

**IN THE CIRCUIT COURT OF  
JACKSON COUNTY, MISSOURI  
AT KANSAS CITY**



<p>██████████,</p> <p style="text-align: center;"><b>Movant,</b></p> <p style="text-align: center;">-vs-</p> <p><b>STATE OF MISSOURI,</b></p> <p style="text-align: center;"><b>Respondent.</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p style="text-align: center;"><b>Division 14</b></p> <p style="text-align: center;"><b>Case No. 1016-CV21686</b></p>
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**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND JUDGMENT REGARDING ALL PENDING MOTIONS**

Comes now the Court on the Movant’s Amended Motion to Vacate, Set Aside or Correct the Judgment or Sentence pursuant to Missouri Supreme Court Rule 29.15. Having considered the Movant’s Amended Motion to Vacate, Set Aside or Correct the Sentence, and having heard and considered the evidence presented at multiple hearings, and having examined the underlying criminal file in *State v. ██████████*, 0616-CR04098-01, the Court finds and concludes that the Movant’s Amended Motion to Vacate and Set Aside the Judgment or Correct the Sentence pursuant to Missouri Supreme Court Rule 29.15 should be and is hereby denied, and further makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. After a plea of not guilty and a trial by jury before the Honorable John Torrence of Division 14 of the 16<sup>th</sup> Circuit Court of Jackson County, Missouri, Movant was found guilty in case number 0616-CR04098-01 of Count 1 of Murder in the Second Degree and Count 2 of Armed Criminal Action.

2. Movant was sentenced on July 25, 2008 to imprisonment for life on Count 1, and 55 years on Count 2. The Court ordered the sentences to run consecutively.
3. The Western District of Missouri Court of Appeals affirmed the conviction on March 16, 2010, and issued its mandate on April 8, 2010.
4. On June 20, 2010, Movant filed his *pro se* Rule 29.15 Motion. On July 28, 2011, Movant filed his Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence raising five claims of ineffective assistance of counsel and incorporating six claims of ineffective assistance of counsel from Movant's *pro se* motion.
5. Hearings on said motion were held on several occasions. Movant was represented at these hearings by Patrick Peters and Justin Crozier.

#### **SUMMARY OF LAW**

Movant faces a heavy burden in establishing a claim for ineffective assistance of counsel. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). Not only must Movant prove his allegations by a preponderance of the evidence, but Movant must also overcome the Court's presumption that his counsel was competent. *Yoakum v. State*, S.W.2d 685, 687 (Mo. App. W.D. 1993).

The Movant's claims of ineffective assistance of counsel are subject to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). For the Movant to be successful in a claim for ineffective assistance of counsel, he must demonstrate that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, and that he was prejudiced by such failure. *Strickland*, 466 U.S. at 687. If Movant fails to meet either the performance or prejudice standard, then the court does not need to consider the other test and Movant's claim for ineffective assistance of counsel must fail. *Vogel v.*

*State*, 31 S.W.3d 130, 135 (Mo. App. W.D. 2000) (citing *State v. Nunley*, 980 S.W.2d 290, 292 (Mo. banc 1998). “A post-conviction movant faces a heavy burden in establishing a claim for ineffective assistance of counsel and must overcome the presumption that counsel is competent.” *Id.*

To prove prejudice, a Movant “must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Vogel*, 31 S.W.3d at 136 (quoting *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997)). “The fact that an error by counsel might have had some conceivable effect on the outcome is not sufficient. Rather, Movant, when challenging a conviction, must show there is a reasonable probability that, absent the alleged error, the fact finder would have had a reasonable doubt respecting guilt.” *Vogel*, 31 S.W.3d at 136 (quoting *State v. Clark*, 925 S.W.2d 872, 878 (Mo. App. W.D. 1996)).

The fact that counsel’s error might have had “some conceivable” effect on the outcome is not sufficient and the court must consider the totality of the evidence in determining whether a reasonable probability exists. *Id.* Moreover, in demonstrating such prejudice, Movant must overcome the strong presumption that counsel reasonably exercised reasonable professional judgment for all significant decisions. *White v. State*, 939 S.W.2d 887, 895 (Mo. banc 1997) (citing *State v. Stepter*, 794 S.W.2d 649, 657 (Mo. banc 1990) (citing *Strickland*, 466 U.S. at 687)). Ultimately, “[t]he benchmark for judging any claim of ineffectiveness must be whether the counsel’s conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

### **CONCLUSIONS OF LAW**

Movant’s claims for ineffective assistance of counsel fail either because the alleged facts, even if true, do not warrant relief or because they are clearly refuted by the record.

**Amended Motion Point 8(a) – Failure to Adequately Counsel Client**

Movant alleges ineffective assistance of trial counsel saying he was not advised "on the relative strength and weaknesses of the evidence at trial." And further, that trial counsel, "failed to adequately counsel Mr. [REDACTED] on the relative merit of the plea offer."

“As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused... When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.” *Missouri v. Frye*, 566 U.S. 134, 145 (2012). “To show prejudice from ineffective assistance of counsel where a plea off has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.” *Id.*

Counsel testified at the evidentiary hearing that he did inform Movant of the plea offer and that movant stated he did not want to take the offer. The transcript from the trial confirms counsel’s testimony:

MR TONEY: And, Mr. [REDACTED], have you and I had an opportunity to discuss your case before proceeding to trial this morning?

THE DEFENDANT: Yes.

MR. TONEY: And, in fact, last week, I believe Thursday, I came up to Clay County where you were housed to talk to you in detail about the case, right?

THE DEFENDANT: Yes.

MR. TONEY: Did I explain to you that the State of Missouri had made an offer to reduce this case to Murder in the Second Degree – I’m sorry, Manslaughter, and recommend a 10-year sentence with a three-year sentence on Armed Criminal Action to run concurrently?

MR. MILLER: Excuse me, Your Honor, I didn't say Manslaughter. I said Murder II.

MR. TONEY: Murder Second, so that it was not an 85 percent – 80 percent crime, but that it would be 10 years and three years; you understand that.

THE DEFENDANT: Yes, sir.

MR. TONEY: Did I explain that to you?

THE DEFENDANT: Yes, sir, you did?

MR. TONEY: All right. Did I also explain to you that the way the case is charged now is Murder in the First Degree, which is, well, only one possible penalty if you get convicted, and that would be life without parole?

THE DEFENDANT: Yes, sir.

MR. TONEY: Did you have an opportunity to talk to your family about the offer that had been made to you?

THE DEFENDANT: Yes, sir, I did.

MR. TONEY: Did you have enough time to talk to me and your family about that offer?

THE DEFENDANT: Yes, sir.

MR. TONEY: Did you make a decision as to whether or not you want to accept or reject the State's offer?

THE DEFENDANT: Yes, sir, I did.

MR. TONEY: Would you tell the Court what that decision was?

THE DEFENDANT: I told – I didn't agree to plead to it.

MR. TONEY: So you want to reject the State's offer?

THE DEFENDANT: Yes, sir, I do.

MR. TONEY: And that decision was made on your own, is that correct?

THE DEFENDANT: Yes, sir.

MR. TONEY: I told you that I would represent you at trial or we could do a plea; that I wasn't going to force you to make that decision in any way at all; that was entirely your decision, correct?

THE DEFENDANT: Yes, sir.

MR. TONEY: We had a long discussion about whose decision that was, correct?

THE DEFENDANT: Yes, we did.

MR. TONEY: All right. And it is your decision to go forward with this trial, is that correct?

THE DEFENDANT: Yes, sir.

Transcript on Appeal, Page 52, Line 9 – Page 54, Line 20.

Contrary to Movant's claim in his Amended Motion, Movant's own testimony from the first morning of trial makes clear that Movant and trial counsel did in fact meet to discuss the relative strengths and weaknesses of the case prior to trial, and makes is unequivocally clear that trial counsel adequately counseled Movant on the merits of the State's plea offer. In case there was any possibility that Movant still did not understand the merits of the State's plea offer, the Court engaged in the following discussion before bringing up the jury panel:

THE COURT: Let me follow up because I think it's unclear from the record that was made as to what the offer was. Apparently it was an offer to reduce the charge to Second Degree Murder, and the agreement would be a 10-year sentence on the Murder II count and a three-year sentence on the Armed Criminal Action count, and presumably the other remaining counts would be dismissed, I guess?

MR. TONEY: That's correct, Your Honor, because those are unaccounted for in the discussion here. There's a bunch of other counts.

MR. MILLER: They would be dismissed, yes.

THE COURT: So a lot of those counts that are pending – well, all but the first two counts would go away.

MR. TONEY: Right.

THE COURT: And to be clear about it, the Second Degree Murder conviction, if it were to occur, would be an 85 percent case. That's the part I was focused on.

MR. TONEY: Okay.

THE COURT: It was kind of unclear what you meant.

MR. TONEY: If I didn't say that, I meant to say that it would be an 85 percent case.

THE COURT: Just to be clear about it, and it seems to me to be a very reasonable offer the State is making here under all the circumstances.

MR. MILLER: I can go no lower, and also, for the record, once jeopardy attaches, the offer is withdrawn.

MR. TONEY: I'm aware of that.

MR. MILLER: I just want it on the record. I want you aware of it.

THE COURT: Okay. All right. You're sure? You don't want any more time to talk about it?

MR. TONEY: I'm going to talk to him while the jury is coming up.

Transcript on Appeal, Page 54, Line 22 – Page 56, Line 9.

Simply put, there is no way for this court to square the claim raised in Movant's Amended Motion with the trial transcript. Movant's alleges that counsel never visited Movant in the Jackson County Detention Center; the trial transcript confirms that counsel visited Movant prior to trial in the Clay County Detention Center. Movant alleges that counsel failed to counsel Movant on the strengths and weaknesses of the evidence; the trial transcript confirms that this is specific topic they discussed when counsel visited Movant in jail. Movant alleges counsel failed to adequately counsel him on the relative merit of the plea offer; not only does the trial transcript confirm that counsel advised Movant of the merit of the plea offer, but that the Court and the State further advised Movant of the merit of the plea offer prior to bringing up the jury panel. Therefore, Movant's claim that counsel was ineffective for failing to adequately counsel client is denied.

**Amended Petition Point 8(b) – Failure to Rehabilitate Impeached Witness**

Movant alleges ineffective assistance of trial counsel for counsel's failure to rehabilitate State's witness ██████████. Ms. ██████ after testifying for the State that the men involved in the crime were masked and presumably unidentifiable, was impeached with a videotaped police

statement where she does not mention a mask on one man, but rather testifies that the man had facial hair.

Movant alleges defense counsel should have questioned ██████████ on the conflicting statements and failure to do so amounted to ineffective assistance of counsel. "Rarely will counsel be deemed ineffective for failure to go far enough in cross-examining a witness." *State v. Parker*, 972 S.W.2d 508, 511 (W.D. 1998). A claim that a defendant's attorney did not go far enough in cross-examining a witness must be rejected, as "the extent of cross-examination must be left to the judgment of counsel." *White v. State*, 939 S.W.2d 887, 897 (Mo. 1997).

However, the trial transcript shows that his attorney did in fact cross-examine the witness regarding many inconsistencies in her statements. The cross-examination regarding only the physical traits seen on the night of the shooting went on for four pages. (Transcript on Appeal, pages 317 - 321). In his closing statement, counsel addressed the inconsistency again. (Transcript on Appeal, page 522, line 18 - page 523, line 1) There is no evidence in the transcript that trial counsel did not exercise sound trial strategy in his cross-examination or throughout the trial relating to this issue.

Movant also alleges that Mr. ██████████' trial counsel should have called a neighbor to the stand who would allegedly testify that ██████████ told him immediately following the attack that both men were wearing masks. "The decision not to call a witness is trial counsel's and is most often excused as a matter of trial strategy." *State v. Timmons*, 956 S.W.2d 277, 284 (Mo. App. W.D. 1997). "The selection of witnesses and the introduction of evidence are questions of strategy, and the mere choice of trial strategy is not a foundation for finding ineffective assistance of counsel." *Id.* Unless counsel believes that the witness's testimony would "unqualifiedly support the defense, the decision of whether to call the witness is a matter of trial strategy that will not

support a finding of ineffective assistance of counsel.” *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995). “To establish that trial counsel was ineffective for not calling a witness, [defendant] was obligated to show that his counsel’s not calling the witness involved something other than reasonable trial strategy; that the witness could have been located through reasonable investigation; that the witness would have testified; and that the witness’ testimony would have provided the defendant with a viable defense.” *State v. Maddix*, 935 S.W.2d 666, 672 (Mo. App. W.D. 1996).

Movant does not assert that his trial counsel was aware of [REDACTED] availability as a potential witness. His failure to allege this requisite element precludes finding prejudice. However, even if Movant had sufficiently alleged this element, Movant has failed to assert that had trial counsel called Mr. [REDACTED] as a witness, the result would have been different. Other witnesses, like [REDACTED], testified that Movant was the attacker and provided sufficient detail about the shooting, unequivocally stating that Movant was involved. It was within the sound discretion of Movant’s trial attorney to address inconsistencies in closing argument. Movant has not presented any evidence that but for these alleged errors and prejudice, the result of the trial would have been different. Finally, Movant did not call any witnesses to testify to [REDACTED] availability, what he would have testified to at trial, or the prejudiced suffered by Movant as a result of [REDACTED] not being called to testify. Therefore, Movant’s claim is denied.

**Amended Petition Point 8(c) – Failure to Present Evidence at Sentencing**

Movant alleges that counsel was ineffective for failing to present any evidence to the Court at sentencing which could have impacted its decision to follow the jury’s recommendation. Movant alleges that the jury’s decision to render a life sentence was "hardly shocking" given the fact that

defense failed to provide "countervailing evidence that would allow the jury to see ██████ as a person" therefore alleging ineffective assistance of counsel.

“Whether counsel’s judgment is good or bad is measured not by the sentence defendant receives, but by whether counsel’s advocacy on defendant’s behalf was reasonable under the circumstances. *Clemmons v. State*, 785 S.W.2d 524, 527 (Mo. banc 1990). It is clear that "an attorney has no absolute duty to present mitigating character evidence relevant to sentencing; rather the introduction of evidence and selection of witnesses are matters of trial strategy." *Rousan v. State*, 48 S.W.3d 576, 583 (Mo. banc 1998). Instead, counsel only has “a duty to make a reasonable investigation of possible mitigating evidence or to make a reasonable decision that such an investigation is unnecessary.” *Clemmons*, 785 S.W.2d at 528 (quoting *Jones v. State*, 767 S.W.2d 41, 43 (Mo. banc 1989)).

Despite there being no real duty to present mitigating evidence, trial counsel attempted to do so anyway. The record clearly reflects that counsel attempted to locate Mr. ██████ family members multiple times to no avail. His inability to locate them is a direct result of the family members moving and changing phone numbers without alerting counsel to the changes. Because an attorney has no duty to present mitigating evidence at sentencing, it cannot be found that Movant’s trial counsel was ineffective for the above allegation. While Movant did call potential mitigating witnesses at the evidentiary hearing, their testimony was not substantial enough to have impacted Movant’s sentence. Therefore, Movant’s claim is denied.

**Amended Petition Point 8(d) – Failure to Object to Admission of Eyewitness Identification**

Movant alleges that it was ineffective assistance of counsel that counsel failed to object to the admissibility of the testimony of a six-year old witness to the murder, ██████, where she identified Mr. ██████ as the assailant. Although the trial court allowed Ms. ██████ testimony

after counsel filed a Motion to Suppress, Movant claims that counsel's failure to object at trial preserved nothing for appeal other than review for plain error. Movant's claim raises the issues of counsel's failure to object to the admission of Ms. ██████ testimony and counsel's failure to preserve the issue for appeal.

First, "the mere failure to object does not constitute ineffective assistance of counsel." *State v. Lumpkin*, 850 S.W.2d 388, 395 (Mo. App. W.D. 1993). The Court "will not deem counsel to have been ineffective... for failing to object to admissible evidence." *State v. Neal*, 849 S.W.2d 250, 258 (Mo. App. W.D. 1993), *see also State v. Hunter*, 840 S.W.2d 850, 870 (Mo. banc. 1992).

Prior to trial, Movant's counsel filed a Motion to Suppress the testimony of Ms. ██████. The Court, after considering the motion, all relevant authority, and arguments of the parties, denied Movant's Motion to Suppress and ruled that Ms. ██████ testimony was admissible. Therefore, counsel's failure to object to the admission of evidence that the court already deemed admissible cannot be considered ineffective assistance of counsel.

Second, "claims for post-conviction relief based on trial counsel's failure to adequately preserve issues for appeal are not cognizable under Rule 29.15." *Glasgow v. State*, 218 S.W.3d 484, 489 (Mo. App. W.D. 2007). "The preservation of an issue for appeal cannot affect the fairness of the trial; preservation only affects rights and standards on appeal." *Id.* Therefore, Movant's claim for ineffective assistance of counsel for failing to object to the admission of Ms. ██████ testimony is denied.

**Amended Petition Point 8(e) – Failure to Move for Mistrial or Other Relief After the Jury was Misinformed of Charges**

Movant alleges his trial counsel was ineffective for failing to move for a mistrial after the jury was privy to other charges instead of just hearing the superseding charges of Second Degree Murder and Armed Criminal Action. To prevail on this claim, Movant must demonstrate both: (1)

that counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances, and (2) that the defendant was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Franklin v. State*, 24 S.W.3d 686 (Mo. banc 2000).

The correct charges remaining when trial began were Murder in the First Degree and Armed Criminal Action. The additional charges that were mistakenly read to the jury were several lesser counts of Endangering the Welfare of a Child and Armed Criminal Action. Movant introduced no evidence that he was prejudiced by the mistaken reading of the lesser charges to the jury.

Whether these charges were read or not, the facts revealed in nearly every witness' testimony were that children were present in the bedroom with Mr. [REDACTED] when he was shot and killed. A jury of reasonable people does not need to hear the formal words, "Endangering the Welfare of a Child," to know that killing a man in front of children, which was evidenced by testimony, include endangering the child's welfare. Counsel testified that his strategy was not to bring attention to the additional charges through an objection or a voir dire on the issue. The only evidence before this Court is that counsel's decision to not to move for a mistrial or other relief was intentional trial strategy. Therefore, Movant's claim is denied.

**Amended Petition Point 8(f) – Failure to Investigate, Interview, Subpoena or Depose Alibi Witnesses**

Movant's first pro se claim is that his trial counsel was ineffective for failing to call alibi witnesses. Specifically, Movant alleges that [REDACTED], movant's girlfriend, and [REDACTED] grandmother, would have testified that Movant was at their home at the time Mr. [REDACTED] was murdered.

“The decision not to call a witness is trial counsel's and is most often excused as a matter of trial strategy.” *State v. Timmons*, 956 S.W.2d 277, 284 (Mo. App. W.D. 1997). “The selection

of witnesses and the introduction of evidence are questions of strategy, and the mere choice of trial strategy is not a foundation for finding ineffective assistance of counsel.” *Id.* Unless counsel believes that the witness’s testimony would “unqualifiedly support the defense, the decision of whether to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel.” *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995).

“To establish that trial counsel was ineffective for not calling a witness, [defendant] was obligated to show that his counsel’s not calling the witness involved something other than reasonable trial strategy; that the witness could have been located through reasonable investigation; that the witness would have testified; and that the witness’ testimony would have provided the defendant with a viable defense.” *State v. Maddix*, 935 S.W.2d 666, 672 (Mo. App. W.D. 1996). “In an ineffective assistance of counsel claim based on failure to call an alibi witness at trial, to show prejudice, the movant must show the witness’ testimony is more than merely cumulative of the evidence adduced at trial and that it would have aided his defense.” *Roberts v. State*, 764 S.W.2d 688, 689 (Mo. App. E.D. 1988).

Movant did not call any witnesses to support this claim at the February 27, 2015 evidentiary hearing on Movant’s Amended Motion. This Court did not even receive any evidence of the existence of [REDACTED] and [REDACTED] until the two sent affidavits to the Court in June 2018 attesting that they were never subpoenaed to testify at Movant’s trial. This fact is neither in dispute nor is it dispositive. Instead, the affidavit of [REDACTED] attests that she did speak to counsel and that counsel believed she would not be a credible witness because she was Movant’s girlfriend. Therefore, the only evidence before this Court indicates that [REDACTED] and [REDACTED] were not called as alibi witnesses specifically due to counsel’s reasonable trial strategy. Therefore, Movant’s claim for ineffective assistance of counsel for failure to call alibi witnesses is denied.

**Amended Petition Point 8(g) – Failure to Obtain Video Taped Interview of Eyewitness for Use at Trial and Suppression Hearing**

Movant next claims that it was ineffective assistance of counsel that counsel failed to obtain the videotaped testimony of ██████████ arguing that it would have (1) supported the suppression motion to cast doubt on the suggestive technique of showing a 6 year-old only one picture of Movant for identification, and (2) aided the defense in arguing the dangers of how suggestive it is to show a 6 year-old witness a single picture of a suspect.

Movant does not allege any reason why he was prejudiced by the failure of counsel to obtain the videotaped interview of Ms. ██████████. The only fact asserted by Movant regarding the videotaped interview is that Ms. ██████████ was holding one lineup photograph – Movant’s photograph.

Regarding Movant’s first assertion, Movant was not prejudiced in any way by the failure of counsel to obtain the videotaped interview of Ms. ██████████ to support his Motion to Suppress. Movant’s motion filed the morning of trial did not allege any factual reasons why Ms. ██████████ testimony should be suppressed. Instead, it asserted only the legal conclusions that the police department’s interview techniques were unduly suggestive and that Ms. ██████████ was incompetent to testify because of her age.

However, the testimony of both Ms. ██████████ and Detective Matthew Williams at the suppression hearing described how the detectives interviewed Ms. ██████████ for an hour and a half, provided her with a photo lineup of 6 different men sharing similar physical characteristics, and asked Ms. ██████████ if any of those men killed her uncle. The testimony describes how the detectives shuffled these photos and presented them to Ms. ██████████ twice in different orders. Both times Ms. ██████████ identified Movant as the man who killed her uncle. The testimony then describes how the

detectives separated Movant's photograph from the lineup and had Ms. [REDACTED] sign her name to the back of it before beginning the 10-minute videotaped portion of the interview.

At the conclusion of the suppression hearing, it was abundantly clear to the Court that the detectives and Ms. [REDACTED] only had one photograph with them when the videotaped portion of the interview began. Movant asserts no new facts regarding the videotaped interview that the Court did not already know and consider prior to ruling on the admissibility of Mr. [REDACTED] testimony.

Regarding Movant's second assertion, Movant was not prejudiced in any way by the failure of counsel to obtain the videotaped interview of Ms. [REDACTED] to aid his defense at trial. Movant's counsel did not even argue the defense that the police department's interview techniques were unduly suggestive because they only provided Ms. [REDACTED] with one photograph. For counsel to argue that defense would have directly contradicted the trial testimony of Ms. [REDACTED], Detective Matthew Williams, and [REDACTED] - [REDACTED] mother who was also present during the police interview. Each witness testified to the same police interviewing procedure as described at the suppression hearing. Therefore, Movant was not prejudiced in any way by counsel's failure to obtain the videotaped interview of Ms. [REDACTED]. Movant's claim is denied.

**Amended Petition Point 8(h) – Failure to Investigate, Interview, or Depose [REDACTED] and [REDACTED]**

Movant then claims that trial counsel was ineffective for failing to investigate, interview, or depose [REDACTED] and [REDACTED] because Movant informed counsel that he, [REDACTED] and [REDACTED] had once lived in the same apartment complex and had smoked marijuana together before. Movant claims that counsel was ineffective for failing to investigate this information because it could have impeached [REDACTED] credibility when she testified that she knew Movant because she saw him around a few times prior to the murder.

"Rarely will counsel be deemed ineffective for failure to go far enough in cross-examining a witness." *State v. Parker*, 972 S.W.2d 508, 511 (W.D. 1998). A claim that a defendant's attorney did not go far enough in cross-examining a witness must be rejected, as "the extent of cross-examination must be left to the judgment of counsel." *White v. State*, 939 S.W.2d 887, 897 (Mo. 1997).

Contrary to Movant's claim, the trial transcript shows that counsel did cross-examine question ██████████ on her connection to Movant:

Q: All right. And when she picked one of those pictures, did you know the person that she had picked?

A: Did I know the person?

Q: Yes.

A: Yes.

Q: And you had known that person from before?

A: I've seen him around a few times.

Q: All right. Had ██████████ ever seen him around?

A: No.

Q: Are you sure?

A: Not to my knowledge she hadn't.

Q: You indicated that you knew the person before. Did you know him from the neighborhood that you live in?

A: No, I did not.

Transcript on Appeal, Page 263, Line 4 – Line 24.

The only facts alleged in Movant's claim that counsel did not highlight in cross-examination were that the three had once lived in the same apartment complex and smoked marijuana together. Counsel's decision to not draw out testimony regarding his client smoking marijuana is clear example of trial strategy that this Court can only conclude was meant to prevent Movant from being prejudiced before a jury. Because Movant did not call

either witness to testify at the hearing or provide any evidence of being prejudiced by counsel's failure to investigate his connection to [REDACTED] and [REDACTED]. Movant's claim is denied.

**Amended Petition Point 8(i) – Failure to Request that Juror [REDACTED] be Dismissed from the Jury or Request a Mistrial**

Movant next claims that it was ineffective assistance of counsel to not have Juror [REDACTED] dismissed from the jury. Juror [REDACTED] stated that after sitting through several days of the trial and looking at the Movant, he believed he might have known the Movant from somewhere. The mere fact that a juror knows a defendant is not grounds for reversal. *State v. Mitchell*, 651 S.W.2d 637, 639 (Mo. App. E.D. 1983). “[A] movant is entitled to a presumption of prejudice resulting from counsel's ineffective assistance during the jury selection process only if the movant can show that a biased venireperson ultimately served on the jury.” *Strong v. State*, 263 S.W.3d 636, 648 (Mo. banc 2008). Although Juror [REDACTED] came forward with his potential recognition of the Movant several days into trial instead of during voir dire, the same principles of *Strong* apply as it is ultimately Movant's burden to “establish that the errors complained of resulted in his trial by a jury that was not fair and impartial.” *Id.* at 647.

Juror [REDACTED] testified that he could not figure out where he knew the Movant from, if he in fact knew him at all. Because of this uncertainty, Juror [REDACTED] did not know whether his possible familiarity with the Movant would have a positive or negative bias against Movant, if any at all. Ultimately, after being questioned by the Court, the State, and counsel, Juror [REDACTED] testified that he could be fair and base his verdict solely on the law and evidence presented at trial. Foreseeing this exact claim that Movant has raised, the State motioned for and argued to have Juror [REDACTED] excused. Counsel opposed the State's motion to excuse Juror [REDACTED] citing both his testimony that he can be fair and impartial and counsel's concern that excusing him would leave “an all-white

jury who's passing judgment on my African-American client." After hearing Juror [REDACTED] testimony and arguments from both parties, this Court found that Juror [REDACTED] could be fair and impartial and denied the State's motion to excuse.

At the evidentiary hearing on Movant's Amended Motion, counsel testified that he did not want to strike Juror [REDACTED] because he, like the defendant, was African-American. Counsel's decision not to move to excuse Juror [REDACTED] or for a mistrial was textbook trial strategy. Movant provided no other evidence that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, nor that he was prejudiced because a bias venireperson ultimately served on the jury. Therefore, Movant's claim is denied.

**Amended Petition Point 8(j) – Failure to Object to the Showing of the Victim's Body at the Crime Scene**

Movant alleges ineffective assistance of trial counsel for counsel's failure to object to the showing of the victim's body to the jury. "A circuit court retains broad discretion in the admission of photographs... Photographs are relevant if they depict the crime scene, the victim's identity, the nature and extent of the wounds, the cause of death, the condition and location of the body, or otherwise constitute proof of an element of the crime or assist the jury in understanding the testimony. *State v. Collings*, 450 S.W.3d 741, 762 (Mo. banc 2014) (internal citations omitted). "A photograph, generally speaking, is superior to words as a means of description... and it should not be rejected because by presenting an accurate portrayal it tends to be inflammatory. *State v. Speed*, 551 S.W.3d 94, 98 - 99 (Mo. App. W.D. 2018) (citing *State v. Burnfin*, 606 S.W.2d 629, 630 (Mo. banc 1980)).

Movant was charged with the murder of [REDACTED]. The State alleged that Movant shot Mr. [REDACTED] twice and then struck him in the head with the butt of his rifle as Mr. [REDACTED] lay

dead or dying on the floor. The State called eyewitnesses that testified that they saw Movant shoot ██████████ twice and then strike him in the head with the butt of a rifle. The autopsy photographs for ██████████ were relevant to illustrate the nature of the crime scene and ██████████ injuries, as they confirmed he suffered two gunshot wounds and a blunt-force head injury. Therefore, Movant was not prejudiced by counsel's failure to object to the admission of the photographs, as they were undeniably relevant and admissible.

Movant's claim is denied.

**Amended Petition Point 8(k) – Failure to Depose State's Witness ██████████**

Finally, Movant claims trial counsel was inadequate for failing to depose ██████████ prior to trial. "Claims of ineffective assistance of trial counsel based on a complaint that trial counsel completed insufficient investigation must allege the specific information the attorney failed to discover, that reasonable investigation would have disclosed that information, and that information would have been beneficial to the defendant." *Glasgow v. State*, 218 S.W.3d 484, 490 (Mo. App. W.D. 2007).

Movant's claim does not allege any specific information that counsel failed to discover. Movant only alleges that counsel did not allow enough time to "determine if matters concerning this witness, could be developed," or "allow himself enough time for reflection and preparation for this hearing and trial." Movant's claim falls well below the specific prejudice standard and is therefore denied.

**OTHER MOTIONS**

Movant has also filed the following *pro se* motions, which are summarily DENIED:

- Motion to Compel Disclosure of Exculpatory Evidence filing on February 14, 2015;
- Motion to Call Witness for Hearing filed on April 23, 2015;

- Motion for Judge to View Witness [REDACTED] Video Statement file on September 21, 2015;
- Motion for Abandonment filed on March 31, 2016;
- Motion for Appointment of Counsel filed on May 17, 2016;
- Motion for Rehearing filed on November 7, 2016;
- Motion for Extension of Time to File Amended Motion filed on November 30, 2016;
- Motion for New Trial filed on January 23, 2017;
- Motion for New Trial at the Close of all Evidence filed on February 17, 2017;
- Motion for Abandonment filed on February 26, 2018;
- Motion to Amend the Judgement Under Rule 78.07 filed on March 12, 2018;
- Motion to Correct Errors in Public Record filed on April 13, 2018;
- Motion Challenging Accuracy of Transcripts filed on May 9, 2018; and
- Motion for New Trial Under the Grounds of Newly Discovered Evidence filed on June 21, 2018.

**JUDGMENT**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that for the reasons set forth hereinabove in the attached Findings of Facts and Conclusions of Law, the Court finds Movant's petition for relief pursuant to Missouri Supreme Court Rule 29.15 should be, and it is hereby DENIED.

May 3, 2019

DATE



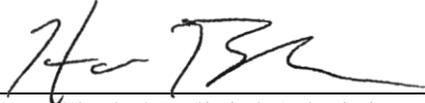
JOHN M. TORRENCE, JUDGE

**Certificate of Service**

This is to certify that a copy of the foregoing was automatically forwarded to the attorneys of record through the Court's eFiling system. In addition, this certifies that a copy of the foregoing was hand delivered/faxed/emailed/mailed to the following on May 03, 2019.

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Law Clerk / Judicial Administrative Assistant, Division 14