. Draper believes that access to the information in Dr. White's report "would have provided the social structure I could apply in creating a LifePath to illustrate to the jury the impact of the community and sociological circumstances on [Movant's] development." (Amended Motion p. 120.)

Dr. Draper also testified about receiving reports from Dr. Gur and Dr. Gelbort. The Amended Motion does not claim some sort of error in Dr. Draper having or not having the reports of Dr. Gur or Dr. Gelbort, and thus such claims are waived.

During cross examination, it became apparent that this particular LifePath display is nothing more than a poorly composed, unwieldy—but admittedly colorful—chart. It is ostensibly set up as a timeline of Movant's life, but there are random quotes scattered about that are not actually tied to a particular point in the timeline. There were multiple errors, both grammatical and factual, that only detracted from the presentation and made it seem more ridiculous. Dr. Draper cherry-picked portions of her report and other expert reports, oftentimes getting the information from the other reports incorrect, and slapped them all together on her fifteen posters. Having experienced this LifePath chart firsthand, this Court can confidently say presentation of such would not have helped Movant at his trial. It actually would have been a gift to the prosecution, as it opened up new lines of potential cross examination and hurt Dr. Draper's credibility as an "expert." Additionally, to the extent that trial counsel had wanted to include presentation of such a LifePath chart, the inclusion of Dr. White's information on the chart was not necessary. A LifePath presentation could have been done with Dr. Draper's information, alone. It still would have been completely unhelpful, but the point is that Dr. White's report is not what made the LifePath possible.

Trial counsel testified at the PCR hearing that all of the information they had was provided to Dr. Draper to write her report. By the time of trial, Dr. Draper did not indicate she needed some additional information in order to complete her report. Prior to trial, if Dr. Draper made a request for information, trial counsel got her what she needed. Dr. Draper never indicated she needed a report from a sociologist about the community of Pine Lawn for her own testimony.

During the three trials in which Dr. Draper did testify, her conclusions were that Movant suffered from an attachment disorder due to an inconsistent upbringing including developmental neglect and traumatic stress during childhood. Dr. Draper admitted during the PCR hearing, as well

[2] The Amended Motion on page 101 erroneously states that Dr. Draper did not testify in the instant case. She did.

as previous trial testimony, that this alleged attachment disorder did not cause Movant to become a murderer. Dr. Draper acknowledged that Movant was never physically or sexually abused, and he still knew the difference between right and wrong. Movant had the capacity to make choices, and he used his free will to choose to murder multiple people.

Sharon Turlington testified during the Leslie Addison PCR that she believed Dr. Draper "testified really badly in the third trial." The "third trial" is the Todd Franklin trial at issue here. Dr. Draper had beneficial information, "but she got mixed up on some stuff, that it did not go very well based on the cross-examination that was done by [the prosecutor]." In the third trial, Ms. Turlington felt Dr. Draper was doing more harm than good. During the cross examination of Dr. Draper in third trial, "she testified to some things that she was impeached on," and the prosecutor "made it just look as if she just says whatever they want, if it helps them and then she's made these other statements that are exactly the opposite, doesn't help them." Ms. Turlington felt this was "extremely damaging to her credibility, and that's why we decided not to call her in the fourth trial."

Would a LifePath have saved this? No.

Regardless of the absurdity of the LifePath chart, this Court still must consider whether there was ineffective assistance of counsel for the failure to provide Dr. Draper with a report like that of Dr. White's. There was not. Movant has not shown that such report was widely available and possible at the time of trial, and has not shown that trial counsel's strategy in choosing to pursue certain themes or witnesses was unreasonable. Dr. White's report or one like it does not provide a viable defense to Movant. Movant has not established that, if such report were provided to Dr. Draper, that the outcome of trial would have been different. Even in the fourth trial, where Dr. Draper did not testify at all, Movant was found guilty and sentenced to death. Having a report that said, in essence, that Pine Lawn was a difficult place to grow up and the atmosphere affected

children in the area, would not have resulted in a life sentence for Movant. Indeed, the information about Movant's circumstances growing up and the surrounding community was presented through other witnesses. These witnesses were carefully selected by trial counsel based on the information they could provide and the limited damaging information that could be elicited through them. Putting Dr. White's report in the hands of Dr. Draper would not have made Dr. Draper testify better, and it would not have affected the outcome of trial. Point 8(J) is denied.

11. **Amended motion claim 8(K)** claims ineffective assistance of trial counsel for failure to call mitigation witnesses during the penalty phase. Specifically, Movant alleges trial counsel should have presented sociological evidence of the role and impact of Pine Lawn and surrounding communities on Movant's developmental and social history.

Movant lists these people as witnesses that trial counsel should have investigated or called: Willibea Blackburn, Vicki Blackburn, Audrey Brown, James Clark, Kelly Crowder, Willie Crowder, Jeannetta Hubbard, Shontay Hubbard, Lisa Hubbard, Tiffany (Hood) Huglie, Arnell Jackson, Brandon Johnson, Victor Johnson, Tanisha Kirkman (Tanesia Kirkman Clark), Johnny Kirkman, Terrence Lee, Sean Nichols, Thurman Shelton, Glenn Sykes, Lisa Thomas, Kenneth Watkins, Elwyn Wells (Walls), George Wells, Clara Wings, Andrian Wright, and Janet Wright.

These people actually testified live at the PCR hearing: Lisa Thomas, Sean Nichols, and Elwyn Walls. The following testimonies were presented via deposition or prior testimony at the PCR hearing: Victor Johnson, George Wells, Kenneth Watkins, Arnell "Smoke" Jackson, Willibea Blackburn, and Tanesia Kirkman Clark.

The following persons' testimonies were not presented at Movant's trial or PCR hearing: Vicki Blackburn, Audrey Brown, James Clark, Kelly Crowder, Willie Crowder, Jeannetta Hubbard, Shontay Hubbard, Lisa Hubbard, Tiffany (Hood) Huglie, Brandon Johnson, Johnny Kirkman,

Terrence Lee, Thurman Shelton, Glenn Sykes, Clara Wings, Andrian Wright, or Janet Wright. Movant's failure to present evidence at a hearing to provide factual support for a claim in his or her post-conviction motion constitutes abandonment of that claim. *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. banc 1998); *Cole v. State*, 223 S.W.3d 927, 931 (Mo. App. 2007). All claims regarding those witnesses are denied as abandoned.

Lisa Thomas

Ms. Thomas is Movant's first cousin. Her mother is the sister of Movant's mother. She testified that although she did not live in Pine Lawn, she visited her grandparents there quite often and would spend time with Movant during those visits. She stated that when Movant was about 15-16 years old, he lived with her family for a period of time. During the Leslie Addison PCR, Ms. Thomas indicated Movant was not in school at that time and "just did what he wanted to do." She recalled that both she and Movant lost friends to gun violence, and that Movant suffered nightmares after the murder of his friend Mikey.

Ms. Thomas offered generalized testimony regarding drugs, gang culture, fights, guns, and people running from the police in Pine Lawn when she was growing up. She indicated that she knew Movant was a gang member and that he did whatever his friends Mikey and Floyd wanted him to do. She was aware Movant was involved in selling drugs and gang activity. Ms. Thomas would see Movant get in fights with people, though she never saw him with a gun. During the Leslie Addison PCR, Ms. Thomas indicated she was unaware of any of Movant's criminal activity or convictions. Ms. Thomas admitted during the Leslie Addison PCR that she visited Movant in jail and told him she would do anything to help him. She personally does not believe in the death penalty.

Ms. Thomas offered no personal knowledge of the circumstances of the murders of Leslie Addison or Todd Franklin.

Sean Nichols

Mr. Nichols is a school administrator who testified to his experiences both while growing up and as an educator. He has never taught or been a school administrator in the city of Pine Lawn. His testimony discussed drugs, gangs, poverty, and the effects this has on the education of children from these type of communities. Mr. Nichols testified about the importance of instilling character and socialization in students, the importance of a father figure, and the challenges of single parent households. Mr. Nichols admitted that there are success stories that come out of these communities as well. During the Leslie Addison PCR, he described the gang activity as being a tremendous problem with the older kids initiating the younger kids into violence and drugs. He indicated during the Leslie Addison PCR that retribution by gang members for citizens cooperating with law enforcement was quite common and that this only led to more violence in these communities. Mr. Nichols offered no evidence concerning Movant's character or record. He had no knowledge of the circumstances of Movant's homicides.

Elwyn Walls

Mr. Walls is a current resident of Pine Lawn and has been a property owner there for more than a decade. He grew up in the general area and described his observations of gangs, drugs, public corruption, violence and the decline in the community. During the Leslie Addison PCR, he described his efforts at exposing corruption in Pine Lawn and his attempts to improve the community with his election to the city council. Mr. Walls agreed that innocent citizens would become victims of crime and gang activity.

Mr. Walls testified that he has never met Movant and has no knowledge of the murders of Leslie Addison and Todd Franklin. He offered no evidence regarding Movant's character or record.

Victor Johnson

Victor Johnson is a multiple felon currently serving prison time for a variety of crimes. He was incarcerated during the time Leslie Addison was murdered, but not when Todd Franklin was murdered. Some of Johnson's prior convictions include multiple counts of robbery, armed criminal action, trafficking second degree, possession with intent to distribute controlled substances, attempted robbery, and carrying a concealed weapon. Johnson does not have any convictions for murder.

Johnson has no personal knowledge of the murder of Leslie Addison and never spoke to Movant about that murder. Johnson heard about the murder of Todd Franklin but did not know anything other than that and never spoke to Movant about that murder. Johnson has seen Movant in prison around 2006 or 2007, when the reminiscing about "the good old days" and "[h]ow it was probably over for us," probably the last time they would ever see each other.

Johnson met Movant when they were both around twelve to fourteen years old and knew Movant as "Deuce," "JR," and "Scooby." They did not go to school together, and they grew up on "different sides" of Pine Lawn. Johnson knew Movant was a member of a gang, and the two did drugs together including marijuana and PCP. Johnson believes Movant is a very intelligent person. Johnson knew Movant's reputation in Pine Lawn was as someone not to be messed with, and someone who carried a gun. Movant was feared and loved in the streets. Johnson had no knowledge of Movant's home life before he met him. Johnson did not know Movant's parents.

Johnson testified Pine Lawn in the 1980s and 1990s had crack cocaine, drugs, gangs, lots of partying, teen pregnancy, guns, and single parent households. Johnson believed this affected him and those around him.

George Wells

George Wells is a convicted murderer. At the time of his deposition, Wells was incarcerated for convictions on murder second degree, attempted robbery first degree, and two counts of armed criminal action. Wells has a prior felony conviction for possession of a controlled substance. Wells was imprisoned during Movant's trial.

Mr. Wells lived in Pine Lawn when he was about seven to eleven years old. He knew Movant because they attended school together. Movant is one year older than Wells. Wells knew Movant as "Scooby," "Scooby Deuce," and "JR." "Deuce" was a gang reference, and Wells testified he and Movant were in rival gangs. Wells knew Movant's reputation to be as a guy who would defend himself and did not really fear anyone. Wells and Movant had shared a cell together for a period of time in prison, and had also been in the County jail together.

Wells did not provide any personal knowledge of the murders of Leslie Addison or Todd Franklin.

Mr. Wells testified Pine Lawn had prostitutes, alcoholism, drugs, single parent households, gangs, teen pregnancy, and poverty while he was growing up, and he believed it affected him and others.

Kenneth Watkins

Kenneth Watkins is a convicted murderer. At the time of his deposition, Watkins was incarcerated in prison for first degree robbery and armed criminal action. Watkins has convictions for multiple other felonies, including unlawful possession of a firearm, multiple robberies, and attempted robbery. While in prison, Watkins admitted to stabbing two people: an inmate in retaliation for punching him, and a guard due to gang affiliation.

Watkins testified in his deposition that he lived in Pine Lawn basically all of his life and

knew Movant as a childhood friend. Movant was two years younger than Watkins, and they met when they were around seven to ten years old. Watkins knew Movant as "JR" and "Scooby Deuce." Watkins stated Movant had a reputation in the community as a "scrapper," meaning a fighter who would defend himself or his turf by fighting and becoming violent.

Watkins did not provide any personal knowledge of the murders of Leslie Addison or Todd Franklin.

Watkins testified he was aware of drugs, addicts, gang culture, fights, guns, poor people, and teen pregnancy in Pine Lawn when he was growing up, and he believes these things affected him and other youth.

Arnell "Smoke" Jackson

Arnell Jackson, a convicted murderer has been incarcerated since shooting a rival gang member in 2003. Unlike the other inmates deposed by Movant, Jackson was present in Pine Lawn the night of Leslie Addison's murder but had left the scene by the time of the shooting. In addition to the sentence he was serving for murder, Jackson admitted prior convictions for robbery first degree, armed criminal action, assault first degree, trafficking in narcotics, and possession of an illegal firearm.

Jackson lived on Oakdale in Pine Lawn. He had met Movant when he was 10 or 11 but believed Movant was several years younger than him. Jackson admitted being a gang member at age 12 and a drug dealer beginning around 9th grade when he was expelled from school. He acknowledged selling drugs to his own father on occasion. Jackson lived with his mother and grandmother whom he described as hard working employed individuals.

Jackson testified that he was shot in the stomach by a rival gang member in 2002. He later admitted that he shot and killed the individual who had shot him. He indicated that he was a member

of the same gang as Movant. He admitted to lying to Ms. Turlington when she interviewed him by phone at the Charleston Correctional Facility. He admitted to trying to help Movant out of the area on the night of the murder of Leslie Addison because he knew the police were looking for him for the murder of Todd Franklin.

The second trial concerning the death of Todd Franklin occurred in 2007, and Movant's trial counsel contacted Jackson in March of 2008, leading to the conclusion that Movant did not provide his trial counsel with Jackson's name until after the second Franklin trial. Sharon Turlington testified that Jackson had nothing helpful or relevant to say. If Jackson had been called, his testimony would put Movant at the scene of the Leslie Addison homicide, and possibly it would have been elicited that Movant and Leslie Addison got into an argument right before her murder. It also would have opened the door to cross examination about Jackson being in prison for murder himself.

Karen Kraft agreed at the PCR hearing that Jackson was not someone the defense wanted to call because of the baggage he carried and that he did not have any useful information. Jackson was in the same gang as Movant, was friends with Movant, and was in prison for murder at the time of the trial.

Willibea Blackburn

Ms. Blackburn is a long-time resident of the north St. Louis County area. Her testimony offered her own observations and stories she had heard regarding drugs, addicts, gang culture, fights, guns, poverty and police corruption in Pine Lawn. She indicated her grandson was killed in Pine Lawn and that she believed Movant knew her grandson. Ms. Blackburn gave no meaningful testimony regarding Movant other than to indicate when he was in her presence he always behaved appropriately. She did not provide any personal knowledge of the murders of Leslie Addison or Todd Franklin. She offered no personal knowledge of whether Movant had experienced any of the

situations she described in Pine Lawn.

Tanesia Kirkman Clark

Tanesia Kirkman Clark testified she grew up in Pine Lawn and knew Movant, his grandparents, and Todd Franklin. During the Leslie Addison PCR, she offered generalized testimony regarding drugs, addicts, gang culture, fights, guns, poor people, single family households, police corruption and teen pregnancy in Pine Lawn when she was growing up. Ms. Kirkman Clark said she was "pretty close" to Movant and Movant was quiet and funny. She agreed that Movant also sold drugs and was in a gang. When questioned during the Leslie Addison PCR about Movant's arrest with sixteen individual baggies of cocaine, she expressed her opinion that she knows, "police plant drugs."

Ms. Kirkman Clark admitted that she and her brother grew up in the same neighborhood as Movant but had not committed any crimes. She indicated that she and her brother had gone to college. Ms. Kirkman Clark indicated during the Leslie Addison PCR that when Movant was in her presence, he always behaved appropriately. She did not provide any personal knowledge of the murders of Leslie Addison or Todd Franklin.

Trial counsel's testimony

Sharon Turlington agreed that the defense theory of mitigation involved presenting evidence of Movant's upbringing and his poor home life and the rough neighborhood he grew up in. Trial 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 Movant's rough upbringing and the neighborhood in which he grew up. Trial counsel did call several members of Movant's family. Movant's aunt testified about Movant's chaotic childhood, as did Movant's grandmother. Movant's uncle testified about the kind of neighborhood Movant grew up in. A

friend of Movant testified how violent the neighborhood was and how Movant changed after he was shot. Movant's probation officer discussed his familiarity with Pine Lawn and the fact that it is a violent and depressed neighborhood. All the witnesses who testified during mitigation at trial had testified previously in mitigation for Movant. One of the things trial counsel considered is how the witnesses testified the first time and what kind of testimony they were able to get from them. Then trial counsel would make a decision to call that witness in this case because counsel knew what the witnesses could say and how it might be helpful. Part of the reason trial counsel chose to recall these witnesses in mitigation was because they believed the witnesses did a good job previously. Additionally, counsel was attempting to prevent damaging evidence from coming out, such as Movant's gang affiliation or other criminal activity. Ms. Turlington's experience has been that putting on witnesses to show a defendant's upbringing and tough neighborhood he grew up in is sometimes successful in death penalty cases. It is not her first choice of mitigation evidence, but "that's sometimes what you have," and that's what the defense had in this case. (PCR tr. p. 177.)

Karen Kraft testified similarly, adding that the witnesses they chose to call in mitigation "didn't have any baggage," which was part of the consideration when choosing who to call. (PCR tr. p. 561.) Calling people during mitigation who were friends with Movant and in the same gang with Movant or had significant criminal history, such as Victor Johnson, Arnell "Smoke" Jackson, and George Wells, would open the door to aggravating evidence. Balancing the good versus the bad was an important consideration. The decisions that trial counsel made about who to call in mitigation were about who could provide the information helpful to the defense while limiting the amount of damage that could be done on cross examination.

As Ms. Turlington noted in the Leslie Addison PCR, "It's been my experience that the worst

possible aggravation to have to deal with is prior murder." At the time of the penalty phase of this trial, the jury had found Movant guilty of Todd Franklin's murder and was hearing evidence about his murder of Leslie Addison. As Ms. Turlington pointed out during the Leslie Addison PCR, "It is very, very, very difficult to get a good verdict in a case where the State's aggravating circumstance is the defendant has prior murder." Trial counsel also agreed during the Leslie Addison PCR that evidence of a difficult upbringing can be aggravating as well as mitigating. For example, some jurors may believe that they grew up in much the same way but did not become killers. And because the victims also grew up in similar neighborhoods, there was potential for jurors to acknowledge the victims grew up there but did not do anything to deserve being murdered.

Ordinarily, the choice of witnesses is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *Barton*, 432 S.W.3d at 750. This is because strategic choices made after thorough investigation of law and facts relevant to plausible opinions are virtually unchallengeable. *Id.* at 750-51. 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 749. "It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Id.* (internal quotations omitted). "In the real world containing real limitations of time and human resources, criminal defense counsel is given a heavy measure of deference in deciding what witnesses and evidence are worthy of pursuit." *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness in the penalty phase of trial, a defendant must show that (1) counsel knew or should have known of the existence of that witness, (2) the witness could be located through reasonable investigation, (3) the

witness would testify, and (4) the witness's testimony creates a reasonable probability that the defendant would not have been sentenced to death. *Barton*, 432 S.W.3d at 757.

Victor Johnson, George Wells, Arnell Jackson, and Kenneth Watkins are incarcerated felons with substantial criminal histories. Watkins, Jackson, and Wells are convicted murderers. None of them professed any personal knowledge of the murders of Leslie Addison or Todd Franklin. The four felons are associated with Movant to varying degrees.

Movant has failed to establish that counsel should have known of the existence of the four felons, as none of the three claimed to be particularly close to Movant, but were all childhood acquaintances or friends of Movant. There is no evidence that Movant provided the names of these three to his trial counsel. When counsel did contact Arnell "Smoke" Jackson, he told her he was not present on the night of the murder. He lied either when he spoke with Ms. Turlington or during his deposition testimony in this case. It is not required that trial counsel go out and find every single person who was ever affiliated or known by their client at every point in his life.

To the extent Johnson, Wells, Jackson and Watkins would have offered testimony about their personal experiences in Pine Lawn that did not involve Movant, that evidence would inadmissible as irrelevant and largely hearsay. To the extent these felons would have tried to testify to the general effects on youth of growing up in Pine Lawn, that testimony would be inadmissible as speculative, lacking foundation, and improper lay opinions. Even if such testimony had been admitted during the penalty phase of trial, Movant has not shown a reasonable probability that he would not have been sentenced to death. The evidence in this case was overwhelming and the aggravating evidence was damning, as Movant had the aggravating circumstances of the murder of Leslie Addison and multiple shootings.

Had these felons testified, it would have opened the door to substantial cross examination

about their prior convictions and affiliations with Movant. It would also have allowed the state to submit gang evidence and any other criminal activity conducted with Movant.

With respect to lay witnesses Sean Nichols and Elwyn Walls, neither of these witnesses had any personal knowledge regarding Movant, his character, his record, or the circumstances of his murders. Their testimony was largely based upon hearsay, opinion, and speculation. Their testimony did not directly relate to Movant. Whether Movant had similar experiences would be speculation. The possible effects on Movant as it relates to his crimes would be nothing more than speculation given his failure to testify. If 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.

The testimony of non-felon lay witnesses Tanesia Kirkman Clark, Lisa Thomas, and Willibea Blackburn must be considered in two ways. First, each witness spoke of their relationship with Movant to a certain degree. Their fondness for Movant and positive personal dealings with him could certainly be considered mitigating to an extent. However, the testimony of these additional witnesses would be cumulative to evidence adduced at trial. The jury was aware through other witnesses presented by trial counsel of Movant's upbringing, home life, schooling, and character as such evidence was presented to the jury during the testimony of his witnesses. The testimony was sufficient to have the Court submit the mitigating circumstances requested by Movant. Counsel cannot be held to be ineffective for failing to call witnesses who would only present cumulative testimony to that already presented.

Second, the testimony of these witnesses with regard to the gangs, drugs, violence, poverty, and other cultural problems in Pine Lawn runs afoul of experienced trial counsel's strategy in mitigation. An objection to much of their testimony being based upon hearsay, opinion, and

speculation is on point. The possible effects of the experiences of theses witnesses on Movant as it relates to his crimes would be nothing more than speculation given his failure to testify. If 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. The testimony of these witnesses under cross examination would lead to evidence a jury could consider to be more aggravating than mitigating.

Trial counsel considered all of these factors and made the reasonable decision to pursue a strategy of calling noncriminal lay witnesses who were not subject to substantial cross examination during the penalty phase. Trial counsel was still able to elicit information about the neighborhood Movant grew up in and argue it was a troublesome area by choosing to call Movant's family members, a friend, and probation officer—witnesses without significant baggage, like extensive criminal histories.

Movant has failed to establish that the listed witnesses would testify to relevant, noncumulative facts. Movant carries the burden of proof and has failed to show the witnesses' testimony create a reasonable probability that the defendant wound not have been sentenced to death. Therefore, the claims regarding the alleged failure to investigate and present evidence concerning sociological evidence of the role and impact of the Pine Lawn community and surrounding areas on Movant's developmental and social history are insufficient to support a finding of ineffective assistance of counsel. Point 8(K) is denied.

12. **Amended motion claim 8(L)** claims ineffective assistance of trial counsel for failure to obtain a FDG/PET brain scan for the penalty phase. Movant claims a PET (positron emission tomography) scan with F-18 deoxy glucose (FDG) should have been conducted as proposed by their retained radiology and brain imaging expert, Dr. David Preston, and that an expert such as Dr. Ruben

Gur should have been called to testify during the penalty phase of the third trial.

Movant underwent a structural MRI in October 2004, before his death penalty trials. An MRI is a type of neuroimaging. Structural MRIs look at structure and anatomy of the brain, as opposed to function. Movant's MRI was read by a radiologist to be "normal." Trial counsel sent the MRI scans or slides to Dr. David Preston, a medical doctor in Kansas. Dr. Preston sent a letter to the defense mitigation expert in November 2004, suggesting a brain FDG/PET be performed. Trial counsel decided not to have a PET scan performed prior to Movant's trials.

After the amended motion was filed, Movant underwent a PET scan in September 2015 in Wisconsin. A PET scan is another type of neuroimaging. It is a functional scan measuring relative metabolisms of glucose in the brain. PET scans do not show anatomy or structure of the brain, although the images resulting from a PET scan may look anatomical.

Dr. Andrew Newberg, a medical doctor, read the PET scan and sent Dr. Gur a four sentence email stating his findings. Dr. Newberg did not testify at any of the trials or at the post-conviction hearings.

Dr. Gur is a clinical psychologist and professor and did not testify at any of Movant's trials. Dr. Gur did testify at the post-conviction hearings. Using Dr. Newberg's email and the actual PET scan data provided to him, including the thirty colorful images generated by Movant's PET scan, Dr. Gur compared Movant's test results against a "normal" database and made several conclusions. Dr. Gur did not review or conduct an MRI or neuropsychological evaluation in reaching his conclusions. Dr. Gur did not use Dr. Gelbort's report in creating his own. Dr. Gur did receive Dr. Gelbort's report immediately before the Leslie Addison PCR and believed Dr. Gelbort's overall findings were consistent with his own. Dr. Gur never talked to Movant, never completed a clinical evaluation of Movant, did not review the testimony of Movant's trials, did not talk to any witnesses connected

with Movant's trials, and did not review any police reports or evidence from the trials. Dr. Gur similarly did not personally review any medical records, incarceration records, or education records of Movant.

Dr. Gur concluded Movant had low metabolism (hypometabolism) in his amygdala, hippocampus, corpus callosum, globus pallidus, pons, and temporal pole, and that Movant had a high resting metabolism (hypermetabolism) in his cortical regions, including his frontal cortex, parietal cortex, and temporal cortex. Dr. Gur's overarching conclusion was that Movant's PET scan indicated some differences in brain metabolism that could be consistent with different types of brain damage, and that there are behavioral traits associated with parts of the brain with that different metabolism. Dr. Gur believed these metabolisms could lead to severe emotional dysregulation; that when Movant is challenged, his cortex could possibly become deactivated; and that when Movant's amygdala becomes activated, his frontal lobe regions could possibly be unable to exercise control. Dr. Gur believed Movant was vulnerable to a loss of control when challenged. About his opinions regarding Movant's metabolisms and potential resulting brain activity and behaviors, Dr. Gur testified during the Leslie Addison PCR that "more likely than not, what I said is true." During this Todd Franklin PCR, Dr. Gur was similarly careful in couching his conclusions in terms of what was "probably" true and what was "possible," rather than saying something was certain or definite.

Dr. Gur believed the etiology of these so-called abnormalities was difficult to determine and would require clinical evaluation and integration with history, which he did not do. Dr. Gur further stated during the Leslie Addison PCR these alleged abnormalities would be consistent with several causes, including a tumor, traumatic brain injury, birth complications, fetal alcohol syndrome, seizure disorder, traumatic experience during childhood, or a genetic disorder. During this Todd

Franklin PCR, Dr. Gur clarified his findings were probably not from a tumor, because there was in fact no tumor discovered.

Dr. Gur agreed that Movant's PET profile was consistent with a number of neurological states both normal and pathological, and agreed that no PET scan pattern in and of itself can indicate a psychiatric problem. He agreed that in cases where an opinion is offered predominantly on the quantitative analysis of neuropsychological and neuroimaging data, opinions may not be offered linking such findings to specific behaviors, nor should the expert offer, let alone dispute, a specific diagnosis reached by personal clinical examinations. Dr. Gur was not opining that a certain brain metabolism caused Movant to commit murder.

Dr. Gur has been analyzing PET scans for legal cases since around 1990, and has testified in multiple different jurisdictions. He estimated during the Leslie Addison PCR that he has performed 85-115 forensic evaluations in criminal cases where someone had either been charged with or convicted of a crime, and almost all of those were capital cases. It does not appear Dr. Gur has ever performed a forensic evaluation in a capital case on behalf of the State or prosecution.

After Dr. Gur reviewed the PET scan information, he created "z-scores" and charted those z-scores to create Figure 2 in his report. Dr. Gur created the z-score by taking Movant's actual scan and applying it to 39 different regions of the brain. A computer generated the numbers for each region, and the numbers indicated the metabolic rates for each region. To compare regional differences, each region was divided by the value of the whole brain, resulting in the average metabolism in Movant's brain for that particular region. Those average metabolism were translated into z-scores. The z-scores were plotted on the vertical axis of Figure 2, with the regions of the brain on the horizontal axis. A z-score of "0" is considered average by Dr. Gur, and each z-score above and below zero corresponds with the standard deviation from average. So a z-score of 1 means one

standard deviation above "normal." Dr. Gur has decided to call "abnormal" anything above or below 1 standard deviation from "normal." No information was provided as to why Dr. Gur picked an absolute value of 1 versus some other number.

The "normal" database by which Dr. Gur compared Movant's z-scores was created at the University of Pennsylvania in the 1990s or 2000s. The database is comprised of sixteen people, eight men and eight women, age range of twenty to fifty years old. Dr. Gur was not sure how many of these sixteen people were African American (like Movant), though he thought it was probably about thirty percent. At the time of the Leslie Addison PCR, Dr. Gur was not sure if any of these people were in their thirties (like Movant at the time of his scan), but at the time of this Todd Franklin PCR, he believed that "most of them" were in their mid-thirties (PCR tr. p. 403). As Dr. Gur stated during the Leslie Addison PCR, the scanner used on the people in the "normal" database was a "new Penn scanner," which was "just about the same" as the scanner used on Movant. Dr. Gur testified to this although he does not know precisely which scanner was used on the persons in the database and admitted that scanners can come from different vendors, have different models, and use different software. He believes the software was "probably" the same. Dr. Gur acknowledged during the Leslie Addison PCR that different mathematical correction procedures lead to systematic differences in the resulting images, making images obtained with different correction procedures not directly comparable. Dr. Gur does not know if the "normal" database used different mathematical correction procedures than those used on Movant, and acknowledged any differences may appear especially in the occipital and cerebellar regions. What was done to account for the fact that the scan of Movant was done on a different physical scanner than the scans used to create the database? According to Dr. Gur, nothing.

As discussed during the Leslie Addison PCR, Dr. Gur attended a conference in December 2012 at Emory University in Atlanta, Georgia, which consisted of experts on neuroimaging discussing the appropriateness of using neuroimages in courtrooms and establishing ethical guidelines for doing so. A consensus paper was published as a result of that conference, to which Dr. Gur was a signatory. Dr. Gur acknowledged that both structural and functional neuroimaging remains controversial in several common forensic settings, and the specific use of functional imaging for making inferences about human behavior or motivation is particularly problematic. A PET scan is functional neuroimaging. Dr. Gur agreed that using a PET scan to make the following hypotheses would be making inferences about human behavior or motivation: (a) a subject may become hyperactive in the presence of a task or challenge, (b) a subject may misinterpret danger signals and when excited, will issue false alarms, and (c) a subject would be unable to exercise control because his "thinking brain" is already operating at full capacity. These three conclusions are ones that Dr. Gur's report opine may be the case for Movant.

Dr. Gur agreed that experts should avoid drawing conclusions about specific behaviors based on the imaging data alone.

Dr. Gur acknowledged that a PET scan shows the activity in one's brain on the day and at the time the scan is completed. The PET scan on Movant occurred approximately 13 years after Movant murdered Todd Franklin and 12 years after Movant murdered Leslie Addison. Despite this, Dr. Gur opined during the Leslie Addison PCR that, "Probably what we see now is very close to what we would've seen 15 years ago." During the Leslie Addison PCR, Dr. Gur testified that between the ages of 25 and 55, the brain metabolism are "pretty much stable." During this Todd Franklin PCR, Dr. Gur said that in terms of PET, "the values become pretty stable" at the age of 20 and thereafter. (PCR tr. p. 404.) Dr. Gur agrees that the 2015 PET scan of Movant does not show the actual activity

in Movant's brain when he shot and killed Todd Franklin in 2002 or when he shot and killed Leslie Addison in 2003. Contradictorily, Dr. Gur further agreed during the Leslie Addison PCR that the extent of normal variability must be appreciated during scan interpretation. Substantial variability may be noted between normal individuals and between scans of a single subject obtained at different times. In other words: scans of people can be different over time.

Dr. Gur testified that traumatic brain injury would explain the metabolic rates he claims exist in the PET scan of Movant. But Dr. Gur has no idea if Movant ever actually suffered brain injury, either pre- or post-scan. Dr. Gur did not review Movant's prison records and did not know whether Movant had been in fights in prison, for example. In keeping with his tendency to testify to possibilities instead of certainties, Dr. Gur speculated during the Leslie Addison PCR that Movant's fights in prison may have resulted in blows to the head, as that is what typically happens in fights.

Dr. Gur allowed that certain medications can affect cerebral metabolism and therefore affect PET scan results. One of those class of medications are corticosteroids, though Dr. Gur said those would have "very subtle" effects. Dr. Gur was not aware that prison records indicate Movant suffers from asthma, had prescriptions in prison for multiple different corticosteroids, and that one of those steroids was actually distributed to Movant in the months before, during, and after the PET scan.

During the Leslie Addison PCR, Dr. Gur conceded that brain imaging findings have limited application to the primary question of the court in determining intent, and the practice of performing imaging studies on a defendant in order to shed light on brain function or state of mind at the time of a prior criminal act is problematic. Currently, brain imaging methods cannot readily determine whether a defendant knew right from wrong or maintained criminal intent at the time of the criminal act. Dr. Gur admitted that one cannot use a PET scan to predict specific behavior, and cannot use a PET scan to determine what behaviors happened in the past.

Karen Kraft testified that if the trial team had had a PET scan completed, it could have come back "normal" and that could have done more harm to the defense. There was no way to have a PET scan completed without the prosecution finding out. Ms. Turlington agreed with this and acknowledged that the PET scans being done in 2007 are likely different than the scans being completed currently due to advancements in technology. At the time of the 2007 trial, Ms. Turlington said that Dr. Preston "might have" been willing to forensically interpret the PET scan, but she does not know for sure. Her experience with local universities is that no one from Washington University in St. Louis or St. Louis University has been willing to come in and forensically give an opinion regarding PET scans. During the Leslie Addison PCR, Ms. Turlington testified that PET scans at the time of Movant's trials from 2004-2008 were not very prevalent, and it was her understanding that "even today [January 2017], PET scans are not used forensically as much as other instruments." At the time of Movant's trials, Ms. Kraft was not aware of experts who would forensically interpret a PET scan.

The conflict trial counsel faced was that the MRI was normal, and if a PET scan were completed, it could have shown a normal brain, too, which would further undercut their mitigation evidence. Regardless of what the PET scan might show, if trial counsel put on evidence of the PET scan, it would also open up cross examination and rebuttal evidence about the normal MRI. All of this was avoided by not presenting either Dr. Gelbort or Dr. Gur.

During the Leslie Addison PCR, Ms. Turlington explained the value that jurors place on scans such as MRIs and PET scans versus neuropsychological testing: if a scan showed that the brain was normal, "it's something that is definitely not helpful because it's a lot easier for lay people to place confidence in a scan such that they might have when they go to the doctor that shows something as opposed to a scan that shows normal, but then you're saying, well, but this paper test

says his brain isn't normal. [I]f you do a scan and it shows that it's—there is no structural damage or the scan doesn't show any damage, the neuro psych testing can still be valid, but it makes it very easy for the prosecutor to argue that, it's just mumbo-jumbo. You should just not pay any attention to that neuro psych testing because here we have a picture of his brain and it's fine, so we [trial counsel] tended to proceed cautiously with imaging for that reason."

Movant additionally argued that Dr. Gur's testimony should have been presented during the guilt phase, though that claim did not appear in the Amended Motion and therefore cannot be properly brought up now. Even so, such testimony would not have been admissible during the guilt phase. Movant has not offered testimony that using a PET scan to make the kinds of conclusions Dr. Gur makes about Movant's potential behaviors had gained acceptance in the scientific community in 2007. Nor is there sufficient information in the record to conclude that his testimony is supported by sufficient facts or data, the product of reliable principles and methods, or that Dr. Gur had reliably applied the principles and methods to the facts of the case. Under cross examination, Dr. Gur made a series of statements calling his own conclusions into question. At most, he could only make statements about what "may" occur in Movant's brain, and the level of professional certainty he expressed was that his opinions were "more likely than not" true.

To prevail on a claim of ineffective assistance of counsel for failure to locate and call an expert witness, the movant must show that (1) such an expert witness existed at the time of trial, (2) the expert witness could be located through reasonable investigation, and (3) the expert witness's testimony would have benefited the defense. *Zink v. State*, 278 S.W.3d 170, 179 (Mo. banc 2009). Counsel's trial strategy is not a basis for ineffectiveness. *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009). The failure to develop or introduce cumulative evidence does not constitute ineffective assistance of counsel. *McLaughlin*, 378 S.W.3d at 343.

As to the penalty phase, when it comes to mitigating evidence, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Hutchison v. State,* 150 S.W.3d 292, 304 (Mo. banc 2004). "[T]he question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death." *Tennard v. Dretke,* 542 U. S. 274, 287 (2004) (internal quotations omitted).

To establish ineffective assistance of counsel, the movant must do more than demonstrate there was evidence that existed that was not presented. *Zink*, 278 S.W.3d at 181. Counsel has limited time and resources, and if there is a strategy that does not look promising, he or she may choose not to expend his limited resources to that end. *Id.* This is a reasonable strategic decision. *Id.* Additionally, it is highly doubtful that evidence of a defendant's particular brain metabolisms would be considered mitigating by a jury. *See, e.g., Schneider v. Delo,* 85 F.3d 335, 340-41 (8th Cir. 1996) (no prejudice in attorney failing to admit evidence of defendant's attention-deficit disorder and insomnia in penalty phase when cognitive abilities were normal and there was no evidence of schizophrenia or bipolar disorder); *Whitmore v. Lockhart*, 8 F.3d 614, 617 (8th Cir. 1993) (attorney not ineffective for failing to introduce evidence of defendant's anti-social personality disorder in penalty phase when he suffered no mental impairment that would negate his responsibility); and *Guinan v. Armontrout*, 909 F.2d 1224, 1229 (8th Cir. 1990) (highly doubtful that evidence of defendant's anti-social personality disorder would be considered mitigating by jury).

It does not seem likely that trial counsel could have found an expert in 2007 to interpret the PET scan forensically. Trial counsel's decision not to order a PET scan in this case was reasonable and strategic in nature. They decided not to risk undermining their plea for mercy by pursuing a scan that could show Movant's brain was "normal." Trial counsel chose not to open the door to cross examination or rebuttal evidence about the normal MRI. Additionally, had trial counsel chosen to

call both Dr. Gur and Dr. Gelbort, there was a real risk of a normal MRI and a normal PET scan undercutting the neuropsychological testing. Trial counsel made the decision with full knowledge of the possible results and decided not to pursue it. This means the decision was strategic in nature and entitled to near complete deference under *Strickland*.

Had Dr. Gur and Dr. Gelbort both been called, Dr. Gur's testimony would have been cumulative to Dr. Gelbort's insofar as Dr. Gur opined Movant might suffer impulse control problems. Regardless of whether Dr. Gelbort testified, Dr. Gur was susceptible to significant, damaging cross examination. He could easily be portrayed as a hired gun with his history of never completing an evaluation for the prosecution. Additionally, the bases of his conclusions were questionable. Dr. Gur apparently arbitrarily decided that the "normal" range was plus or minus one from the standard deviation, and the normal database was comprised of only sixteen people. There was no reassurance that the scans of the so-called "normal" people were done on machines sufficiently similar to that used to scan Movant, and no testimony was presented as to how it was determined the "normal" population was, in fact, normal. Dr. Gur did not account for Movant's possible ingestion of medications that Dr. Gur admitted affected brain metabolism, even if the effect was "subtle," and did not know if Movant had suffered a head injury at any point in his life when traumatic brain injury can also affect brain metabolism.

The conclusions themselves were phrased as generalities or possibilities, such as this effect may occur if Movant was challenged, or that the scan of Movant's brain on a particular date was probably the same as it would have been on a different date. Dr. Gur agreed that Movant's PET profile was consistent with a number of neurological states both normal and pathological.

Also damaging to the credibility of his conclusions was the consensus paper, to which Dr. Gur was a signatory, generated after the conference at Emory University. Dr. Gur acknowledged that

both structural and functional neuroimaging remains controversial in several common forensic settings, and the specific use of functional imaging for making inferences about human behavior or motivation is particularly problematic. Then Dr. Gur proceeded to make conclusions about Movant's behavior.

Dr. Gur further admitted that currently, brain imaging methods cannot readily determine whether a defendant knew right from wrong or maintained criminal intent at the time of the criminal act. This would have been true in 2007 as well. Dr. Gur admitted that one cannot use a PET scan to predict specific behavior, and cannot use a PET scan to determine what behaviors happened in the past.

During the penalty phase, the jury found beyond a reasonable doubt each of the five statutory aggravating circumstances based on Movant's previous serious assaultive convictions and depravity of mind. Eleven witnesses testified on the State's behalf in the penalty phase. The aggravating evidence presented consisted of the facts of Movant's other crimes, the murder of Leslie Addison, his various times on probation, his flight from Missouri, and the effect on Todd Franklin's family of losing him.

Eight witnesses testified on Movant's behalf in the penalty phase (seven gave live testimony and the testimony of the eighth was read into the record). The mitigating evidence included testimony from lay witnesses including Movant's own family members who knew Movant and testified he had positive qualities. They also testified about the circumstances surrounding Movant's childhood and the crime and violence in Pine Lawn.

During the trial, there was overwhelming evidence of deliberation in Movant's murder of Todd Franklin. Douglas fired a gun in the presence of Todd Franklin, who fled. Movant and Douglas chased him. There, while Todd Franklin stood in a yard with multiple eyewitnesses in the

area, Douglas shot Todd Franklin and he fell to the ground. Then Movant, getting the gun from Douglas, approached Todd Franklin, kicked him, uttered derogatory epithets about Todd not being dead yet, and shot him at least two more times. Todd Franklin died from his wounds.

In light of the evidence, 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. First, the mitigating value of the PET scan evidence is limited because it is highly doubtful that testimony about the possible outcomes of varying metabolisms in the brain would be considered mitigation by the jury, particularly when there was no testimony that the metabolisms would cause Movant to commit murder. Additionally, the aggravating factors in this case are very weighty. Movant chased Todd Franklin and proceeded to shoot him after he was already shot and laying on the ground. The jury also heard how Movant stood over Leslie Addison and pulled the trigger repeatedly as she begged for her life. Movant has additional violent priors, including assaults. There is no reasonable probability that the PET scan evidence would have resulted in the jury returning a sentence of life.

Movant has failed to show trial counsel were deficient in declining a PET scan and has failed to show Movant was prejudiced. Point 8(L) is denied.

13. **Amended motion claim 8(M)** claims ineffective assistance of trial counsel for failure to investigate and rebut statutory aggravators of prior serious assaultive convictions for first degree assault and armed criminal action against Daryl Bryant and Jermaine Burns during the penalty phase. Specifically, Movant claims trial counsel should have submitted the medical records of Daryl Bryant to argue the injury sustained was not serious, should have called an investigator such as Peron "Butch" Johnson to testify as to alleged inconsistencies with the state's evidence in the underlying assault and armed criminal action matters, and should have called Michael Douglas to bring forth evidence that the shooter in the Bryant and Burns matter was not Movant, but was Kyle Dismukes.

It bears noting that the jury found five statutory aggravators. Separate from the assault case, they also found depravity of mind.

Turning first to the claim that trial counsel should have called Michael Douglas at trial, as alleged on page 136 of Movant's Amended Motion, this court points out that trial counsel did, in fact, call Michael Douglas at trial. In other portions of the Amended Motion, Movant claims that calling Douglas was error and that not impeaching Douglas with a particular document was error. Movant apparently cannot decide if calling Michael Douglas was a good idea or not. The "evidence" that Douglas could have provided as to the assaults and armed criminal actions was that Kyle Dismukes reportedly told Douglas that he (Dismukes) shot Bryant. This sounds like hearsay.

Concerning Butch Johnson's testimony, the deposition of Butch Johnson was submitted by Movant, and this Court took judicial notice of both Movant's underlying assault trial with Burns and Bryant, as well as the PCR for that case. Butch Johnson was employed by the Public Defender's office. This Court has reviewed the findings issued by Judge Ross after an evidentiary hearing as well as memorandum opinion by the Missouri Court of Appeals, Eastern District, found at *McFadden v. State*, 349 S.W.3d 449 (Mo. App. 2011). Mr. Johnson testified before Judge Ross in the evidentiary hearing on February 23-24, 2009, along with other witnesses. In his findings filed on June 20, 2010, Judge Ross found the testimony of Mr. Johnson in regards to his examination of the crime scene photographs and an experiment he conducted to be unreliable and refuted by the physical evidence in the case. This Court has also reviewed the findings in Movant's PCR for his murder of Leslie Addison. This Court concurs with the findings of Judge Ross and Judge DePriest. Mr. Johnson does not possess the qualifications necessary to give any opinions regarding the evidence in the assault case. His observations, conclusions, and opinions were based on personal speculation rather than physical evidence. Mr. Johnson's lack of education and training do not

qualify him to render his testimony. His visit to the crime scene five years after the assaults took place, his reliance on a single photograph taken of glass on the street, and his failure to interview actual witnesses to the shootings or crime scene causes his testimony to be unreliable.

Sharon Turlington agreed that the State could have presented testimony of live witnesses instead of paper copies of prior convictions to prove up Movant's priors for assault and armed criminal action, and that live testimony probably would have a more dramatic effect than paper records. There was also the concern that live testimony could just highlight another instance of Movant going around shooting people and blaming it on Kyle Dismukes. As Ms. Turlington put it,

> [W]e put on that Kyle Dismukes was the shooter in this case in the guilt phase. I felt that putting on evidence that Kyle Dismukes did another case that [Movant] supposedly did is actually aggravating. It makes it look like Vincent McFadden just blames everything on someone else, so regardless of anything else, that would have been enough for me to say we're done, because that is not believable, and I think highly aggravating if you're a juror to think that this guy comes into this court and blames someone else for everything he has ever done.

(PCR tr. p. 197.) Ms. Turlington did not believe that the information she had suggesting Kyle Dismukes was the shooter in the assault and armed criminal action matter—the information being that Movant had so testified in that trial—was enough to present or to disprove the conviction. Additionally, trial counsel had received some investigative work done by Butch Johnson, and that did not change their trial strategy in terms of whether and how to contest the assault and armed criminal action prior convictions.

Karen Kraft agreed that live witnesses testifying about prior convictions could be more damaging than the paper certified copies alone, and that she had concerns that presenting information that claimed Kyle Dismukes was responsible for the shootings of Bryant and Burns may do the defense more harm than good.

Movant is not persuasive in claiming that, if the jury had received the medical records of

Bryant, their decision as to death would have been different. Movant suggests that the medical records would have challenged the jury's alleged belief that Bryant suffered serious physical injury. Of course, even if the jury had this belief, the determination of whether a prior offense is seriously assaultive is a question of law for the court to decide. *State v. McFadden*, 369 S.W.3d 727, 744 (Mo. banc 2012). The information in the medical records actually does not prove the injury was not serious. Submitting the records means the defense would be submitting further information concerning the victim's medical condition that could have prompted live testimony or further information presented by the State in a more graphic, explicit way than by simply presenting paper copies of a prior conviction. It also does not take away from the fact that Movant was actually convicted of four separate offenses of assault first, assault first, armed criminal action, and armed criminal action. It does not detract from a theme that Movant is a repeat shooter of people, and would do nothing to undermine the evidence concerning depravity of mind.

Movant has not shown it was unreasonable trial strategy for trial counsel to handle Movant's prior convictions the way they did. Given 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. Point 8(M) is denied.

14. **Amended motion claim 8(N)** claims ineffective assistance of trial counsel for failure to investigate and rebut evidence of non-statutory aggravating evidence regarding the murder of Leslie Addison during the penalty phase. Specifically, Movant claims trial counsel should have called Brandon Travis, Theresa Jones, Arnell "Smoke" Jackson, Maggie Jones, and Margaret Walsh, all in an effort to impeach the testimony of Eva Addison, and should have challenged the evidence of lighting and distances at the Leslie Addison crime scene.

To prevail on a claim of ineffective assistance of counsel for failing to call a witness, Movant must show that: (1) trial counsel knew or should have known of the existence of the witness, (2) the witness could be located through reasonable investigation, (3) the witness would testify, and (4) the witness's testimony would have produced a viable defense. *Hutchison*, 150 S.W.3d at 304. Movant has satisfied the first three requirements for some of the listed witnesses. But none of these witnesses' testimony would have produced a viable defense.

Theresa Jones

Theresa Jones did not testify at the PCR hearing and no information concerning her was presented by Movant. Allegations in a post-conviction motion are not self-proving and Movant bears the burden of proving grounds for relief by a preponderance of the evidence. *Malady*, 762 S.W.2d at 443. Movant's failure to present evidence at a hearing to provide factual support for a claim in his or her post-conviction motion constitutes abandonment of that claim. *Id.* Claims regarding Theresa Jones are denied as abandoned.

Brandon Travis

Brandon Travis did not appear for the PCR hearing. He was deposed prior to trial, where he admitted taking Movant to Leslie Addison's house prior to the murder of her, putting Movant at the crime scene. Travis further admitted Movant got into an argument with Leslie Addison prior to her murder. Travis claimed he let Movant out of the car and did not know where Movant went, meaning Travis could not provide any testimony that Movant was not the shooter of Leslie Addison. Trial counsel Sharon Turlington agreed this information was not helpful to the defense, and she did not "see any benefit to calling Brandon Travis whatsoever, really." (PCR tr. p. 202.) Ms. Turlington acknowledged that Travis would have been subject to cross examination if he had taken the stand, meaning information about Movant's gang affiliation and crimes committed together could have

come out. Karen Kraft testified similarly.

Trial counsel made a strategic decision not to call Brandon Travis to the stand, it was a decision that was not unreasonable, and their decision did not constitute ineffective assistance of counsel.

Arnell "Smoke" Jackson

Jackson's video deposition was submitted for consideration at this PCR hearing. The second trial concerning the death of Todd Franklin occurred in 2007, and Movant's trial counsel contacted Jackson in March of 2008, leading to the conclusion that Movant did not provide his trial counsel with Jackson's name until after the second Todd Franklin trial. Sharon Turlington testified that Jackson had nothing helpful or relevant to say. If Jackson had been called, his testimony would put Movant at the scene of the Leslie Addison homicide, and possibly it would have been elicited that Movant and Leslie Addison got into an argument right before her murder. It also would have opened the door to cross examination about Jackson being in prison for murder himself.

Karen Kraft agreed at the PCR hearing that Jackson was not someone the defense wanted to call because of the baggage he carried and that he did not have any useful information. Jackson was in the same gang as Movant, was friends with Movant, and was in prison for murder at the time of the trial.

To prevail on a claim of ineffective assistance of counsel for failing to call a witness, step one is a showing that trial counsel knew or should have known of the existence of the witness. That does not appear to have been the case with Jackson. At any rate, nothing suggests Jackson would have produced a viable defense. Counsel made a strategic decision not to call Jackson as a witness, and Movant has failed to show that decision was unreasonable.

Maggie Jones

Maggie Jones did not testify at the PCR hearing, though she did participate in a pretrial deposition. She was at her home on Blakemore Avenue the night of Leslie Addison's murder watching television in her bedroom. While Ms. Jones testified that she did not hear--nor did Eva Addison tell her of--an argument with Movant in front of the home, she did speak to a very emotional Eva Addison who related that she saw Movant shoot Leslie several times.

Sharon Turlington testified at the PCR hearing that while she understands Maggie Jones's testimony impeaches Eva Addison's testimony about there being an argument, "the real gist of Eva's testimony was more that I saw [Movant] shooting my sister and that this doesn't really impeach that part of her testimony, and I think that's the reason we didn't call Maggie Jones." (PCR tr. p. 119.)

Karen Kraft testified that Jones's testimony corroborates Eva Addison's testimony in terms of Eva being emotional right after the murder, and claiming Movant had shot her sister. Ms. Kraft agreed that hearing about Eva's emotional statements to Ms. Jones immediately after the murder could be much stronger than the minor impeachment about whether Ms. Jones heard an argument.

There was good and bad impact that could come from the testimony of Maggie Jones, and trial counsel took that into consideration when deciding not to call Ms. Jones as a witness. Trial counsel's strategy was not ineffective assistance of counsel. Ms. Jones's testimony would not have changed the outcome of this trial.

Margaret Walsh

Margaret Walsh's previous testimony at the PCR concerning Leslie Addison was submitted in this PCR. Movant asserts that Ms. Walsh should have been called to testify to the lack of blood on his clothing he was wearing when he was arrested two days after the homicide. While trial counsel acknowledged that this evidence was consistent with their defense, they admitted that it

would only be minor impeachment at best as they could not prove that this was the clothing Movant was wearing at the time of the murder. It also corroborated Eva Addison's testimony because the clothing matched the description Eva Addison provided to police. The testimony of this witness would not have provided Movant with a viable defense, would not have changed the outcome of trial, and counsel's reasons for not calling her did not constitute ineffective assistance of counsel.

Lighting and Distances

Movant also alleges failure to challenge the evidence regarding lighting and distances at the Leslie Addison crime scene, specifically mentioning the testimony of Officer Jeff Hunnius and Stacey Stevenson. Movant offered the testimony of Officer Hunnius from the prior PCR concerning Leslie Addison. No testimony of Stacey Stevenson was offered.

During the penalty phase of the trial at issue here, Officer Hunnius testified about the crime scene and lighting in the area where Leslie Addison was found. He testified that it was dark, but there were lights on the front of the elementary school across the street, and that those lights lit up that side of the street. Stacy Stevenson testified at trial about what he saw and heard the night Movant murdered Leslie Addison. He was cross examined about the lighting and distances during trial and the limitations of what exactly he could see. His testimony was consistent with that of Eva Addison's. Eva Addison testified about the contacts Movant had with her and her sisters before coming back to murder Leslie Addison. Eva testified about what she saw, when she saw it, and how she saw it. She was cross examined about her ability to witness the murder despite being behind bushes, about alleged inconsistencies between her testimony versus previous trials and deposition, and about her continued conversations with Movant after he murdered her sister. Eva Addison was consistent about what Movant said and what he did when he murdered Leslie Addison.

Karen Kraft and Sharon Turlington testified they each went out to the scene of the Leslie

Addison homicide several times, as did an investigator with their office. Sharon Turlington recalled during her testimony at the Leslie Addison PCR that she sent someone from the defense team to the scene at night. Karen Kraft testified that she determined Eva Addison could have seen what she said she saw. Nobody from the investigative team ever provided evidence or information that Eva Addison would not have been able to witness what she said she saw.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691. Defendant must establish that the witnesses or evidence could have been located through reasonable investigation; they would have testified if called; and their testimony would have provided a viable defense. *Hogshooter v. State,* 681 S.W.2d 20, 21 (Mo. App. 1984). Mere failure to impeach a witness does not entitle Movant to relief on a claim of ineffective assistance of counsel. The court presumes that counsel's decision not to impeach a witness is a matter of trial strategy. In proving that counsel was ineffective for failing to impeach a witness, a defendant has the burden of showing that the impeachment would have provided him with a defense or would have changed the outcome of the trial, and he must also overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. *Barton v. State*, 432 S.W.3d 741, 750 (Mo. banc 2014).

Counsel did investigate the scene of the crime, including the distances and lighting involved. Trial counsel personally visited the scene multiple times and sent someone there at night to view the area. Trial counsel believed that it was possible for Eva Addison to have witnessed the murder as she testified to during the trials. Despite this belief, trial counsel did cross-examine multiple witnesses on the lighting and distance. Counsel did conduct reasonable investigation into the lighting and distances at the scene and made reasonable strategic decision on how to use that information at trial. The claims regarding the alleged failure to challenge evidence of lighting and

distance are insufficient to support a finding of ineffective assistance of counsel. Point denied.

15. **Amended motion claim 8(O)** claims ineffective assistance of trial counsel for failure to rebut the good character evidence of the victim, Todd Franklin, during the penalty phase. In particular, Movant claims trial counsel should have presented evidence that Todd Franklin was a drug user and seller, an enforcer for a violent drug dealer, and had pled guilty to drug distribution. Movant states Tanesia Kirkman and Audrey Brooks could have testified about Todd Franklin's character.

Audrey Brooks did not appear to testify at the PCR hearing and no testimony of hers was presented. Claims regarding Audrey Brooks are deemed abandoned.

Tanesia Kirkman Clark was deposed over the phone in June 2018 and that deposition has been provided to the court. Ms. Kirkman Clark testified that Todd Franklin was nice, respectable, liked to make people laugh, and was "a good kid" to her. She also stated he sold drugs and was in a gang. Ms. Kirkman Clark further testified she was "pretty close" to Movant and Movant was quiet and funny. She agreed that Movant also sold drugs and was in a gang.

The fact that the victim Todd Franklin had drugs on his person at the time of his death was brought out at trial, and defense counsel used that when cross examining witnesses during the penalty phase and during closing argument. During the penalty phase, the jury had already found Movant guilty of murdering Todd Franklin. PCR counsel offered evidence that Todd Franklin pled guilty to the felony of trafficking drugs, second degree, and received a suspended imposition of sentence. This offense occurred when Todd Franklin was seventeen years old, and he successfully completed his probation. Karen Kraft agreed that attacking the victim is a concern when counsel is asking the jury for mercy for Movant. Sharon Turlington acknowledged that it is possible the jury may not have appreciated them attacking the character of the victim.

The existence of Todd Franklin's prior plea of guilty does not in any way provide a defense to Movant's murdering him. The attack was brazen, vicious, and there was overwhelming evidence of guilt. Nothing suggested, even remotely, that Todd Franklin's past probation had anything to do with Movant standing over him and shooting him repeatedly. Additionally, the evidence presented in aggravation—that Movant had multiple prior serious assaultive convictions, that the crime involved depravity of mind, the murder of Leslie Addison—was not going to be outweighed with the added information that Todd Franklin had pled guilty in his past. As Ms. Turlington noted in the PCR for the Leslie Addison case, it has been her experience that the worst possible aggravation to have to deal with is another murder, which fact is not changed by Todd Franklin's probation as a teenager. Additionally, to the extent that the victim's drug affiliation was in any way persuasive, Todd Franklin having drugs on him at the time of his murder was elicited and argued. Ms. Kirkman Clark's testimony would also have had no effect on the verdict, as the information she provided regarding Todd Franklin's reputation was both positive and negative, and fairly mundane at that. Additionally, the cross examination of Ms. Kirkman Clark could have revealed Movant's own drug history and gang affiliation, which defense counsel went to pains to avoid.

Movant has failed to show that his attorneys did not exercise the level of skill and diligence that reasonably competent counsel would exercise in a similar situation, and has failed to show that this prejudiced him.

16. **Amended motion claim 8(P)** claims ineffective assistance of trial counsel for failure to object to allegedly improper penalty phase arguments. This would seem to be included in the claim in the *Pro Se* PCR motion of "Ineffective assistance of counsel because trial counsel failed to object to the prosecution'simproper (sic) statments (sic)." Movant included many specific quotes in his Amended Motion, and all of those have been considered by this court although all of them are not

specifically recounted in this Order.

It appears that the majority of Movant's Amended Motion simply copied and pasted what was argued on direct appeal in the Appellant's Brief. There is one small paragraph on page 131 of the Appellant's Brief that is not included in the Amended Motion. There is one section of the Amended Motion that is not in the Appellant's Brief: the part on pages 168-69 of the Amended Motion where the Movant claims the prosecutor urged the jurors to weigh the victim's life against Movant's by indicating Todd Franklin did not have a father in his life, that he worked and was trying to do well and was nonviolent, but that Movant was not.

Karen Kraft gave the closing argument during the penalty phase and she objected multiple times to the State's penalty phase closing. Most were sustained; some were overruled. Ms. Kraft testified during the PCR hearing to her training and experience in defending death penalty cases, including the fact that she has given many death penalty closing arguments. Ms. Kraft is familiar with the issues in closing arguments and knows attorneys are given substantial latitude in closing. Ms. Kraft agreed whether to object during closing is a matter of trial strategy, and part of that strategy is to object when she thinks an objection may do the defense some good.

In upholding the Movant's conviction and sentencing, the Supreme Court held that none of the arguments in the penalty phase closing were erroneous. *State v. McFadden*, 369 S.W.3d 727, 750-52 (Mo. banc 2012). The Court found that during closing argument, the State may discuss the need for strong law enforcement, the prevalence of crime in the community, and that the conviction of the defendant is part of the jury's duty to uphold the law and prevent crime. *Id.* at 750. Improper personalization is established when the State suggests that the defendant poses a personal danger to the jurors or their families, which was not the case here. *Id.* Additionally, the State may express its opinion that there was no evidence of mitigation and that the death penalty should be imposed, which

was proper. *Id.* at 750-51. The Court further found that victim impact evidence and related argument about the impact of the crime upon the victim and victim's family is permissible, and the State did not comment that the victim's family deserved retribution in the form of demanding the death penalty, but rather explained that as members of civilized society we engage in preserving the due process rights of a defendant. *Id.* at 751. As to the allegedly emotional statements, the Court found that the State argued inferences from the evidence presented in this case, which included emotionally charged facts. *Id.* 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. *Id.* Regarding the allegation that the State converted mitigating circumstances into aggravating circumstances, the Supreme Court found that the State's closing argument attempted to demonstrate to the jury that Movant's behavior was not so unusual to be considered a mitigating circumstance, and that the State is free to comment on the evidence and the credibility of the defendant's case. *Id.* at 752. Counsel may even belittle and point to the improbability and untruthfulness of specific evidence. *Id.* The State did not argue that the jury should disregard any of the evidence, but rather it was attempting to challenge Movant's mitigating evidence. *Id.* The jury was properly instructed as to what factors should be considered. *Id.*

Movant claims the prosecutor created prejudice by personalizing and making himself an unsworn witness. The prosecutor stated "there wasn't anything redeeming or mitigating about this defendant that came up in this trial. I didn't hear anything. I listened to the mitigation," and "[t]he killing of Leslie is evidence in aggravation...That evidence, in and of itself, after you've opened the second door, the fact that he killed a second person, is probably what's going to tip over the edge and get him the death penalty. That's my feeling on it." Movant also writes that the prosecutor "claimed knowledge and experience" which were, in the words of the prosecutor "apt to carry much weight

against the accused when they should carry none." This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

Movant claims the prosecutor argued with no evidentiary support to inflame the jury's emotions, by arguing that Movant treated the victim "as if it was a deer that he's killing," with no sanctity for human life; that Movant had a desire to also kill Eva Addison, but did not get a chance because he was caught; and that he drew juvenile Michael Douglas into his web of violence; that there was no stopping Movant and that his victims meant nothing to him. This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

Movant claims the prosecutor impermissibly encouraged the jury to decide the case based on emotion, not facts, by arguing that Movant killed for power, control, status, and pleasure, and even animals do not kill for those reasons, and by arguing that if there was one person in the courtroom who believed in the death penalty, it was Movant. This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

Movant claims the prosecutor argued outside the evidence and exceeded the scope of victim

impact by telling the jury to look at the lives Movant ruined. This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

Movant claims the prosecutor further personalized to the jury by making arguments about the jury being part of the criminal justice system, the victim's faith in the criminal justice system, and that the jury represented the community. Movant claims further error when the prosecutor argued that "everyone who has a sister or brother hopes and prays they never had to endure the pain and suffering that the Addisons and Franklins have had to endure by someone with a cruel and evil intent that that man had," and by asking the jury to think of the terror that Leslie Addison, Eva Addison, and Todd Franklin went through. This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

Movant claims the prosecutor encouraged the jury to rely on alternative sources of law by stating that we live in a civilized society but there was a time when society would have provided the victims' families an opportunity for their own retribution, and that in this current society the state gave him a fair trial and put on evidence and that Movant has a right to a lawyer and a jury trial. This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of

argument would not have changed the outcome of the case.

Movant claims the prosecutor again relied on emotion by stating, "Please don't shoot me. My God. My God. Please don't shoot me. I'm 18. I want to live. I haven't lived. I haven't had children. I didn't do anything. I'm a totally innocent victim. I'm a woman." This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

Movant claims the prosecutor urged the jurors to weigh the victim's life against Movant's by indicating Todd Franklin did not have a father in his life, that he worked and was trying to do well and was nonviolent, but that Movant was not. This was the section not in Appellant's Brief on direct appeal, and was therefore not directly addressed by the Supreme Court. This Court does not agree with Movant's characterization of the argument—the prosecutor was not "weighing the victim's life against Movant's," but was rather arguing against the supposedly mitigating evidence presented by the defense concerning Movant's upbringing. It was argument, based on the evidence, highlighting how growing up in a particular neighborhood without a father does not necessarily result in or provide an excuse for becoming a multiple murderer. The argument was also about victim impact, because it discussed the life of Todd Franklin and what was lost when he was murdered. Additionally, this Court notes that the jury was properly instructed in this case as to what was to be considered in determining sentencing. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

Movant claims the prosecutor converted mitigators into aggravators by saying the following things were aggravating: that Movant had no mental disease under the law; that he has a supportive family and people in his life tried to help him; that Movant has the intelligence to choose to do what was right; that Movant has the capacity to know right from wrong; that Movant was never beaten, abused, or sexually molested; that Movant has no mental defect under the law. This Court agrees with the Supreme Court that this line of argument was proper. Trial counsel cannot be held ineffective for failing to make meritless objections. Movant has not demonstrated that trial counsel's strategy in failing to object was unreasonable. Any objection to this portion of argument would not have changed the outcome of the case.

The prosecutor's closing argument was powerful. So was the evidence. Movant brutally murdered two people and was sentenced to death by four separate juries for doing so. Movant was represented by some of the most experienced death penalty defense attorneys Missouri has ever seen. Karen Kraft's decision not to object to certain arguments during closing at this trial was a matter of trial strategy. And while Ms. Kraft's own penalty phase closing argument is not at issue in this section of the Amended Motion, this Court would like to say that her argument was a well thought out plea for mercy, using the evidence she had available to her. Objecting to those portions of the State's closing argument would not have changed the outcome of this trial. Counsel was not ineffective for failing to object during penalty phase closing as alleged in section 8(P) of the Amended Motion.

PRO SE MOTION

1. PCR counsel have not attached Movant's *pro se* motion to the Amended Motion. To obtain an evidentiary hearing for claims related to the ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing that counsel's performance did not conform to

the degree of skill, care and diligence of a reasonably competent attorney and that the movant was thereby prejudiced. *State v. Brooks*, 960 S.W.2d 479, 497 (Mo. banc 1997). Prejudice is shown when the movant establishes "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Hall*, 982 S.W.2d at 680. In order to prevail on a claim of ineffective assistance of counsel, Movant must demonstrate that: (a) his trial counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have under similar circumstances; and (b) Movant was thereby prejudiced. *State v. Holcomb*, 956 S.W.2d 286, 295 (Mo. App. 1997).

2. The *pro se* motion lists three bases for relief:

> 8(a) "Ineffective assistance of counsel because trial counsel failed to show the jury Michael DOuglas' (sic) charge and sentence after the State opened the door to this evidence," and
>
> 8(b) "Ineffective assistance of counsel because trial counsel failed to object to uncharged crime and bad acts evidence," and
>
> 8(c) "Ineffective assistance of counsel because trial counsel failed to object to the prosecution'simproper (sic) statments (sic)."

3. Claim 8(a) in the pro se motion claims error for trial counsel's alleged failure to show Michael Douglas's charge and sentence. This is misleading because trial counsel did in fact attempt to present evidence concerning Douglas's twenty year prison sentence on the charge of murder second degree. The trial court did allow that Douglas pled guilty to his participation in Todd Franklin's murder, and the jury did hear that Douglas did not receive the maximum sentence, had an out date, and that Douglas did not believe Movant being on trial was fair. The trial court—not counsel—excluded the specific sentence Douglas received and excluded the specific language of the charge to which Douglas pleaded. On direct appeal, Movant/Appellant claimed error when the trial court limited the testimony of Douglas regarding the details of his plea agreement. The Supreme

Court found no error. *McFadden*, 369 S.W.3d at 736-37.

Trial counsel is not ineffective for trying to elicit information and being prohibited from doing so because of court order. Movant has not shown his trial counsel has failed to exercise the level of skill and diligence that a reasonably competent attorney would exercise in a similar situation and has not shown how some failure of trial counsel prejudiced him. Point denied.

4. Claim 8(b) in the pro se motion seems to be preserved in sections 8(D) and 8(E) of the Amended Motion. As for *pro se* claim 8(b), Movant has not made any allegations or offered any proof beyond what was alleged and provided in the Amended Motion 8(D) and 8(E) regarding failure to object to uncharged crimes and bad acts evidence. The Court has already made findings as to those portions of the Amended Motion, and its ruling is the same for this portion of the *pro se* motion. Point denied.

5. Claim 8(c) in the pro se motion seems to be preserved in sections 8(B) and 8(P) of the Amended Motion. As for *pro se* claim 8(c), Movant has not made any allegations or offered any proof beyond what was alleged and provided in the Amended Motion 8(B) and 8(P) regarding failure to object during the voir dire, guilt phase, and penalty phase of trial. The Court has already made findings as to those portions of the Amended Motion, and its ruling is the same for this portion of the *pro se* motion. Point denied.

CONCLUSIONS OF LAW

1. In a proceeding under Rule 29.15, Movant bears the burden of establishing his grounds for relief by a preponderance of evidence.

2. Movant has failed to establish by a preponderance of the evidence that he is entitled to the relief requested in claims 8(A) – 8(P) of his Amended Motion.

3. Movant has not demonstrated that trial counsel failed to exercise the customary skill

and diligence that a reasonably competent attorney would have under similar circumstances.

4. Movant was not denied any rights under the United States Constitution or the Missouri Constitution.

5. Movant has failed to establish any basis in law to have his sentence vacated, set aside or corrected.

ORDER, JUDGMENT, AND DECREE OF COURT

WHEREFORE, it is hereby ordered, adjudged, and decreed that Movant's Amended Motion for Post-Conviction Relief under Rule 29.15 be hereby overruled and denied.

SO ORDERED:

Honorable David Lee Vincent III
Circuit Court Division 9

Jan 14, 2019.

cc: Jeannie Willibey and Valerie Leftwich, Attorneys for Movant
Kelly Snyder and S. Bart Calhoun, Attorneys for Respondent