APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1024

Lance Shockley

Petitioner - Appellant

v.

Travis Crews

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis (4:19-cv-02520-SRC)

JUDGMENT

Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's applications for a certificate of appealability. Appellant's motions for leave to file an overlength application for a certificate of appealability and reply

are granted. The court has carefully reviewed the original file of the district court, and the amended application for a certificate of appealability is denied. The original application for a certificate of appealability filed on February 16, 2024 is denied as moot. Judge Kelly would grant a certificate of appealability on Claim 1, which alleges ineffective assistance of trial counsel.

The appeal is dismissed.

April 02, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Stephanie N. O'Banion

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LANCE SHOCKLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:19-cv-02520-SRC
	)	
TRAVIS CREWS,	)	
	)	
Respondent.	)	

Memorandum and Order

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I. Introduction

A jury found that Lance Shockley murdered Missouri Highway Patrol Sergeant Carl DeWayne Graham, Jr., and a Missouri judge sentenced him to death for his crime. In the nearly 19 years since the murder, Shockley has presented his case to Missouri courts on four occasions. After the Missouri Supreme Court twice affirmed his conviction and death sentence, Shockley now petitions this Court for a writ of habeas corpus on 28 grounds. The Court finds

Shockley's arguments lack merit and denies his Petition.

II. Background

The Missouri Supreme Court described the pertinent facts as follows:

> On November 26, 2004, [Shockley] was involved in a motor vehicle accident resulting in the death of his passenger. Over the next several months, [Sergeant Graham] conducted the investigation of the accident, which criminally implicated [Shockley].
>
> On March 20, 2005, at approximately 12:20 p.m., [Shockley] borrowed his grandmother's red Pontiac Grand Am (hereinafter, "the red car"), which had a bright yellow sticker on the trunk near the driver's side. Between 1:45 p.m. and 4:15 p.m. that afternoon, various witnesses noticed a red car with a bright yellow sticker affixed to the driver's side of the trunk parked on the wrong side of the road a few hundred feet from [Sergeant Graham's] residence.
>
> At 4:03 p.m. that day, [Sergeant Graham] returned home, backed his patrol car into his driveway, and radioed dispatch he was ending his shift. As [Sergeant Graham] exited his vehicle, he was shot from behind with a high-powered rifle that penetrated his Kevlar vest. The bullet severed [Sergeant Graham's] spinal cord at the neck, immediately paralyzing him. [Sergeant Graham] fell

backward and suffered fractures to his skull and ribs upon impact with the pavement. The killer then approached [Sergeant Graham], who was still alive, and shot him twice more with a shotgun into his face and shoulder. The recovered rifle bullet was deformed, but ballistics experts determined it belonged to the .22 to .24 caliber class of ammunition that would fit a .243 caliber rifle. Investigators later learned that, around 7 p.m. on the evening of [Sergeant Graham's] murder, [Shockley's] wife gave [Shockley's] uncle a box of .243 caliber bullets and stated, "[Shockley] said you'd know what to do with them."

[Shockley] returned the red car to his grandmother between 4:15 p.m. and 4:30 p.m. that same day. Investigators calculated it took approximately eighteen minutes to drive from [Shockley's] grandmother's house to the location where the red car with the yellow sticker had been parked near [Sergeant Graham's] home.

Two highway patrol investigators interviewed [Shockley] at his residence that evening. [Shockley] immediately denied killing [Sergeant Graham] and stated he spent all day working around his house with his neighbor, Sylvan Duncan (hereinafter, "Sylvan"). The next day, [Shockley] again met with investigators and elaborated on the alibi. [Shockley] claimed he was visiting relatives, including his grandmother, and he

watched from his living room as Sylvan pushed brush. [Shockley] stated he knew [Sergeant Graham] was investigating him for the fatal accident and, without prompting, declared he did not know where [Sergeant Graham] lived.

Later that day, [Shockley] visited his grandmother and instructed her to tell the police he had been home all day the day [Sergeant Graham] was shot. When his grandmother told [Shockley] she would not lie for him, he put his finger over her mouth and said, "I was home all day."

Police arrested [Shockley] on March 23, 2005, for leaving the scene of the car accident that resulted in his passenger's death. The state subsequently charged [Shockley] with leaving the scene of a motor vehicle accident, first-degree murder for [Sergeant Graham's] death, and armed criminal action. The state proceeded to trial only on the first-degree murder charge and sought the death penalty. [Shockley] was represented initially by several public defenders, including Thomas Marshall (hereinafter, "Marshall" and, collectively, "the first trial team"). [Shockley] later obtained private counsel and was represented at trial by Brad Kessler (hereinafter, "Kessler"), David Bruns (hereinafter, "Bruns"), and Mollyanne Henshaw (hereinafter, "Henshaw" and collectively, "trial counsel").

The state theorized [Shockley] killed [Sergeant Graham] to stop the fatal car accident investigation. [Shockley's] defense was it was ridiculous for him to believe, simply by killing [Sergeant Graham], law enforcement would halt its investigation into the accident. Trial counsel also argued the police improperly directed all their investigative attention toward him rather than pursuing other possible perpetrators.

After a five-day guilt phase proceeding, the jury found [Shockley] guilty of first-degree murder. During the penalty phase, the state submitted four statutory aggravators pursuant to 565.032.2: (1) [Sergeant Graham] was a "peace officer" and the "murder was committed because of the exercise of his official duty;" (2) [Shockley] was depraved of mind when he killed [Sergeant Graham] and, "as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman;" (3) [Sergeant Graham] was murdered "for the purpose of avoiding . . . or preventing a lawful arrest;" and (4) [Sergeant Graham] was a "potential witness in [a] past or pending investigation . . . and was killed as a result of his status as a . . . potential witness."

The jury found the first, third, and fourth statutory aggravators were proven beyond a reasonable doubt. The jury did not find unanimously the circumstances in mitigation

> outweighed those in aggravation. However, the jury was unable to agree which punishment to recommend. After overruling [Shockley's] motion for new trial, the circuit court imposed a death sentence pursuant to section 565.034.4.

Shockley v. State (*Shockley II*), 579 S.W.3d 881, 890–92 (Mo. 2019). Shockley appealed his conviction to the Missouri Supreme Court, which affirmed. *State v. Shockley* (*Shockley I*), 410 S.W.3d 179 (Mo. 2013). Shockley then filed a postconviction-relief motion under Missouri Supreme Court Rule 29.15, which the motion court denied after an evidentiary hearing. Docs. 33-107, 33-108. He appealed that decision, and the Missouri Supreme Court again affirmed. *Shockley II*, 579 S.W.3d at 921. Shockley now seeks a writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254.

III. Standard of Review

The Antiterrorism and Effective Death Penalty Act, known as AEDPA, and related caselaw establish a complex, multilayered set of standards for adjudicating Shockley's claims. Given the complexity of those standards—and the voluminous briefing the Court must analyze under those standards (about 1,000 pages of briefing and over 15,000 pages of exhibits)—an extended preliminary explanation of the relevant standards would not effectively frame the Court's analysis. Therefore, the Court divides its analysis into six sections, stating the applicable standards at the beginning of each: (1) motion for a *Rhines* stay, (2) discovery motion, (3) ineffective-

assistance claims adjudicated on the merits in state court, (4) other claims adjudicated on the merits in state court, (5) procedurally defaulted ineffective-assistance claims, and (6) other procedurally defaulted claims. And for the sake of clarity, instead of addressing the claims in the order in which Shockley presented them, the Court groups the claims into these six sections.

IV. Motion for a *Rhines* Stay

A. Overview

In response to the Court's order for supplemental briefing regarding *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), Doc. 61, Shockley moved to stay this case so he could pursue state-court remedies on claims 6, 13, 21, 22, and 26, citing *Rhines v. Weber*, 544 U.S. 269 (2005). Doc. 64 at pp. 4–8. Though a state prisoner seeking a writ of habeas corpus in federal court generally must first exhaust available state-court remedies, *see* 28 U.S.C. § 2254(b), the Supreme Court held in *Rhines* that, where a petitioner includes both exhausted and unexhausted claims in his complaint and the petitioner can show that a stay would not frustrate the objectives of AEDPA, courts must grant a petitioner's request for a stay. 544 U.S. at 278; *see also infra* Section IV.B. (discussing the test for when a stay would frustrate the objectives of AEDPA).

In each claim Shockley moves to stay, he presents a claim under *Martinez v. Ryan*, 566 U.S. 1 (2012), that is, an ineffective-assistance-of-trial-counsel claim attached to an ineffective-assistance-of-postconviction-counsel claim. *See* Doc. 48 at pp. 161–

237, 305–25; 382–443; 502–11. In Missouri courts, "[a] person convicted of a felony after trial claiming . . . ineffective assistance of trial and appellate counsel . . . may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15." Mo. Sup. Ct. R. 29.15(a). On direct appeal, the Missouri Supreme Court affirmed the trial court's judgment against Shockley on August 13, 2013. *See Shockley I*, 410 S.W.3d at 225. "If an appeal of the judgment or sentence sought to be vacated, set aside or corrected is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court issues affirming such judgment or sentence." Mo. Sup. Ct. R. 29.15(b). Shockley timely sought Rule 29.15 review of numerous claims. *Shockley II*, 579 S.W.3d at 892. Yet, nearly nine years later, on June 9, 2022, Shockley requested a *Rhines* stay as to claims 6, 13, 21, 22, and 26. *See* Doc. 64. So, the time has long since passed for Shockley to meet Missouri's ninety-day deadline to seek review pursuant to Rule 29.15 of these newly minted claims.

Shockley now seeks to return to state court and litigate his claims under Missouri Supreme Court Rule 91. Doc. 64 at p. 1. Rule 91 states that "[a]ny person restrained of liberty within [Missouri] may petition for a writ of habeas corpus to inquire into the cause of such restraint." Mo. Sup. Ct. R. 91(b). In 1952, Missouri adopted Rule 27.26, modeled after the federal "single, unitary, post-conviction remedy" established by 28 U.S.C. § 2255. *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 717 n.3, 719 (Mo. 1976). That rule was "intended to provide the excusive procedure

which shall be followed when a prisoner in custody seeks relief on the basis of [various kinds of claims, including claims of constitutional violations]." *Id.* at 715 (quoting Mo. Sup. Ct. R. 27.26 as it existed in 1976). "Rule 27.26 . . . was a procedural substitute for a state habeas proceeding." *Duvall v. Purkett*, 15 F.3d 745, 747 n.2 (8th Cir. 1994). Rule 29.15 has since replaced Rule 27.26 as the procedure for convicted felons to litigate constitutional claims. *Burns v. Gammon*, 173 F.3d 1089, 1091 (8th Cir. 1999) (describing Rule 29.15 as the "successor rule" to Rule 27.26).

Shockley does not provide any meaningful argument for his contention that some of his claims remain unexhausted or give any substantive discussion of the relevant caselaw. *See* Doc. 64. After reviewing the relevant caselaw, the Court finds that Shockley has exhausted his claims and that a stay at this late stage of the proceedings would frustrate the objectives of AEDPA. *See infra* Section IV.C. Therefore, the Court does denies Shockley's request for a *Rhines* stay.

B. Standards for *Rhines* stay

Shockley alleges that he has filed a "mixed" petition and the Court should therefore grant a stay. Doc. 64. The Court finds that, even if the petition were mixed, other considerations make Shockley ineligible for a stay. The Court discusses the relevant standard for whether to stay a mixed petition below. Faced with the question of how to address a mixed petition—a petition containing both exhausted and unexhausted

claims—the Supreme Court found that "[a]ny solution to this problem must . . . be compatible with AEDPA's purposes." *Rhines*, 544 U.S. at 271, 276. To resolve this question, the Supreme Court established the following standard:

> [I]t likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for failing to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition.

Id. at 278.

"An applicant [for federal habeas relief] shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). "Although this language could be read to effectively foreclose habeas review by requiring a state prisoner to invoke *any possible* avenue of state court review, [the Supreme Court has] never interpreted the exhaustion requirement in such a restrictive fashion." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (citation omitted) (emphasis in original). Exhaustion requires only that state courts have "a *fair* opportunity to act on [the petitioner's] claims." *Id.* (citation omitted) (emphasis in original). "State petitioners must give the state one full opportunity to resolve any constitutional issues by

invoking one complete round of the State's established appellate review process." *Id.* at 845. "A state prisoner is not required to pursue 'extraordinary' remedies outside of the standard review process . . . ." *Welch v. Lund*, 616 F.3d 756, 758 (8th Cir. 2010) (citations omitted). And, "if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (citation omitted).

C. Discussion of motion for a *Rhines* stay

The Court cannot grant Shockley a *Rhines* stay for the following reasons, which the Court discusses below: (1) in Missouri, direct appellate review and postconviction review under Rule 29.15 provide the established procedure for Shockley to raise his claims, making them sufficient to exhaust these claims; (2) even if the possibility of review under Rule 91 could keep a claim from becoming exhausted, Rule 91 does not provide Shockley another opportunity to litigate his case in Missouri; and (3) a court should only stay a case with unexhausted claims where the petitioner has not intentionally delayed the proceedings, but Shockley has intentionally delayed this Court's proceedings. Therefore, Shockley is ineligible for a *Rhines* stay.

1. Procedural default under Rule 29.15(b) exhausts Shockley's claims

Shockley cannot seek any further postconviction review in Missouri. Rule 29.15 provides the procedure

for petitioners convicted of a felony after trial to present constitutional claims, especially claims of ineffective assistance. Mo. Sup. Ct. R. 29.15(a). Because Shockley appealed his conviction, *see Shockley I*, 410 S.W.3d at 179, he had 90 days from the final decision on that appeal to file any claim for postconviction relief, Mo. Sup. Ct. R. 29.15(b). This deadline passed nearly a decade ago, *see Shockley I*, 410 S.W.3d at 179 (entered August 13, 2013), and it procedurally bars Shockley from any further Rule-29.15 relief.

Shockley claims that he can still receive state habeas review under Missouri Supreme Court Rule 91. Doc. 64 at p. 1 (citing *State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 381 (Mo. 2021) (holding that "[t]here is no absolute procedural bar to . . . seeking habeas relief" under Rule 91 (alteration in original) (quoting *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. 2001) (rev.ed on other grounds))). *But see Johnson*, 628 S.W.3d at 381 ("But the opportunities for [habeas] relief are extremely limited. A strong presumption exists . . . against claims that already have once been litigated." (citation omitted)). The Court concludes that Shockley's procedural default under Rule 29.15 exhausts his claims regardless of Missouri's Rule 91 procedure. Four reasons support this conclusion.

First, Rule 29.15 postconviction review provides the established means for a petitioner in Shockley's position to raise ineffective-assistance claims. "Rule 29.15 . . . post-conviction motions for relief 'are designed to provide a single unitary, post-conviction remedy, to be used in place of other remedies,

including the writ of habeas corpus.'" *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 701 (Mo. 2010) (quoting *Nixon*, 63 S.W.3d at 214); *see also State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516 (Mo. 2010) (same). While this principle does not mean that review under to Rule 29.15 entirely replaces habeas review pursuant to Rule 91, *see Laughlin*, 318 S.W.3d at 701–02, it does establish Rule 29.15 as *the* appropriate procedure for petitioners like Shockley to present their constitutional claims, *see* Mo. Sup. Ct. R. 29.15(a).

To exhaust a claim, "[s]tate petitioners must give the state one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. If a procedure is part of the "normal, simple, established . . . appellate review process," the petitioner must exhaust that remedy. *Id.* at 845. While terms like "normal" and "established" are not self-defining, the Missouri Supreme Court's repeated finding that Rule 29.15 provides "a single unitary post-conviction remedy, to be use in place of other remedies," *see, e.g., Laughlin*, 318 S.W.3d at 701 (citation omitted), makes clear that Rule 29.15 provides Missouri's "established appellate review process" for convicted felons with constitutional claims, *O'Sullivan*, 526 U.S. at 845; *see also* Mo. Sup. Ct. R. 29.15(a). The deadline for Shockley to raise claims according to Missouri's established appellate review process has now passed, making those claims exhausted. *See Woodford*, 548 U.S. at 93 (citation omitted).

Second, Rule 91 provides only an extraordinary remedy. "A state prisoner is not required to pursue 'extraordinary' remedies outside the standard review process" to exhaust his claims. *Welch v. Lund*, 616 F.3d 756, 758 (8th Cir. 2010) (citations omitted); *see also Grass v. Reitz*, 643 F.3d 579, 585 n.3 (8th Cir. 2011) (finding that the Missouri Supreme Court's declaration that a procedure "is an extraordinary remedy that is not part of the standard review process" makes that procedure unnecessary for purposes of exhausting a claim (citation omitted)). The Missouri Supreme Court has held that "[t]he relief available under a writ of habeas corpus has traditionally been very limited, and courts are not required to issue this extraordinary writ where other remedies are adequate and available." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000). Where a petitioner fails to raise a claim in postconviction review, the petitioner generally cannot raise those claims in a Missouri habeas petition. *Id.* Therefore, a state habeas petition pursuant to Rule 91 is an extraordinary remedy, not part of the established procedure for Missouri petitioners; Shockley does not need to pursue the extraordinary Rule 91 state habeas review to exhaust his claims.

Third, procedural default exhausts a claim: "[s]tate prisoners, however, often fail to raise their federal claims in compliance with state procedures, or even raise those claims in state court at all. If a state court would dismiss these claims for their procedural failures, such claims are technically exhausted . . . ." *Shinn*, 142 S. Ct. at 1732. If a petitioner fails to

present his claims pursuant to Rule 29.15, the petitioner procedurally defaults those claims. *Moore-El v. Luebbers*, 446 F.3d 890, 898 (8th Cir. 2006). Thus—setting aside the nuances of the general standard established by *O'Sullivan*—failure to raise a claim under Rule 29.15 procedurally defaults that claim, and procedural default exhausts a claim. Ergo, Shockley has defaulted the claims he chose not to raise in his Rule-29.15 review.

Fourth, accepting Shockley's argument would lead to precisely the absurd result that the *O'Sullivan* Court sought to avoid. The Supreme Court reasoned that, if it required petitioners to "invoke *any possible* avenue of state court review," this rule would "effectively foreclose [federal] habeas review." *O'Sullivan*, 526 U.S. at 844 (emphasis in original). Therefore, the Supreme Court does not require a state petitioner to invoke every possible remedy before deeming his claims exhausted. *Id.* The Missouri Supreme Court has found that "there is no absolute bar to seeking habeas relief. Successive habeas corpus petitioner are, as such, not barred." *Johnson*, 628 S.W.3d at 381 (citation omitted) (cleaned up). According to Shockley, this means he can pursue further avenues of review in state court and, therefore, his unraised claims remain unexhausted. Doc. 64 at p. 1. By this logic, a petitioner can always file for habeas relief in Missouri, and a petitioner can never fully exhaust the established appellate process, "effectively foreclose[ing] [federal] habeas review." *O'Sullivan*, 526 U.S. at 844. The fact that Shockley's Rule-91 theory leads to precisely the absurd result the

Supreme Court designed its exhaustion standards to avoid highlights the error in Shockley's argument: Rule 91 provides extraordinary relief, not the established procedure to for petitioners to litigate their constitutional claims. For these reasons, the Court finds that Shockley does not need to seek relief under Rule 91 to exhaust his claims. Rather, Shockley has exhausted his claims.

2. Rule-91 relief is not available to Shockley

Even if Shockley were required to pursue every possible state remedy to exhaust his claims, Rule 91 does not provide an available remedy. Although Missouri prisoners can, in exceptional circumstances, receive habeas review under Rule 91 for procedurally defaulted claims, Shockley fails to mention any of the applicable caselaw, and he certainly fails to present a persuasive argument that he falls into one of these exceptions. Under Missouri law the following narrow exceptions exist for a prisoner to obtain habeas review under Rule 91 of procedurally defaulted claims:

> [S]ubsequent habeas relief is not barred when the petitioner can demonstrate: (1) a claim of actual innocence or (2) a jurisdictional defect or (3)(a) that the procedural defect was caused by something external to the defense—that is, a cause for which the defense is not responsible—and (b) prejudice resulted from the underlying error that worked to the petitioner's actual and substantial disadvantage.

State ex rel. Laughlin v. Bowersox, 318 S.W.3d 695, 701 (Mo. 2010) (emphasis omitted) (quoting *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516–17 (Mo. 2010)).

Shockley never argues actual innocence and never alleges any jurisdictional defect. *See* Docs. 48, 56, 64. Shockley likewise fails to show that something external to the defense caused the procedural defect. The absence of an allegation of a jurisdictional defect being self-evident, the Court turns to the actual-innocence and then the external-to-the-defense prongs. As noted below in Section VI.A., Shockley states he has always maintained his innocence. But Shockley never argues actual innocence; that is to say, in his hundreds of pages of briefing and motions in this Court, at no time does Shockley argue that he did not murder Sergeant Graham. *See* Docs. 48, 56. When addressing an analogous actual-innocence exception to procedural default in the federal context, Shockley states that "[t]he exception requires a habeas petitioner to present new evidence that affirmatively demonstrates he is innocent," and then sidesteps the issue, arguing only that—*but for* the allegedly unreliable evidence used against him—the jury could not have convicted him of murder. Doc. 56 at pp. 174–75. Because Shockley fails to squarely address the actual-innocence exception to the federal bar on procedurally defaulted claims, the Court cannot find that Shockley would succeed under the actual-innocence exception to the Missouri bar on procedurally defaulted claims. *See infra* Section VI.A. (discussing in detail the standards for actual-

innocence and Shockley's failure to attempt to meet those standards).

Although he does attempt to demonstrate cause and prejudice under federal standards by alleging that postconviction counsel acted incompetently in each of the relevant claims, Shockley does not cite any case holding that postconviction-counsel incompetence is "something external to the defense" under Missouri's procedural rules. *See* Doc. 48; *see also State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 76 (Mo. 2015) (explaining that the something-external-to-the-defense standard requires a petitioner to show that "[t]he fatual or legal basis for a claim must not have been reasonably available to counsel or some interference by state officials must have made compliance impracticable") (citing *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. 2013); *Gehrke v. State*, 280 S.W.3d 54, 59 (Mo. 2009) ("If a claim could have been raised in a . . . Rule 29.15 motion but was not raised, the [petitioner] waives that claim and cannot raise the claim in a subsequent petition for habeas corpus."). Further, as explained below, the Court concludes that postconviction counsel did not act incompetently and that Shockley did not suffer prejudice from any alleged ineffective assistance. *See infra* Sections VI.C.1.a.–i. In sum, Shockley fails to show that he could receive another layer of review in the Missouri-court system and fails to show that he requires another layer of review to exhaust his claims. Because Shockley has exhausted his claims, he fails to meet the requirements for a stay under *Rhines*. 544 U.S. at 278.

3. Shockley has intentionally delayed this proceeding

What's more, even if the Amended Petition contained unexhausted claims, "if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Rhines*, 544 U.S. at 277–78; *see also Shinn*, 142 S. Ct. at 1739 ("[A] federal habeas court may never 'needlessly prolong' a habeas case . . . ." (citation omitted)). Shockley only requested a *Rhines* stay nearly three years after filing this case—and only after *Shinn* made clear that he could not support the allegedly unexhausted claims with evidence. Docs. 1, 64. The Court accordingly views with a healthy dose of skepticism Shockley's belated, post-*Shinn* assertion of having unexhausted claims.

That said, if he truly believed he had further state remedies but nonetheless filed this federal petition, Shockley should have brought the lack-of-exhaustion issue to this Court's attention immediately. Typically, a federal court cannot review an unexhausted claim. *Wade v. Mayo*, 334 U.S. 672, 679 (1948). Moreover, if Shockley thought, before filing, that he still had available state remedies, he could have waited, free of statute-of-limitations concerns, to file this habeas case until after the appropriate court had adjudicated his claims. *See generally*, 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgement or claim is pending shall not be counted toward any period of limitations

[for federal habeas petitions]."). In either case, Shockley's tactics amount to intentional delay.

If Shockley genuinely believed that his Petition or Amended Petition contained unexhausted claims, he would have moved for a stay at the earliest possible moment. Instead, only after the Supreme Court handed down *Shinn*—which foreclosed an evidentiary hearing and precluded the Court from otherwise considering evidence beyond the state-court record on his ineffective-assistance-of-post-conviction-counsel claim—did Shockley pivot to a new, and unsupported, argument for a stay. Because Shockley intentionally delayed filing a motion for a stay, and because the Court concludes his motion lacks merit, *Rhines* does not entitle Shockley to a stay, and the Court denies his motion. Doc. 64.

V. Discovery motion

A. Overview

In keeping with AEDPA's overarching design, federal law sets a high bar for a habeas petitioner to be entitled to discovery. First, 28 U.S.C. § 2254(d) bars petitioners from developing and presenting evidence outside the state court record to relitigate the state court's decision. Second, 28 U.S.C. § 2254(e)(2) bars petitioners who have failed to develop the state court record from developing and presenting additional evidence, unless they meet certain stringent requirements. Finally, any evidentiary development must still comply with the Federal Rules of Evidence. The Court explains each of these in detail below. Therefore, to introduce any new

evidence for the Court to consider, Shockley must first run AEDPA's gauntlet.

B. AEDPA and standards for a discovery motion

In 28 U.S.C. § 2254(d), Congress enacted the following bar on federal habeas relief:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

So, if a claim "was adjudicated on the merits in State court proceedings," a petitioner must overcome § 2254(d)'s bar on relief. And that petitioner cannot use evidence from outside the state-court record to overcome this bar. *Cullen v. Pinholster*, 563 U.S. 170, 181–83 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. . . . It would be strange to ask a federal court

to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court."); *Shoop v. Twyford*, 142 S. Ct. 2037, 2043–44 (2022) ("Review of factual determinations under § 2254(d)(2) is expressly limited to 'the evidence presented in the State court proceeding.'"). Further, when § 2254(d) renders evidence outside the state-court record irrelevant, it also makes that evidence inadmissible. *Shoop*, 142 S. Ct. at 2044 (stating that "AEDPA . . . restricts the ability of a federal habeas court to develop and consider new evidence, limiting review" under § 2254(d)(1) and (d)(2) to the state-court record (citing *Pinholster*, 563 U.S. at 181)).

Even if the state court did not adjudicate a claim on the merits, AEDPA limits a petitioner's ability to introduce evidence outside the state-court record:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered

> through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

According to the opening clause of § 2254(e)(2), these strict limits apply to cases where the petitioner "failed to develop the factual basis of a claim." Here, "fail[] to develop" means a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 431 (2000). So whether § 2254(e)(2) applies to a petitioner does not depend on "whether the facts [that the petitioner now wants to introduce] could have been discovered but instead [on] whether the [petitioner] was diligent in his efforts [to discover and present those facts in state court]." *Marcyniuk v. Payne*, 39 F.4th 988, 999 (8th Cir. 2022) (quoting *Williams v. Taylor*, 529 U.S. at 435). Recently, the Supreme Court established that "under § 2254(e)(2), a [petitioner] is 'at fault' even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the [petitioner] can satisfy § 2254(e)(2)'s stringent requirements." *Shinn*, 142 S. Ct. at 1735.

A petitioner who "fails to demonstrate either that the requirements of § 2254(e)(2) do not apply to him [because he diligently attempted to develop the factual record] or that he can satisfy those requirements . . . is not entitled to discovery." *Marcyniuk*, 39 F.4th at 1000. But overcoming the bar of § 2254(e)(2) is a necessary—not sufficient—condition for petitioner to add further evidence. And even where § 2254(e)(2) does not bar the introduction of further evidence, other rules may bar additional evidence, such as § 2254(d)'s bar on using evidence outside the state-court record to review state-court adjudications of the merits. *Pinholster*, 563 U.S. at 181–85.

C. Discussion of discovery motion

In January 2022, Shockley filed his motion for discovery, requesting expansion on claims 24 and 25, which he presented in state court, and claims 6, 13, 21, 22, 26, and 27, which he did not present in state court. Doc. 57. The parties fully briefed this motion and then submitted additional briefing after the Supreme Court's *Shinn* decision. Docs. 57–59, 64–65. The Court addresses first, the claims Shockley presented in state court; second, the claims Shockley did not present, but that Shockley claims meet § 2254(e)(2)'s high bar; third, claims Shockley did not present in state court, and which Shockley does not argue meet § 2254(e)(2)'s high bar; fourth, claim 27, which makes no concrete allegations, but which Shockley says meets the discovery standard of *Bracy v. Gramley*, 520 U.S. 899 (1997); and, fifth, claims that Shockley mentions without properly discussing in his

discovery motion. As explained below, having analyzed each of Shockley's arguments, the Court concludes that on the facts and under the law, Shockley's motion for discovery fails.

1. Discovery requests for raised claims

Shockley already presented, and attempted to develop, the factual records for claims 24 and 25 in state court. Doc. 20-52 at pp. 65–66; Doc. 48-3 at pp. 129–32. Therefore, Missouri's courts have "adjudicated [these claims] on the merits," and § 2254(d) applies, requiring Shockley to show that the Missouri Supreme Court contradicted Supreme Court precedent, unreasonably applied that precedent, or unreasonably determined the facts. *See* § 2254(d). Of course, no *new* evidence could possibly render the Missouri Supreme Court's decision retroactively unreasonable, *Pinholster*, 563 U.S. at 182–83, and so cannot possibly be relevant to whether Shockley can overcome § 2254(d)'s bar on relief. *Id.* Granting discovery on claims 24 and 25, then, would "needlessly prolong" this case, contravening the Supreme Court's instructions. *Shoop*, 142 S. Ct. at 2044 (quoting *Shinn*, 142 S. Ct. at 1739).

In defense of his request for discovery, Shockley says that he did not raise these claims in state court, so *Pinholster* does not apply. Doc. 59 at pp. 7–8. Yet, Shockley did raise claim 24 in state court, Doc. 48 at p. 458 (As Shockley alleges in is Amended Petition, "The Supreme Court of Missouri addressed this claim as '*Point V. Failure to call a ballistics expert*.'"), as well as claim 25, *id.* at p. 501 ("[T]he Missouri Supreme Court's decision denying *Brady* relief was contrary to

clearly established federal law . . . ."). Shockley makes some vague remarks suggesting that the Missouri Supreme Court might not have adjudicated some aspect of these claims. *See, e.g.*, *id.* at p. 458 ("This aspect of the claim was raised during post-conviction proceed[ings]"); *id.* at 470 ("To the extent the Missouri courts ruled on the merits of Shockley's *Brady* claim . . . ."). He does not explain, however, what he means by these remarks. A brief comparison of claims 24 and 25 of Shockley's Amended Petition with points V and XVII of the Missouri Supreme Court ruling reveals that Shockley raised these claims in state court. *Compare* Doc. 48 at pp. 455–68, *with Shockley II*, 579 S.W.3d at 906–08; *compare* Doc. 48 at pp. 468–501, *with Shockley II*, 579 S.W.3d at 920–21. Shockley's arguments here rest on a misrepresentation of the record, and to the contrary, Shockley did raise claims 24 and 25 in state court. This argument therefore fails.

Shockley also argues that, under *Pinholster*, a court may allow a petitioner to gather and present additional evidence before it determines whether § 2254(d) bars relief. Doc. 59 at p. 66 (citing *Pinholster*, 563 U.S. at 203 n.20). The footnote Shockley cites explains that the Supreme Court was "barred from considering the evidence *Pinholster* submitted" from outside the state-court record in deciding whether his claims satisfied § 2254(d). *Pinholster*, 563 U.S. at 203 n.20. The footnote also states that "we need not decide . . . whether a district court may ever choose to hold an evidentiary hearing

before it determines that § 2254(d) has been satisfied." *Id.*

The Court disagrees with Shockley's reading of *Pinholster*. *Shoop* clarifies any ambiguity in *Pinholster* regarding whether a court can allow a petitioner to add to the state-court record before overcoming § 2254(d). *Shoop* cited *Pinholster*'s holding that review under § 2254(d)(1) is limited to the state-court record as a restriction on "the ability of a federal habeas court to develop and consider new evidence." *Shoop*, 142 S. Ct. at 2043–44. The *Shoop* Court concluded that "[a] court . . . must, consistent with AEDPA, determine at the outset whether the new evidence sought could be lawfully considered," and held that the district court erred by giving the petitioner an opportunity to develop the record without "determin[ing] how, in light of the limitations on its review described above, newly developed evidence could aid [the petitioner's] cause." *Id.* at 2044–45. The Court will not repeat the error identified in *Shoop*.

Finally, Shockley argues that *Pinholster* does not bar him from developing the record, because "Shockley can show that he was diligent in his attempt to develop the *Brady* issue in state court." Doc. 59 at p. 64 (referring to claim 25). Shockley quotes a passage from another *Pinholster* footnote: "§ 2254(e)(2) should be interpreted in a way that does not preclude a state prisoner, who was diligent in state habeas court and who can satisfy § 2254(d), from receiving an evidentiary hearing." *Id.* (quoting *Pinholster*, 563 U.S. at 1400 n.5). According to this

footnote, a petitioner who can succeed under § 2254(d)—for example, by showing that the state court applied a standard that contradicts a rule set by the Supreme Court—and who can satisfy § 2254(e)(2)'s restrictions could possibly add to the evidence in the state-court record. But *Pinholster* and *Shoop* make clear that a court cannot allow a petitioner to develop the record without first determining "whether the new evidence sought could be lawfully considered"—and a court cannot lawfully consider evidence outside the state-court record in deciding whether § 2254(d) bars relief. *Shoop*, 142 S. Ct. at 2044. So, a court can only "grant an evidentiary hearing or 'otherwise consider new evidence' under § 2254(e)(2)," for a claim adjudicated on the merits in state court if it first decides that the petitioner satisfies § 2254(d). *Id.* (quoting *Shinn*, 142 S. Ct. at 1739). As discussed in Sections V.B.1.m. (claim 24) and V.B.2.f. (claim 25), § 2254(d) bars relief on claims 24 and 25, so the Court cannot allow Shockley to expand the record for these claims.

2. Discovery requests under § 2254(e)(2) and *Shinn*

Although Shockley did not raise and develop the factual basis for claims 21 and 22 in state court, he gives three reasons why he thinks he can overcome § 2254(e)(2)'s restrictions on further discovery. Doc. 64 at p. 6. First, he argues that *Martinez* allows him to satisfy § 2254(e)(2). *Id.* Second, he argues that "the evidence supporting the claim did not previously exist," so he satisfies § 2254(e)(2)(A)(ii). *Id.* Third, he opines that "a miscarriage of justice would occur if this

Court were to not grant further evidentiary development." *Id.* Each of these arguments fail.

First, although Shockley argues he can satisfy or bypass § 2254(e)(2) by demonstrating ineffective assistance of postconviction counsel, *Shinn* conclusively rejected this theory. Section 2254(e)(2) does not bar a petitioner from developing the record where the petitioner is not "at fault" for the lack of factual development. *Shinn*, 142 S. Ct. at 1734. In his briefing filed before the Supreme Court decided *Shinn*, Shockley argued that "*deficient* representation of post-conviction counsel is not imputed to the petitioner," pursuant to *Martinez*. Doc. 59 at p. 51; *see also infra* Section VI.C.1. (detailing the caselaw surrounding *Martinez*). Then the Supreme Court decided *Shinn*, holding that "under § 2254(e)(2), a prisoner is 'at fault' even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements." *Shinn*, 142 S. Ct. at 1735. So, *Shinn* undermines Shockley's appeal to *Martinez*. Shockley cannot demonstrate that he satisfies § 2254(e)(2) by showing ineffective assistance of postconviction counsel. Thus, Shockley's first argument for overcoming § 2254(e)(2)'s bar on discovery fails.

Second, Shockley says that he could not have previously discovered—because it did not exist—the evidence that he now asks the Court to consider. Doc. 64 at p. 6. Additionally, he argues that no reasonable jurist would find him guilty in light of this new

evidence. *Id.* According to this argument, Shockley satisfies § 2254(e)(2) by showing that his claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence" and that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254(e)(2).

Shockley, however, cannot satisfy either of these elements. Elsewhere, when presenting his ineffective-assistance claim, Shockley argues at length that his postconviction counsel could have discovered this allegedly new evidence through the exercise of due diligence. *See* Doc. 48 at p. 394 ("What is critical, however, is that the questioning of such evidence was taking place before, at the time, and after Shockley's trial."); *id.* at p. 396 ("This information would have been available to Shockley's trial lawyers to challenge the reliability of such evidence."). And as the Court discusses in its analysis of Shockley's cause-and-prejudice argument for claim 21 below, Shockley has persuaded the Court that his postconviction counsel could have discovered this evidence through the exercise of due diligence. *See infra* Section VI.C.2.b. Therefore, Shockley fails to satisfy § 2254(e)(2)(A).

Even if Shockley could satisfy § 2254(e)(2)(A) by showing that he could not have previously discovered the evidence that he hopes the Court will consider in deciding claims 21 and 22, Shockley would still need to satisfy § 2254(e)(2)(B). This would require him to

show by clear and convincing evidence that, in light of the allegedly new evidence, "no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254(e)(2)(B). Shockley says that the allegedly new evidence undermines the reliability of the ballistics evidence used at trial, and if his trial counsel or the trial court had excluded the allegedly unreliably ballistics evidence, the jury could not have convicted him. Doc. 64 at p. 6. But, because of the strength of the cumulative case against Shockley, *see infra* Section VI.A., a reasonable factfinder could have found him guilty in the absence of the ballistics evidence he now seeks to dispute. Therefore, even if Shockley could satisfy § 2254(e)(2)(A), he could not satisfy § 2254(e)(2)(B).

Third, Shockley argues that "a miscarriage of justice would occur if this Court were to not grant further development." Doc. 64 at p. 6. However, Shockley does not cite any case holding that a petitioner can bypass § 2254(e)(2)'s restriction on developing the record by arguing that a miscarriage of justice would occur in the absence of further discovery. *See* Doc. 64. Presumably, Shockley is drawing from his discussion of the miscarriage-of-justice exception to the rule barring procedurally defaulted claims. *See* Doc. 56 at p. 174 (presenting Shockley's discussion of the miscarriage-of-justice exception). But even if this exception applied in the context of § 2254(e)(2), this exception does not apply to Shockley, as the Court discusses in Sections VI.C.1.h. and VI.C.2.b. Therefore, Shockley's three

arguments for further discovery for claims 21 and 22 each fail.

3. Discovery requests contrary to § 2254(e)(2) and *Shinn*

Shockley requests discovery on claims 6, 13, and 26, which he did not present in state court and does not argue meet § 2254(e)(2)'s high bar. Doc. 57. Each of these presents a *Martinez* claim—in other words, a procedurally defaulted ineffective-assistance-of-trial-counsel claim that Shockley hopes to revive with a showing of postconviction-counsel incompetence. *See Shinn*, 142 S. Ct. at 1733; *see also* Mo. Sup. Ct. R. 29.15(b). In support of his motion for discovery, Shockley cites, among other cases, *Sasser v. Hobbs*, which reversed a district court's denial of an evidentiary hearing on several *Martinez* claims and concluded that "the district court is authorized under 28 U.S.C. § 2254(e)(2) and required under *Trevino* to 'hold an evidentiary hearing on the claim[s].'" 735 F.3d 833, 853 (8th Cir. 2013) (alteration in original) (citation omitted).

Since Shockley filed his discovery motion, the Supreme Court rejected the reasoning in *Sasser* and that case's interpretation of *Trevino*. *Shinn*, 142 S. Ct. at 1734. Instead, the Supreme Court held "that, under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." *Id.* The Court reasoned that, because no Sixth-Amendment right to postconviction counsel exists, "state postconviction counsel's ineffective assistance in

developing the state-court record is attributed to the prisoner." *Id.* Thus, "under § 2254(e)(2), a prisoner is 'at fault' even when state postconviction counsel is negligent." *Id.* at 1735. "In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements." *Id.*

In his supplemental brief, Shockley all but concedes that *Shinn* forecloses expansion of the state-court record in this case. *See* Doc. 64. Although he says that claims 21 and 22 can meet § 2254(e)(2)'s standards for discovery, he remains conspicuously silent on how this standard should apply to his other attempts to expand the evidentiary record. *Id.* Instead of arguing that he can satisfy these requirements, Shockley condemns § 2254(e)(2) and *Shinn*'s interpretation of that statute as unconstitutional and otherwise unlawful as applied to him and the facts of his case. Doc. 64 at pp. 8–10. Shockley cites no authority supporting his challenge to the Supreme Court's decision. *See* Doc. 64. Essentially, Shockley urges the Court to ignore controlling caselaw. *Id.* at p. 8. But the Court "must follow Supreme Court precedent which directly applies to a case before [it]." *Hennepin Cnty. v. Fed. Nat. Mortg. Ass'n*, 742 F.3d 818, 823 (8th Cir. 2014). And Shockley admits that *Shinn* applies here. Doc. 64 at p. 8. Thus, the Court denies Shockley's request for discovery on claims 6, 13, and 26 and rejects Shockley's broader arguments that *Shinn* and § 2254(e)(2) should not govern this case.

4. Discovery requests under *Bracy*

Shockley requests discovery on claim 27—which voices Shockley's suspicion that prosecutors violated *Brady v. Maryland,* 373 U.S. 83 (1963)—without any concrete factual allegations. Doc. 48 at pp. 511–19. Shockley argues that because he can demonstrate "good cause" for further discovery, he can proceed under *Bracy v. Gramley*. Doc. 57 at p. 60. *Bracy* concerns Habeas Rule 6(a), which says that a party is entitled to discovery if he can show good cause for further discovery. 520 U.S. at 901. Shockley does not supply any argument or cite any authority supporting the notion that the Habeas Rules allow a petitioner to circumvent § 2254(e)(2)'s limits on discovery and record expansion. *See* Docs. 57, 59. Indeed, the Eighth Circuit has rejected such attempts to escape AEDPA's requirements, concluding that "the conditions prescribed by § 2254(e)(2) must still be met" when a petitioner attempts to expand the record under the Habeas Rules. *Mark v. Ault*, 498 F.3d 775, 788 (8th Cir. 2007) (citations omitted) (discussing the relationship between § 2254(e)(2) and discovery under Habeas Rule 7's provision for record expansion); *cf. Shoop*, 142 S. Ct. at 2044–45 ("[P]etitioner[s] cannot use [the All Writs] Act to circumvent statutory requirements or otherwise binding procedural rules." (citation omitted)). Shockley does not argue that he can meet § 2254(e)(2)'s standard for discovery. Doc. 57 at pp. 56–61. Thus, the Court denies Shockley's request for discovery on this vacuous claim.

5. Discovery requests without briefing

In his discovery briefing, Shockley seeks discovery on a number of claims, but he does not submit related briefing on, claims 8, 9, and 11. More specifically, Shockley "reiterates his request for this Court to grant discovery as requested in the initial motion, [and] grant a hearing on Claims 6, 13*, 8*, *9*, *11*, 21, 22, 24, 25, and 26 of his amended petition." Doc. 59 at p. 1 (emphasis added); *see also id.* at p. 2 (citing Doc. 48) ("Mr. Shockley previously sought a hearing on claims 6, 13, 8, 9, 11, 21, 22, 24, 25, and 26 in his amended petition for writ of habeas corpus."). Shockley's briefing on his discovery requests discusses most of these claims. *See* Doc. 57 (seeking discovery on claims 6, 13, 21, 22, 24, 25, 26, and 27); Doc. 59 (arguing for discovery on claims 6, 13, 21, 22, 24, 25, 26, and 27); Doc. 64 (arguing for discovery on claims 6, 13, 21, 22, and 26, but not 24, 25, or 27). However, Shockley's briefing does not request an evidentiary hearing on claims "8, 9, [and] 11." Doc. 59 at p. 1. At the end of his Amended Petition, Shockley makes a general request for "discovery and a hearing on claims brought pursuant to *Martinez v. Ryan*." Doc. 48 at p. 530. While Shockley raises claims 8, 9, and 11 under *Martinez*, *id.* at pp. 248–69, 283–91, *Martinez* does not provide an exception to § 2254(e)(2)'s limits on discovery, *see supra* Section IV.C.2–3. Shockley does not explain how he can overcome this problem, nor does the Court see any argument he could provide. Therefore, the Court denies Shockley's request for discovery on claims 8, 9, and 11.

VI. Habeas corpus petition

Having resolved Shockley's ancillary motions, the Court now turns to the merits of Shockley's Amended Petition.

A. The evidence against Shockley

Shockley contends that "[t]he State's weak circumstantial case was not enough to convict" him. Doc. 48 at p. 25. This notion stands in the background of the prejudice analysis of Shockley's many *Strickland* claims, so, in Shockley's view, each of his counsel's alleged failures played a key role in Shockley's conviction. *See, e.g.*, *id.* at 250 (claiming that a witness's testimony was "essential" to the prosecution's case and that counsel failed to address the testimony appropriately).

The Missouri Supreme Court rejected Shockley's characterization of the evidence:

> Here, the circumstantial evidence was strong. Knowing that Sergeant Graham was investigating his involvement in the accident that killed Mr. Bayless, for several months Mr. Shockley concocted a series of lies to conceal the fact that it was he who drove the truck into the ditch. He also encouraged others to lie for him about his participation in the accident, including putting his finger over his grandmother's mouth when she said she would not lie for him. Once Mr. Shockley learned that Sergeant Graham had verified his involvement, he obtained Sergeant Graham's home address. The day of Sergeant

Graham's murder, Mr. Shockley borrowed his grandmother's car, and witnesses testified to seeing the car near Sergeant Graham's house during the estimated time of the murder. Mr. Shockley returned the car to his grandmother within thirty minutes of the shooting. The bullet that penetrated Sergeant Graham's Kevlar vest belonged to the .22 to .24 caliber class of ammunition. Although never found in his possession, Mr. Shockley was known to own a .243 rifle, and investigators discovered a single empty slot in Mr. Shockley's gun cabinet. On the night of the murder, Mrs. Shockley took a box of .243 ammunition to Mr. Shockley's uncle and stated that "Lance said you'd know what to do with them." After learning that Mr. Shockley previously had fired his .243 rifle on his uncle's property, investigators searched the grounds and discovered a .243 shell casing. The investigators also recovered several .243 shell casings on Mr. Shockley's field as well as several bullet fragments. Three highway patrol ballistics experts compared the fragments found on Mr. Shockley's property to the slug pulled from Sergeant Graham's body. All concluded that, in their expert scientific opinion, the three bullet fragments recovered from Mr. Shockley's field were fired from the same firearm as the one used to shoot the bullet into Sergeant Graham. In addition to the .243 rifle, Mr. Shockley owned numerous other guns, including three

> shotguns. A ballistics expert testified that a shotgun wadding discovered on Mr. Shockley's property was consistent with the wadding found near Sergeant Graham's body. The evidence was sufficient to support the imposition of a death sentence considering the strength of the evidence.

Shockley I, 410 S.W.3d at 203.

Having reviewed the evidence, the Court concludes that the Missouri Supreme Court reasonably found that "the circumstantial evidence [against Shockley] was strong." *Id.* The Court must accord this determination of fact appropriate deference. 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). Given the facts that the Missouri Supreme Court marshaled to support its judgment on the strength of the prosecution's case, Shockley fails to rebut the presumption in favor of the Missouri Supreme Court. Therefore, AEDPA requires the Court to reject Shockley's weak-circumstantial-case theory.

Further, Shockley does not argue that he is actually innocent. *See* Docs. 48, 56. "In order to establish a valid claim of actual innocence, a defendant must show factual innocence, not simply legal insufficiency of evidence to support a conviction." *McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001) (citation omitted) (explaining the notion of actual innocence in the context of procedural default);

see also Bousley v. United States, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency." (citation omitted)). To succeed in a claim of actual innocence, a petitioner "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536–37 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995), *superseded in part by* 28 U.S.C. § 2244(b)(2)(B)(i)). In considering whether a petitioner is actually innocent—not simply whether the evidence presented at trial was insufficient—"the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *Id.* at 348 (citation omitted).

Shockley, however, makes no attempt to demonstrate actual innocence, as opposed to mere legal insufficiency. *See* Docs. 48, 56. Even when squarely addressing the issue of actual innocence in the context of the actual-innocence exception to the bar on procedurally defaulted claims, Shockley conspicuously avoids the issue. Doc. 56 at pp. 174–75. Arguing that he can overcome procedural default, Shockley says that "[t]he [actual-innocence] exception requires a habeas petitioner to present new evidence that affirmatively demonstrates that he is innocent of the crime for which he was convicted." *Id.* (citations omitted). He then argues only that some of the prosecution's evidence lacked reliability in light of

new scientific studies, refusing to plainly state whether he is actually innocent. *Id.* This careful phrasing falls far short of an "affirmative[] demonstrat[ion] of innocence," *Id.*

Shockley's argument only alleges the "legal insufficiency of the evidence to support [Shockley's] conviction." *McNeal*, 249 F.3d at 749 (citation omitted). In the entirety of Shockley's briefing, the closest he comes alleging actual innocence is the following: "Shockley has always maintained his innocence of the crime, and the evidence against him was not strong." Doc. 48 at p. 22. This statement sits within a broader description of the events of the trial and the alleged insufficiency of the case against Shockley. *Id.* Rather than arguing that the Missouri-criminal-justice system has convicted a factually innocent man, Shockley's overarching theory of the case is that the police and jury wanted to convict him and that every defense attorney and court involved in the litigation of this case has acted unreasonably. *See* Doc. 48. In sum, the Court does not find even the seed of an actual-innocence argument in Shockley's briefing, much less an argument that meets the standards established by the Supreme Court and Eighth Circuit. The Court now turns to Shockley's claims for relief.

B. Claims adjudicated on the merits in state court.

Because federal habeas review serves only as a last resort against miscarriages of justice in state criminal court, *Woods v. Donald*, 575 U.S. 312, 316 (2015) (citation omitted), federal law circumscribes

the power of federal courts. "Under AEDPA, . . . a federal [habeas] court may disturb a final state-court conviction in only narrow circumstances." *Brown v. Davenport*, 142 S. Ct. 1510, 1518 (2022). For a federal court to issue a writ of habeas corpus brought by a person disputing a state court's ruling, the petitioner must show that the state court's adjudication on the merits:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d)(1)–(2). Further raising the bar, AEDPA provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

§ 2254(e)(1).

A state court's decision stands "contrary to" clearly established Supreme Court precedent "if the state court either 'applies a rule that contradicts the

governing law set forth in [Supreme Court] cases' or 'confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the] precedent.'" *Penry v. Johnson*, 532 U.S. 782, 792 (2001) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). An unreasonable application of clearly established Supreme Court precedent occurs when the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the case. *Id.* (citing *Williams v. Taylor*, 529 U.S. at 407–08). Finally, a state-court decision counts as an unreasonable determination of the facts "only if it is shown that the state court's presumptively correct factual findings do not enjoy support in the record." *Ryan v. Clarke*, 387 F.3d 785, 790 (8th Cir. 2004) (citing § 2254(e)(1); *Boyd v. Minnesota*, 274 F.3d 497, 501 n.4 (8th Cir. 2001)). These standards create a high bar for any claim adjudicated on the merits in state court.

1. Ineffective-assistance claim adjudicated on the merits in state court

a. *Strickland v. Washington*

Twenty of Shockley's 28 claims allege ineffective assistance of counsel, and Shockley presented 12 of these claims in Missouri court. *See* Doc. 48. The Missouri Supreme Court analyzed these claims under *Strickland v. Washington*, 466 U.S. 668 (1984), and the Court accepts those analyses, so long as they meet

§ 2254(d)'s deferential standard. In *Strickland*, the Supreme Court explained:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. For the sake of consistency, the Court will refer to the team of attorneys that first represented Shockley as "initial counsel," the team of attorneys that represented Shockley at trial as "trial counsel," the team of attorneys that represented Shockley on direct appeal as "appellate counsel," the team of attorneys that represented Shockley during Rule 29.15 collateral review as "postconviction counsel," and his federal habeas counsel as "present counsel."

i. *Strickland*'s performance and prejudice prongs

A habeas court does not dissect trial counsel's conduct but instead looks to the trial counsel's performance as a whole. *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) ("Since '[t]here are countless ways to provide effective assistance in any given case,' unless consideration is given to counsel's overall performance, . . . it will be 'all too easy for a court examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'" (internal citation omitted and alteration in original)); *see also Harrington v. Richter*, 562 U.S. 86, 111 (2011) ("[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' . . . it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (citation omitted)); *Jennings v. Stephens*, 574 U.S. 271, 276–82 (2015). And, counsel's strategic decisions are "entitled to a 'strong presumption' of reasonableness." *Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021) (quoting *Harrington*, 562 U.S. at 104). Thus, even a decision without an obvious explanation deserves a presumption of reasonableness, especially when the rest of the attorney's conduct reflects competence. In other words, to prevail on a claim of ineffective assistance of counsel, Shockley must overcome a very high bar.

Strickland does not require the Court to scour counsel's behavior for everything that falls short of

the ideal. The performance stage of a *Strickland* analysis looks to whether an attorney's actions meet the standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. While sources such as American Bar Association standards may provide insight, a court that simply enforced ABA guidance as the benchmark for effective assistance would undermine "the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 689 (citation omitted). The Sixth Amendment does not guarantee perfection; it simply "ensure[s] that criminal defendants receive a fair trial." *Id.* Emphasizing this point, the Supreme Court held in *Harrington* that "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690). Federal courts must take care to avoid the temptation to "second-guess counsel's assistance after conviction or adverse sentence." *Strickland*, 466 U.S. at 689. To guard against this temptation, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

The prejudice stage of a *Strickland* analysis requires more than "a showing that the errors impaired the presentation of the defense." *Id.* at 693 (internal quotation marks omitted). Although the Supreme Court considered requiring petitioners to

"show that counsel's deficient conduct more likely than not altered the outcome in the case," it decided this standard "is not quite appropriate." *Id.* at 694. Instead, *Strickland* requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "[T]he difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). This prejudice standard requires a "substantial, not just conceivable" likelihood of a different result. *Id.* at 112. Thus, to succeed under *Strickland*, a petitioner must come close to meeting a "more-probable-than-not" standard. *Dorsey v. Vandergriff*, 30 F.4th 752, 757 (8th Cir. 2022) (citation omitted).

Shockley says that his many ineffective-assistance claims should have a cumulative effect:

> Conducting a cumulative review of counsel's deficiencies also follows [*Strickland*]. There, the Supreme Court repeatedly explained that lower courts must consider whether trial counsel's errors (plural) impacted the trial in a manner that violated the Sixth Amendment; it did not instruct that each individual error should be reviewed for prejudice, but rather the opposite.

Doc. 48 at p. 33.

While courts should take defense counsel's overall performance into account in applying the presumption of effective assistance, a court cannot

amalgamate many weak ineffective-assistance claims into one strong ineffective-assistance claim. Consistently lackluster performance can erode a court's trust that an attorney acted reasonably under professional norms, and overall "active and capable advocacy" bolsters a court's confidence that counsel had strategic reasons for unexplained decisions. *Harrington*, 562 U.S. at 111 (citation omitted); *see Kimmelman*, 477 U.S. at 386. Yet, as a matter of analysis, prisoners cannot stack many small mistakes until they rise to the level of ineffective assistance. "*Strickland* does not authorize a cumulative inquiry of counsel's performance" and "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation." *Shelton v. Mapes*, 821 F.3d 941, 950–51 (8th Cir. 2016) (citations omitted). Just as *Strickland* does not authorize cumulative-performance analyses, it does not authorize cumulative-prejudice analyses. "[A] habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) (citations omitted).

Therefore, to succeed under *Strickland*, a prisoner must show that an individual decision fell below the standard of competence under professional norms—not that counsel fell below a standard of ideal performance with the benefit of hindsight. The prisoner must also show that the individual error had a reasonable likelihood of prejudicing his case—not just a speculative possibility of prejudice. The Supreme Court did not intend for *Strickland* to serve

as a gateway for protracted litigation over every time a defense attorney fumbles or sputters. By design, *Strickland* sets a high bar.

ii. The ABA's guidelines do not set the standard for effective assistance

The preceding section details what the standard for ineffective assistance is; the Court must also say what the ineffective-assistance standard is not. Shockley often relies on ABA guidelines to support his various arguments that he received ineffective assistance. *See* Doc. 48. Given Shockley's repeated reliance on the ABA guidelines, the Court engages in a somewhat detailed review and concludes that they do not apply.

Describing its guidelines for defense counsel in death-penalty cases, the ABA states that its goal is "to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 921 (2003). These 178 pages provide wide-ranging and thorough advice for capital defense counsel. *See id.* Thus, the ABA's goal is neither to state a standard of the bare minimum required for professional competence nor to describe professional expectations, but to prescribe a standard of high-quality representation. *See id.* at 930 (arguing the Supreme Court has removed protections for defendants and accepted "seriously deficient performance" when applying *Strickland*, making it

important for the ABA to "mandat[e] the provision of high quality legal representation"). At best, these guidelines can only have significance "to the extent they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (citing *Strickland*, 466 U.S. at 688). The Supreme Court has stressed ABA guidelines do not define competent practice and lower courts must not treat the guidelines as "inexorable commands." *Id.* at 8. Despite this, the guidelines themselves purport to mandate counsel's conduct, e.g., the word "'should' is used [in the guidelines] as a mandatory term[,]" and immodestly state that the guidelines "are not aspirational . . . [but] embody the current consensus about what is required to provide effective representation in capital cases." ABA Guidelines for Death Penalty Cases, *supra* at 920–21. Addressing the ABA's capital-defense guidelines specifically, the Supreme Court noted both the "exhaustive detail" of the guidelines and their stringency. *Bobby*, 558 U.S. at 8. Despite the Supreme Court's caution about the ABA's guidelines in general and its capital-defense guidelines especially, Shockley consistently treats the ABA's recommendations as binding mandates. *See* Doc. 48.

Another reason to scrutinize whether the ABA guidelines provide a proper, or even objective, standard by which to evaluate the conduct of death-penalty trial counsel is the ABA's admitted lack of neutrality on the death penalty. While the ABA avoids taking any position on the death penalty considered in the abstract, it condemns the current death-penalty

system as unjust; calls for increased federal scrutiny of state-court adjudications; and advocates for the suspension of all federal executions, pending more research on the equity of the current system. Testimony of Stephen F. Hanlon on behalf of the Am. Bar Assoc. before the U.S. House of Reps. Comm. on the Judiciary, Subcomm. on the Const., C. R., and C. L. (Dec. 8, 2009) (on file with the ABA); *see also* Brief of the Am. Bar Assoc. as Amicus Curiae in Support of Respondent, *Shoop v. Twyford*, 142 S. Ct. 2037 (2022) (No. 21-511); Brief of Amicus Curiae Am. Bar Assoc. in Support of Granting the Petition for a Writ of Certiorari, *Andrus v. Texas*, 142 S. Ct. 1866 (2022) (No. 21-6001); Brief for the Am. Bar Assoc. as Amicus Curiae Supporting Respondents, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) (No. 20-1009); Letter from Thomas M. Susman, Governmental Affairs Off., to the U.S. Senate (July 20, 2009) (on file with the ABA). Given the ABA's vociferous public criticism of the death penalty, it is not unreasonable to consider whether its guidelines set an unachievable standard for trial counsel such that nearly all counsel will, under the guidelines, be deemed deficient.

For example, relying on the ABA guidelines, Shockley's present counsel repeatedly faults Shockley's various past counsel for not raising nearly every possible objection. *See, e.g.*, Doc. 48 at p. 100 ("ABA Guidelines for capital counsel also demonstrate counsel's failures in voir dire."); *id.* at p. 153 ("Counsel is tasked with being familiar with the process of death qualification in order to be able to expose jurors who cannot meaningfully consider mitigation and to

rehabilitate jurors who initially indicate opposition to the death penalty 'that make them possibly excludable.'" (quoting ABA Guideline 10.10.2(B) at 1049)). According to Shockley, the ABA guidelines establish a mandate for competent attorneys to object whenever possible. *Id.* at p. 336 ("Defense counsel's failure to object fell far below prevailing professional norms and denied Shockley the effective assistance of counsel."); Doc. 48 at p. 350 ("The ABA Guidelines for capital counsel repeatedly emphasize the duty of trial counsel to preserve all viable legal issues for later appellate review. . . . The duty to preserve 'any and all conceivable errors,' is 'one of the most fundamental duties of any attorney defending a capital case at trial.'" (citation omitted)); *Id.* at p. 377 ("Shockley can establish prejudice due to his counsel's failure to object. The use of the demonstrative rifle was prejudicial because it misled the jury into connecting Shockley with the murder weapon never produced by the State.").

Regardless of whether the ABA's elaborate capital guidelines stem from its advocacy against the death penalty, seasoned trial lawyers would reject the ABA's command to object always and everywhere. *See Gonzalez v. United States*, 553 U.S. 242, 249 (2008) ("Numerous choices affecting conduct of the trial, including the objections to make . . . depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial."); *Loefer v. United States*, 604 F.3d 1028, 1030 (8th Cir. 2010) (concluding trial counsel reasonably

decided not to raise what he believed was a "meritless objection" to maintain "credibility with the district court"); James McElhaney, *When to Object*, ABA Journal 75 A.B.A. J. 98 (June 1989) ("You get no points for making every possible objection.").

Effective trial counsel should develop a theory of the case and shape trial strategy around that theory. *Driscoll v. Delo*, 71 F.3d 701, 714 (8th Cir. 1995) (A "general trial strategy that included minimizing the number of objections . . . during the other side's closing argument" was objectively reasonable.). Counsel must decide how vigorously to object to certain harmful evidence in front of the jury. *See* McElhaney, *When to Object*, at 98 (Counsel has a "limited good-will account" with the judge and jury and objections are usually "withdrawals" from this account.). To execute a sound trial strategy, counsel should consider whether to object or not; said differently, objecting always and everywhere, as the ABA guidelines purport to mandate, violates fundamental tenets of wise trial strategy. The Court would therefore look with great skepticism on an object-always-and-everywhere strategy, and finds it at least conceivable that following such a strategy in itself could cause counsel's performance to fall below "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Although Shockley repeatedly asks the Court to treat ABA standards as the criterion for competence, *see* Doc. 48, *Strickland* warns that "[t]he availability of intrusive post-trial inquiry into attorney performance or detailed guidelines for its evaluation

would encourage the proliferation of ineffectiveness challenges." 466 U.S. at 690. Because the ABA's guidelines do not set the standard for review of counsel's conduct, *Harrington*, 562 U.S. at 105; *Strickland*, 466 U.S. at 690, the Court does not treat the ABA's guidance as a legally authoritative statement of the minimum required for professional competence. Rather, the Court will evaluate each of Shockley's ineffective-assistance claims with due deference to his former counsel, as required by Supreme Court precedent. *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."); *Harrington*, 562 U.S. at 105 ("[T]he standard for judging counsel's representation is a most deferential one."); *Premo v. Moore*, 562 U.S. 115, 126 (2011) ("In applying and defining [*Strickland*'s] standard substantial deference must be accorded to counsel's judgment." (citation omitted)).

iii. *Strickland* and § 2254(d)

Setting aside the dogmatic notion of professional competence stated in the ABA guidelines, *Strickland* supplies a broad and flexible concept of effective assistance. Because *Strickland* creates "latitude" for defense attorneys, *Strickland* sets a high bar for any prisoner seeking to raise an ineffective-assistance claim. The bar for ineffective-assistance claims rises even higher once a state court rejects the claim, requiring federal courts to apply *Strickland* and § 2254(d) in tandem. Applying these two standards together, the Court undertakes a "doubly" deferential review:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 562 U.S. at 105 (internal citations omitted); *see also Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) ("[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009))).

So the combination of *Strickland* and § 2254(d) does more than place one high barrier to relief on another high barrier to relief: because *Strickland*'s language is so broad, it allows for a broad range of reasonable interpretations. To succeed on any of the ineffective-assistance claims adjudicated by the Missouri Supreme Court, Shockley must do more than show that he suffered a violation of his Sixth-

Amendment rights. He must persuasively impugn the reasonableness of the Missouri Supreme Court's adjudication: Shockley must prove that no reasonable interpretation of *Strickland*'s repeated insistence on proper deference to counsel, and no reasonable view of the range of professional competence, could result in the Missouri Supreme Court's adjudication of his claims.

b. Claim 1

Shockley's first four claims relate to Juror 58's conduct during voir dire and while serving on the jury.

> Two months before serving on the jury, Juror 58 published a 184-page book, which he described as a fictionalized autobiography. The book contains six pages chronicling the protagonist's brutal and graphic revenge murder of a defendant who killed the protagonist's wife in a drunken-driving accident. The protagonist viewed the defendant as escaping justice in the court system because the defendant received only probation following his conviction. The book's front and back covers contain illustrations of blood spatter. The back cover states the protagonist's life changed forever when his wife was killed and her murderer was set free. The cover states the protagonist "sought vengeance" and "seeks justice" and "knows he will die fighting the system."

Shockley II, 579 S.W.3d at 893.

In claim 1, Shockley first alleges that trial counsel deprived him of effective assistance in jury selection by failing to search for juror bias when Juror 58 volunteered the statement that "I'm a published author . . . [a]nd so I thought maybe I should be coming out with fact [sic] as well." Doc. 48 at pp. 45–48; Doc. 20-3 at p. 83, Tr. at 710:19–22. Second, Shockley argues that trial counsel failed to effectively litigate Juror 58's alleged juror misconduct in connection with their motion for a new trial. Doc. 48 at pp. 62–77. Shockley adds that counsel failed to preserve questions about Juror 58's impartiality for direct appellate review, *id.* at pp. 60–61, although the Missouri Supreme Court eventually reached the merits of the issue on postconviction appellate review, *Shockley II*, 579 S.W.3d at 893–905. To grant relief under § 2254 for an ineffective-assistance claim, the Court must conclude that the Missouri Supreme Court contradicted the Supreme Court's standards for effective assistance of counsel, unreasonably applied *Strickland*, or premised its application on unreasonable factual findings. *See* § 2254(d). The Missouri Supreme Court found that trial counsel acted competently in both instances and that Juror 58 did not prejudice Shockley. *Shockley II*, 579 S.W.3d at 893–98. The state court adjudicated this claim reasonably. *See* § 2254(d)(1)–(2).

i. Jury selection

Shockley first argues that, but for trial counsel's purportedly incompetent decision not to ask Juror 58 follow-up questions about his book, they could have struck Juror 58 for cause and the jury might have

declared Shockley innocent or given him only a life sentence. Doc. 48 at p. 45. The Missouri Supreme Court held that trial counsel's questioning of Juror 58 passed constitutional muster, that the trial court would not have struck Juror 58 for cause, and that Shockley failed to show that Juror 58 harbored bias against Shockley or harmed the impartiality of the jury's deliberations. *Shockley II,* 579 S.W.3d at 896–97.

To determine the competence of Shockley's counsel, the Missouri Supreme Court looked to trial counsel's reasoning in choosing to focus on questions about Juror 58's family ties with law enforcement at the expense of asking about his book. *Id.* at 895–96. According to Shockley's trial counsel, Juror 58 had personal experience related to their theory of the case. *Id.* Trial counsel asked Juror 58 about his son being a police officer and Juror 58's own knowledge of guns, as firearms evidence played a "crucial part[] in selecting jurors and in presenting their theory of the case." *Id.* Meanwhile, Juror 58's book seemed like a less fruitful avenue of inquiry, because trial counsel saw the novel as simply a "vanity project." *Id.*

The Sixth Amendment does not require counsel to pursue every issue to the furthest degree possible. *See Yarborough v. Gentry*, 540 U.S. 1, 7 (2003); *see also Clayton v. State*, 63 S.W.3d 201, 207–08 (Mo. 2001); *supra* Section VI.B.1.a.ii. As the Missouri Supreme Court noted, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's

judgments." *Shockley II*, 579 S.W.3d at 897 (quoting *Collings v. State*, 543 S.W.3d 1, 16 (Mo. 2018) (quoting *Strickland*, 466 U.S. at 691)). In the Missouri Supreme Court's judgment, the details of trial counsel's deliberation demonstrate that they decided competently, not negligently, to not inquire about Juror 58's book in favor of other issues. *Shockley II*, 579 S.W.3d at 896–97.

Even if trial counsel did act incompetently, the Missouri Supreme Court still would not have decided in Shockley's favor. *Id.* at 897 ("[Shockley] cannot demonstrate he was prejudiced by trial counsel's failure to question Juror 58 about the book."). For reasons the Court describes in greater depth in its discussion of Shockley's third claim, *see infra* Section VI.B.2.a., the Missouri Supreme Court reasonably found that Juror 58 did not poison the jury's impartial deliberations and did not prejudice Shockley. *Shockley II*, 579 S.W.3d at 897, 904–05. And this finding merits deference under § 2254(d)(2). Ergo, Shockley's argument that his counsel failed him in voir dire fails at both the performance and prejudice stages of the *Strickland* analysis. 466 U.S. at 687.

Shockley raises several arguments to the contrary. First, Shockley notes that lead trial counsel declared himself ineffective after the fact, Doc. 48 at pp. 53–54, but federal law requires that this Court defer to the Missouri Supreme Court's evaluation of counsel's competence, not counsel's own retrospective evaluation. *See* § 2254(d)(1)–(2). Thus, counsel's retrospective self-evaluation does not settle the issue of his reasonableness.

Second, Shockley points to a statement from another member of his trial team, stating that they had no strategic reason for not asking Juror 58 about his novel. Doc. 48 at p. 71. But the Missouri Supreme Court did not say that trial counsel had a strategic reason to avoid asking further questions; rather, that court found that counsel reasonably believed that Juror 58's writing a novel "had no bearing on his suitability as a juror in this particular case." *Shockley II*, 579 S.W.3d at 896. So while Shockley says that trial counsel failed to "examine [Juror 58] about all of the revealed biases," Doc. 48 at p. 86 (citation omitted), the Missouri Supreme Court found that Juror 58's statement about his novel during jury selection did not reveal a potential bias, *Shockley II*, 579 S.W.3d at 896.

Third, Shockley finds fault with trial counsel's explanation that they did not ask Juror 58 about his book because he self-published the novel, which in counsel's eyes rendered it less important. Doc. 48 at pp. 99–100. Shockley notes that Juror 58 did not say in voir dire that he self-published his book, and so trial counsel could not have reasoned that the novel was self-published and, therefore, unimportant. *Id.* However, when deposed, lead trial counsel did not say whether he remembered Juror 58 explicitly saying that he self-published the book or whether counsel inferred that Juror 58 was not a professional author and concluded that the Juror 58 self-published his book. Doc. 20-52 at p. 25, Tr. at 16:4–24. Trial counsel said only that he knew Juror 58 self-published his novel, *id.*, so Shockley's argument that counsel's

reasoning amounts to only a "post hoc rationalization" fails. Doc. 56 at p. 21 (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). Shockley also says that a self-published work should have concerned counsel more than a published book, because it would contain the author's unedited views. *Id.* However, the Missouri Supreme Court reasonably credited trial counsel's belief that Juror 58 only mentioned the book because of pride in his "vanity project," not because it had any objective significance to the trial, so trial counsel reasonably "did not see a reason to question him about it." *Shockley II*, 579 S.W.3d at 896.

Fourth, Shockley says that trial counsel's allegedly unreasonable failure to exclude Juror 58 from the jury created "a reasonable probability of a motion for new trial being granted or the conviction and sentence [being] reversed on direct appeal due to juror misconduct." Doc. 48 at p. 108. Shockley more specifically argues as follows: Juror 58 served as foreperson during the guilt phase; after the jury unanimously found Shockley guilty, trial counsel reviewed Juror 58's book and argued for a mistrial, which the court denied; instead, by consent of the parties, the trial court removed Juror 58 from the penalty phase, and the remaining jurors could not reach a unanimous sentencing decision. *Id*. at p. 106. Relying on the dissent in the Missouri Supreme Court's habeas review, Shockley then argues that he "may have had a reasonable probability of a life sentence had counsel not performed ineffectively and allowed Juror 58 to sit on the jury." *Id*. However, he provides no evidence, and no reasonable argument, to

support the idea that had Juror 58 never been on the jury in the first place, the jury—with someone other than Juror 58 sitting—would unanimously have agreed on sentencing him to life imprisonment. *See id.* Shockley relies primarily on the opinion of the lone dissenting judge. *Id*. After reviewing both the trial evidence and the evidence presented to the Rule 29.15 postconviction motion court, the Missouri Supreme Court rejected this speculative and unsupported argument. *Shockley II*, 579 S.W.3d at 894–97. Shockley does not and cannot articulate how that court unreasonably applied federal law as established by the Supreme Court or unreasonably determined the facts in rejecting his claim. *See* § 2254(d). Accordingly, Shockley's first argument in support of claim 1 fails.

ii. Motion for a new trial

In claim 1 Shockley also argues that his attorneys represented him incompetently when they chose not to support their motion for a new trial with juror testimony. Doc. 48 at pp. 57–59, 86–88. After Juror 58's book came to light and after the jury found Shockley guilty, the trial judge suggested in an order that "[a] further hearing may be required with additional testimony" to settle the issue of Juror 58's supposed misconduct. Doc. 20-18 at p. 145. But trial counsel chose not to support the motion for a new trial with juror testimony. *See id.* at pp. 148–53. After trial counsel filed the motion, the trial judge broached the matter again, asking the parties in a letter if they intended to gather any juror testimony and making clear that Juror 58 gave a copy of his novel to the

bailiff. *Id.* at p. 167. After receiving the letter, Shockley's trial counsel chose not to subpoena any witnesses to testify at the motion-for-a-new-trial proceeding. Doc. 20-24 at pp. 643–64, Tr. at 643:8–644:17

Trial counsel's statements demonstrate that they considered the advantages and disadvantages of their choice. *Id*. They viewed the jury's decision not to sentence Shockley to death as a victory. *Id.* at pp. 701–02, Tr. at 701:24–702:7. And the Missouri Supreme Court noted that Shockley's lead trial counsel "had significant trial experience and never had a trial judge impose a death sentence after the jury could not agree on a punishment in a case he tried." *Shockley II*, 579 S.W.3d at 898. Further, one of Shockley's trial lawyers believed that the trial judge would be less likely to sentence Shockley to death if they did not "open up [the] can of worms" of juror testimony. Doc. 20-24 at pp. 643–44, Tr. at 643:8–644:4. And another doubted the utility of subpoenaing any witness because "that person would have had at that point . . . two or three weeks or four weeks to have figured out some way to answer the questions." Doc. 20-52 at pp. 31–32.

Over the dissenting judge's view that counsel "had a duty to file a proper and supported motion for a new trial," *Shockley II*, 579 S.W.3d at 922, the majority of the Missouri Supreme Court found that counsel's reasoning behind their decision reflected their competence:

> Even though trial counsel's strategy failed in hindsight, the record clearly demonstrates that trial counsel evaluated their options,

> drew upon their experience, and chose to forego "opening the can of worms" regarding Juror 58's alleged misconduct in exchange for attempting to persuade the circuit court to impose a life sentence to save [Shockley's] life.

Shockley II, 579 S.W.3d at 898. "Ineffective assistance of counsel will not lie where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy, and it is the exceptional case where a court will hold a strategic choice unsound." *Id.* (quoting *State v. White*, 798 S.W.2d 694, 698 (Mo. 1990)). And indeed, the record does show that trial counsel decided strategically, drawing upon their significant experience and the resources available to them. The Court therefore finds the Missouri Supreme Court's holding reasonable. *See Clarke*, 387 F.3d at 790; 28 U.S.C. § 2254(d)(2).

Shockley objects to this reasoning. First, he insists that counsel's decision cannot count as strategic, because counsel chose not investigate Juror 58's conduct and "a strategy chosen without the benefit of an investigation is only reasonable to the 'extent reasonable professional judgment supported the limitations on investigation.'" Doc. 48 at p. 87 (citation omitted). Yet the trial judge forbade trial counsel from contacting jurors before filing a motion for a new trial, and the Missouri Supreme Court credited trial counsel's reasoning that investigating Juror 58 at the mistrial hearing would be "opening [a] can of worms." *Shockley II*, 579 S.W. 3d at 898. Further, even if counsel had investigated the issue,

they would have found that Juror 58 did not bias the jury against Shockley, so trial counsel did not prejudice Shockley. *Id.* at 897. Therefore, Shockley fails at both *Strickland*'s performance prong and its prejudice prong.

Second, Shockley says that trial counsel unreasonably based their decision on the false impression that the judge ordered them "not to talk to or subpoena jurors." Doc. 48 at p. 111. But lead trial counsel acknowledged that he could have subpoenaed jurors. Doc. 20-52 at p. 32. Shockley also says that trial counsel based their decision on the belief that the trial judge did not want them to uncover juror misconduct, and says this belief was unreasonable. Doc. 48 at p. 111. Although lead trial counsel did think that the trial judge feared that they would uncover juror misconduct, he did not give this as the reason trial counsel chose not to subpoena jurors. Doc. 20-52 at pp. 31–32, Tr. at 22:25–23:13. He had a different reason: any juror he might have subpoenaed "would have had at that point now two or three weeks or four weeks to have figured out some way to answer the questions had we subpoenaed him." *Id.* Thus, Shockley's argument lacks factual support.

Third, although the Missouri Supreme Court found that lead trial counsel "had significant trial experience and never had a trial judge impose a death sentence after the jury could not agree on punishment in cases he tried," *Shockley II*, 579 at 898, Shockley says that lead trial counsel faced this set of circumstances "only one other time." Doc. 48 at p. 112–13. But instead of supporting this proposition

with a citation to the record, Shockley cites an Associated Press article from 1989. Even if *Shinn* and § 2254(e)(2) allowed the Court to consider this article, and even if this article could speak to lead trial counsel's experience nearly 20 years after the article's publication, the Missouri Supreme Court reasonably considered trial counsel's decades of capital-defense experience in analyzing the competence of counsel's decision. *Shockley II*, 579 S.W.3d at 898; *see also* Doc. 53 at pp. 13–14 (describing lead counsel's decades of experience as a defense attorney).

Fourth, Shockley says that "if counsel wanted the judge to decide penalty [sic] knowing that the jury had hung, they could have requested the judge and State consent to doing just that even if a new trial were granted." Doc. 48 at p. 105 (citation and quotation marks omitted). Shockley does not discuss whether trial counsel considered this option or why they decided against it. *Id.* In the absence of any record of trial counsel's reasoning on this point, the Court can only speculate: maybe counsel unreasonably failed to consider the option, or maybe counsel thought the judge's view of Shockley would only sour after a second verdict of guilt. But either way, this speculation would undermine the deference that the Court here owes to both the Missouri Supreme Court and trial counsel. *See* § 2254(d); *Strickland*, 466 U.S. at 691. Because Shockley gives no proper basis for this Court to second-guess the Missouri Supreme Court's determination that Shockley's trial counsel acted competently, the Court denies claim 1.

c. Claim 5

In claim 5, Shockley argues that his trial counsel failed to adequately conduct voir dire and challenge for cause Juror 3. Doc. 48 at pp. 148–60. Because Juror 3 stated that he felt "probably more inclined" to impose a death sentence in a case involving a law-enforcement victim, Shockley says that trial counsel should have highlighted this alleged prejudice and challenged Juror 3 for cause. *Id.* The Missouri Supreme Court found Shockley's complaints about Juror 3 too weak to support either cause or prejudice in a *Strickland* analysis, so a motion to strike Juror 3 for cause would have failed. *Shockley II*, 579 S.W.3d at 906. Trial counsel, then, served Shockley effectively. *Cf. Sittner v. Bowersox*, 969 F.3d 846, 853 (8th Cir. 2020) ("Failure to raise a meritless objection cannot support a claim of ineffective assistance." (citation omitted)). This finding undercuts Shockley at both the "cause" and "prejudice" elements of this *Strickland* analysis. 466 U.S. at 687.

To succeed, Shockley must show that the Missouri Supreme Court's adjudication of the claim fell below the standard set in § 2254(d). It did not. The state court described Juror 3's voir dire as follows:

> During the death qualification voir dire, Juror 3 stated he would not consider sentencing until after the verdict. Juror 3 was asked, "Does the fact [Victim] . . . has the status of a law enforcement officer then change your deliberation in the second stage? Would you say that you automatically would be more inclined to give the death penalty

> simply because it was the murder of a law enforcement officer?" Juror 3 answered, "I probably would be more inclined." [Lead trial counsel] explained the state had to prove an aggravating circumstance existed beyond a reasonable doubt during the penalty phase and a finding [Shockley] killed Victim would prove one aggravating circumstance beyond a reasonable doubt. Juror 3 stated, "I respect law officers and what they have to do. I guess I would feel that's more of a crime than just an average --." [Lead counsel] responded, "Okay. And that's fair."

Shockley II, 579 S.W.3d at 905 (first alteration in original).

Lead trial counsel pressed Juror 3 on these statements, asking whether this aggravating factor would decide which penalty he deemed appropriate. *Id.* Juror 3 replied that he respected law enforcement, but that this factor would not automatically make him more inclined to seek the death penalty. *Id.* at 906. Juror 3 assured counsel that he could act impartially. *Id.* The Missouri Supreme Court affirmed the motion court's judgment that this interaction could not support a motion to strike Juror 3 for cause. *Id.* While Shockley complains that trial counsel should have asked questions that would have revealed Juror 3's alleged latent biases, nothing he says establishes a standard of performance that trial counsel fell below. Doc. 48 at pp. 153–59. Nothing he says undermines Juror 3's credibility. *Id.* The Missouri Supreme Court reasonably evaluated the facts surrounding this claim

and reasonably applied *Strickland* to those facts. *See* § 2254(d). Thus, the Court denies claim 5.

d. Claim 7

In claim 7, Shockley argues that counsel provided ineffective assistance when his attorneys failed to call James Chandler to testify during the guilt phase of the trial. Doc. 48 at p. 238. According to Shockley, Chandler would have testified that he saw Shockley driving roughly two hours before the murder. *Id.* at p. 240. Supposedly, this testimony would have shown that Shockley did not lie in wait outside Sergeant Graham's home. *Id.* at p. 241. However, trial counsel believed this testimony would only highlight that Shockley had no alibi for the time of the murder and undermine their defense theory. *Shockley II*, 579 S.W.3d at 911. The Missouri Supreme Court found that trial counsel made this decision competently. *Id.* Shockley calls this explanation "nonsensical," Doc. 48 at p. 247, notes that lead trial counsel did not have specific memories of his reasoning on the issue, *id.* at p. 243, faults counsel for relying on investigations by Shockley's initial counsel, *id.*, and insists that Chandler would have undermined the State's timeline, *id.* at p. 244. But given the reasons that trial counsel cites for not calling Chandler, this Court concludes that the Missouri Supreme Court adjudicated the issue reasonably, *see Shockley II*, 579 S.W.3d at 911; § 2254(d), and the Court denies claim 7.

e. Claim 9(a)

In claim 9, Shockley argues that his trial counsel violated his Sixth-Amendment rights by failing to investigate and call Mila Linn to rebut the connection between Shockley and the red car near the crime scene. Doc. 48 at p. 258. The Missouri Supreme Court concluded that trial counsel had sound reasons to *not* call Linn and not much reason *to* call Linn, so trial counsel did not ineffectively represent Shockley. *Shockley II*, 579 S.W.3d at 912. Shockley also questions the effectiveness of trial counsel's decision to not investigate Linn, but he did not raise this issue as a claim in state court, so the Court addresses it in Section VI.C.1.c.

Shockley says that Linn would have testified that she knew Shockley; that she saw a red car in Sergeant Graham's neighborhood near the time of the murder, driven by someone she did not recognize; that the car's driver looked different than Shockley; and that she had relayed this information to the police, after looking at a photo line-up. Doc. 48 at pp. 262–64. Trial counsel introduced some of this information into evidence by cross-examining one of the police officers who spoke with Linn. Doc. 20-4 at pp. 113–14, Tr. at 1336:1–1337:5. The officer agreed that Linn did not identify Shockley as the person driving the car. *Id.* at p. 114, Tr. at 1337:1–5. During closing arguments, trial counsel contended that the State's failure to present Linn's testimony showed that the "state was hiding the ball." *Shockley II*, 579 S.W.3d at 912. The Missouri Supreme Court found that "it is clear [Linn's] testimony would be undermined severely due

to her admission her memory of the events was impaired by heavy drinking," giving trial counsel a reason not to call her to testify. *Id.* Still, trial counsel introduced the most important information from Linn via cross-examination of the police officer, thereby avoiding the significant risk of Linn being impeached by her alcohol-impaired memory and used Linn's absence against the State. These are reasonable strategic decisions, and "[o]rdinarily, 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," *Id.* (quoting *Tisius v. State*, 519 S.W.3d 413, 427 (Mo. 2017)); thus, "[t]rial counsel was not ineffective for failing to call Linn to testify at trial." *Id.*

Shockley objects to this account. Doc. 48 at p. 264. According to Shockley, trial counsel missed the most crucial elements of Linn's statement: she knew Shockley, the people in the car did not look like Shockley, and she saw this car "at a location away from the scene of the crime." *Id.* at pp. 266–67. Further, Shockley says that the Missouri Supreme Court ignored the importance of Linn's testimony. *Id.* at pp. 264–65. Shockley also says that trial counsel could have rehabilitated Linn with testimony from her son. *Id.* at p. 269. These objections do not demonstrate the unreasonableness of the Missouri Supreme Court's factual findings. Although Shockley shows that trial counsel could have gained something from calling Linn and that they could have attempted to defend her testimony, he does not demonstrate that the advantages of calling Linn outweighed the

disadvantages so decisively that trial counsel acted ineffectively. Shockley falls far short of showing that the Missouri Supreme Court decided the issue unreasonably. *See* § 2254(d). The Court denies the first part of claim 9 and takes up the second part below in Section VI.C.1.c.

f. Claim 10

In claim 10, Shockley argues that trial counsel assisted him ineffectively by failing to impeach Lisa Hart regarding the red car she saw near Sergeant Graham's home before the murder. Doc. 48 at p. 270. Hart provided police with a description of the car, including details about a yellow sticker, visible from the car's front. *Id.* at pp. 273–74. Later, she identified this as Shockley's grandmother's car, and that car had a yellow sticker on the back. *Id.* at pp. 274–75. Trial counsel did not impeach Hart with these prior statements. *Shockley II*, 579 S.W.3d at 913. Instead, they "attempted to bring out discrepancies in her testimony by calling her husband," although trial counsel conceded that this strategy "did not go well." *Id.* The Missouri Supreme Court found that this strategy passed constitutional muster, and further that even if trial counsel acted incompetently, this failure did not prejudice Shockley, considering the other evidence tying him to the red car at the crime scene. *Id.* So, the Missouri Supreme Court concluded that Shockley's ineffective-assistance claim fails.

Shockley says that this analysis rests on an unreasonable determination of the facts and fails to comply with federal law. First, he says that, although the Missouri Supreme Court found that trial counsel

"attempted to bring out discrepancies in her testimony by calling her husband," *Shockley II*, 579 S.W.3d at 913, trial counsel actually only questioned Mr. Hart about the red car's license plate and "chose not to ask Roger Hart about any other detail of the car," Doc. 48 at p. 280. But Shockley is incorrect. Trial counsel asked Mr. Hart whether he and his wife reported what they saw to the police, including details about the yellow sticker. Doc. 20-5 at pp. 88–89, Tr. at 2004:8–2007:13. Mr. Hart said that he and his wife included everything they saw in their police report, but that they did not include any details about a yellow sticker. *Id.*, Tr. at 2004:19–21. Trial counsel asked whether they assumed that the red car in the police parking lot was the same red car they saw near Sergeant Graham's house. *Id.*, Tr. at. 2006:5–8. Mr. Hart replied that they did not make this assumption but recognized the car. *Id.* Counsel pressed Mr. Hart on how he and his wife could confidently identify the car when they could not list many specific details about the car, besides identifying it as a red Pontiac Grand Am. *Id.,* Tr. 2006:9. Mr. Hart said that, because he owned a similar car, he could visually recognize the car, without listing specific details from memory. *Id.*, Tr. at 2006:10–2007:8. Thus, the Missouri Supreme Court correctly found that counsel did attempt to impeach Ms. Hart's testimony by questioning her husband. *Shockley II*, 579 S.W.3d at 913.

Second, Shockley argues that the way "law enforcement displayed [Shockley's grandmother's] Pontiac Grand Am was suggestive and impacted [Ms. Hart's] credibility." Doc. 48 at p. 278. According to

Shockley, trial counsel "failed to impeach Lisa Hart's credibility with the circumstances of the line-up." *Id.* at p. 279. However, trial counsel asked Mr. Hart whether he and his wife "assumed this must have been the car that you had seen because it's a red car and it's at the police station." Doc. 20-5 at p. 88, Tr. at 2006:5–8. As noted, Mr. Hart said he did not make this assumption. *Id.* Thus, trial counsel did attempt to impeach the Ms. Harts' testimony with the circumstances of the line-up.

Third, Shockley argues that the Missouri Supreme Court incorrectly concluded that because "other witnesses" corroborated Ms. Hart's testimony, trial counsel's failed attempt to impeach Ms. Hart did not prejudice the defense. Doc. 48 at p. 281. Shockley says that contrary to that court's finding that multiple witnesses corroborated Ms. Hart's testimony, only one other witness—Rick Hamm—testified that he saw the red car. However, three witnesses testified that they saw the red car: Ms. Hart, Mr. Hart, and Rick Hamm. Doc. 20-5 at pp. 53–54, Tr. at 1865:22–1868:25 (Hamm's testimony about the red car); *id.* at pp. 60–61, Tr. at 1892:2–1898:8 (Ms. Hart's testimony about the red car); *id.* at pp. 88–89, Tr. at 2004:8–2007:13 (Mr. Hart's testimony about the red car). Shockley, not the Missouri Supreme Court, inaccurately describes the record.

Fourth, Shockley says that the Missouri Supreme Court failed to apply *Driscoll v. Delo*, 71 F.3d 701. Doc. 48 at p. 277. Shockley cites this case for the proposition that reasonable counsel would impeach a witness whose testimony evolves over time. *Id.*; *see*

also Driscoll, 71 F.3d at 710. Counsel, though, did attempt to impeach Ms. Hart's credibility. Further, the change in Ms. Hart's testimony does not resemble the change in testimony discussed in *Driscoll*. 71 F.3d at 710 (finding that "counsel could [not] justify a decision not to impeach a state's eyewitness whose testimony . . . took on such remarkable detail and clarity over time"). Therefore, the Missouri Supreme Court did not fail to reasonably apply *Driscoll*. And *Driscoll* is an Eighth Circuit case, not a Supreme Court case. *Id.* at 701. Thus, the state court's analysis involves no unreasonable determination of fact and no unreasonable application of United States Supreme Court precedent. *See* § 2254(d). The Court denies claim 10.

g. Claim 12

In claim 12, Shockley argues that his trial counsel incompetently failed to investigate and call Carol and Sylvan Duncan to rebut the State's timeline of events, Doc. 48 at p. 292, but he largely fails to address the Missouri Supreme Court's reasoning or the caselaw stating that decisions about which witnesses to call are presumptively matters of trial strategy. Doc. 48 at pp. 292–304. The Missouri Supreme Court found that:

> Trial counsel conducted a thorough investigation regarding the Duncans' testimony, including reviewing all their pretrial statements and meeting with them in person. Trial counsel determined the Duncans could, at best, provide an imperfect alibi, which [Shockley's counsel] explained

> trial counsel were not comfortable presenting.

Shockley II, 579 S.W.3d at 911. Further, trial counsel had good reason to *not* call the Duncans. *Id.* Counsel saw Carol Duncan as uncertain about the timeline of events and did not believe that Sylvan Duncan would hold up to cross-examination. *Id.* Also, the Duncans might have testified about Shockley's "graphic description of [Sergeant Graham's] face after being shot[.]" *Id.* ("[Shockley] told the Duncans [Sergeant Graham] had been shot in the face and 'I heard that you could just take the flap – his face and just pull it back and then lay it back over.'"). Thus, "[t]rial counsel were not ineffective for failing to call the Duncans to testify at trial." *Id.* Indeed, Shockley himself admits that the Duncans' testimony "could not provide an alibi to the charges," Doc. 48 at p. 302, acknowledging one of counsel's reasons to not call the couple, *Shockley II*, 579 S.W.3d at 911; *see also id.* at 912 (citing *Tisius*, 519 S.W.3d at 427, for the proposition that "[o]rdinarily, 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"). The Missouri Supreme Court adjudicated this claim reasonably, and its judgment warrants deference under § 2254(d). The Court denies claim 12.

h. Claim 14

In claim 14, Shockley contends that trial counsel incompetently failed to object to the police presence in and around the courthouse during Shockley's trial and sentencing. Doc. 48 at p. 325. According to

Shockley, the police presence prejudiced the jury and judge against him. *Id.* The Missouri Supreme Court rejected this claim, but Shockley says that the state court's treatment of the jury issue misapplied federal law and its treatment of the judge issue distorted the facts. Doc. 48 at pp. 332–34. Neither argument succeeds.

Shockley's aunt testified that "seventy-five to one hundred police officers" stood outside the courthouse each day of the trial, and Shockley's attorney testified that the trial court excluded or prevented law-enforcement officers from watching or participating in the trial while dressed in uniform. *Shockley II*, 579 S.W.3d at 917. Shockley's counsel testified that the police were at the courthouse to protect Shockley from threats made against him. *Id.* at 918. Moreover, of the jurors who testified during the postconviction hearing, none observed a large police presence during the trial, none observed armed personnel watching over Shockley, and none testified that the police presence influenced their verdict. *Id.* Shockley further fails to point to any evidence that any of the jurors were aware of or were influenced by the police presence of uniformed law enforcement. Doc. 48 at pp. 325–35.

The Missouri Supreme Court concluded that Shockley's trial counsel "were not ineffective for failing to object to the large police presence at [Shockley]'s trial and at sentencing." *Shockley II*, 579 S.W.3d at 918. To this, Shockley only responds that "[c]ommon sense would tell you that the jury would notice a large number of uniformed officers in and around the courthouse." Doc. 48 at p. 332–33. This

speculative assertion does not show that the Missouri Supreme Court unreasonably determined the facts of this claim.

Shockley faults the Missouri Supreme Court for not following *Woods v. Dugger*, 923 F.2d 1454, 1459 (11th Cir. 1991), where the Eleventh Circuit found that, based on the totality of the circumstances, the number of prison guards who attended Woods's trial in full uniform deprived Woods of his right to a fair trial. Doc. 48 at pp. 331–34. But the Court easily distinguishes *Woods* because that case concerned the attendance of uniformed law enforcement *during trial in the presence of the jury*. *See Woods*, 923 F.2d at 1459. Here, the trial judge excluded uniformed law enforcement from watching the trial in the jury's presence. *Shockley II*, 579 S.W.3d at 917. Shockley also cites *Woods* for the proposition that heightened police presence "is inherently prejudicial." Doc. 56 at p. 106. Because of the distinctions between *Woods* and this case, and because an alleged failure to follow something other than United States Supreme Court precedent would not qualify for relief under section 2254(d), Shockley's argument fails. The Missouri Supreme Court reasonably concluded that, because jurors never saw the heightened police presence—unlike in *Woods*—Shockley suffered no prejudice. *Shockley II*, 579 S.W.3d at 918. Accordingly, the Court denies the portion of claim 14 aimed at the supposed effect of police presence on the jury.

Shockley also argues that trial counsel violated his right to effective assistance by failing to object to an elected trial judge sentencing Shockley under the

political pressure of heightened police presence. Doc. 48 at pp. 333–35. Shockley argues that the electoral pressure must have biased the trial judge against him. *Id.* The motion court noted procedural issues with this claim, and concluded that Shockley had not demonstrated prejudice. *See Shockley II*, 579 S.W.3d at 918. The Missouri Supreme Court affirmed, reasoning that Shockley "failed to present any evidence regarding this claim at the evidentiary hearing" and rejecting the claim for lack of factual support. *Id.* at 918–19. Specifically, "[t]rial counsel were not asked about their failure to object or offer any reason why an elected circuit court judge could not impose sentencing." *Id.* at 919. Shockley, however, says that "[t]his is simply factually wrong. [Trial counsel were] explicitly asked about this and testified about the issue." Doc. 48 at p. 334.

Despite Shockley's incredulity, the record does not support his assertion. Lead counsel stated that he knew the trial judge held an elected position and explained why he did not object to police officers wearing uniforms during sentencing. Doc. 20-53 at pp. 6–7, Tr. 63:5–64:9. He did not say anything regarding the mere presence of police officers at sentencing or the trial judge's impartiality. *Id.* Thus, the Missouri Supreme Court reasonably found that the record contains no insight on trial counsel's decision not to question the judge's impartiality and that this ineffective-assistance argument lacks support in the record. *Shockley II*, 579 S.W.3d at 919. Further, Shockley does not supply any argument to support the idea that, if trial counsel had objected to the elected

trial judge sentencing Shockley, this objection would have had a reasonable likelihood of securing a sentence free of supposed bias or resulted in a different, unelected judge to sentence him. Shockley only cites dissenting opinions to support his argument. Doc. 48 at pp. 333–35. The Court finds the Missouri Supreme Court's adjudication reasonable and denies claim 14. *See* § 2254(d).

i. Claim 15(a)

In claim 15, Shockley says that his trial counsel incompetently failed to object to "the prosecutor's comment on Lance Shockley's decision not to testify." Doc. 48 at p. 336. Shockley complains that trial counsel mishandled a prosecutor's vague remark during cross-examination and a statement during closing arguments about the defense's failure to explain why Shockley's grandmother's car would appear near the crime scene. *Id.* at p. 337. The Missouri Supreme Court found that, because the first incident presented no grounds on which trial counsel could have objected, counsel's decision not to object meets the standard of effective assistance. *Shockley II*, 579 S.W.3d at 913–14. Because Shockley did not raise the second of these incidents in state court, the Court addresses the second part of this claim with the rest of Shockley's procedurally defaulted claims. *See infra* Section VI.C.1.f.

Shockley argues that, "in response to a witness stating that she did not know why Shockley's grandmother's car was across the street from where the victim was killed, the prosecutor pointedly replied, '[s]omeone does.'" Doc. 48 at p. 337. According

to Shockley, this amounts to a comment on his decision not to testify. *Id.* Trial counsel did not object to this statement, though the judge told the prosecutor to "keep the comments to yourself." *Shockley II*, 579 S.W.3d at 913. The Missouri Supreme Court found several flaws in this argument: the prosecutor did not directly comment on Shockley's failure to testify, an objection would have drawn unwanted attention to the comment, a request for a curative instruction would have lacked merit, Shockley would not have received a new trial had counsel preserved the issue, and Shockley cannot demonstrate prejudice. *Id.* at 914; *see Sittner*, 969 F.3d at 853 ("Failure to raise a meritless objection cannot support a claim of ineffective assistance." (citation omitted)).

Shockley says that the Missouri Supreme Court's reasoning contradicted *Combs v. Coyle*, 205 F.3d 269, 279 (6th Cir. 2000), and *Gabaree v. Steele*, 792 F.3d 991, 998–99 (8th Cir. 2015). Doc. 48 at pp. 340–41. However, these cases do not bear any factual similarity to this case. *See Combs*, 205 F.3d at 279 (in which the defendant refused to answer questions from the police at the crime scene, the prosecutor argued that the defendant's refusal to answer evidenced the defendant's recognition of "the gravity of the situation," and the judge instructed the jury that it could consider this refusal as evidence of the defendant's *mens rea*, and defense counsel unreasonably failed to object to the prosecutor's argument and the judge's instruction); *Gabaree*, 792 F.3d at 998–99 (evaluating counsel's decision not to

object to two witness statements for fear of highlighting those statements, and finding counsel unreasonable because, in the first instance, the testimony played such a crucial role in the case and, in the second instance, because counsel did highlight the testimony in cross-examination). Thus, Shockley's argument against the Missouri Supreme Court's reasoning does not stand. More fundamentally, Shockley's argument cannot succeed because the Missouri Supreme Court reasonably found that the prosecutor did not comment on Shockley's decision not to testify, and any alleged misapplication of Circuit precedent is not a basis for relief under § 2254(d). Because the Missouri Supreme Court applied *Strickland* reasonably, the Court denies the first part of claim 15.

j. Claim 17

In claim 17, Shockley argues that trial counsel deprived him of effective assistance by failing to object to an accumulation of victim-impact evidence during sentencing, including a funeral-casket photograph, a video montage shown at Sergeant Graham's funeral, and a drawing by Sergeant Graham's son depicting what the son described as Shockley shooting his father. Doc. 48 at p. 348. The Missouri Supreme Court determined that an objection from trial counsel would have reflected negatively on Shockley, and that, in any event, Shockley suffered no prejudice because, even if counsel had objected, any objection would have "been nonmeritorious." *Shockley II*, 579 S.W.3d at 915.

Shockley objects that this finding unreasonably discounts the emotional impact of this evidence, that a right to object exists under New Jersey law, and that the Missouri Supreme Court's finding that any objection would have failed misapplies *Strickland*'s prejudice standard. Doc. 48 at pp. 352–54. All of Shockley's arguments stand on unsteady ground because he cites no binding legal standard to evaluate the evidence's admissibility. *Id.* at pp. 348–56.

First, Shockley gestures toward an argument that the state court should have found the evidence more egregious. Doc. 48 at p. 352. Shockley complains that the Missouri Supreme Court does not specifically address the effect of a drawing from Sergeant Graham's five-year-old child, which depicted Sergeant Graham's murder. *Id.* According to Shockley, it was "unfair" to allow the jury to consider this drawing in judging the impact of the crime. *Id.* Yet, the Missouri Supreme Court never says what impact it thought the evidence had. *Shockley II*, 579 S.W.3d at 914–15. Instead, the Missouri Supreme Court found that trial counsel correctly believed that they had no legal basis to object to the victim-impact evidence. *Id.*

Second, Shockley argues that the Missouri Supreme Court should have followed *State v. Hess*, 23 A.3d 373 (N.J. 2011), which condemned inflammatory victim-impact evidence and allegedly bears a factual resemblance to this case. Doc. 48 at pp. 352–53. But the Missouri Supreme Court has not adopted *Hess* as the law in Missouri—and it explicitly distinguished Shockley's case from *Hess*. *Shockley II*, 579 S.W.3d at 915. This Court cannot demand that Missouri follow

New Jersey law, s*ee* 28 U.S.C. § 2254(d)(1), much less a New Jersey case that the Missouri Supreme Court found distinguishable. Even if the state court failed to appreciate the alleged analogy between *Hess* and this case, Shockley would have no basis for relief in a federal habeas court. Shockley presented *Hess* as the sole authority for his argument that trial counsel could have objected to the victim-impact evidence.

Shockley also cites *Dodd v. Trammell*, 753 F.3d 971 (10th Cir. 2013), to support his prejudice argument. Doc. 48 at p. 355. However, that case does not bear on Shockley's case, because in *Dodd,* the State introduced impermissible victim impact testimony by asking the victim's family members whether they recommended the death penalty. 753 F.3d at 996–99. Here, the sentencing-phase evidence properly addressed the impact on "the victim and the impact of the murder on the victim's family." *Williams v. Norris*, 612 F.3d 941, 952 (8th Cir. 2010) (quoting *Payne v. Tennessee*, 501 U.S. 808, 826–27 (1991)). The Missouri Supreme Court premised its analysis of the prejudice prong of Shockley's ineffective-assistance argument on the fact that, here, the victim-impact evidence did not violate Shockley's rights. *Shockley II*, 579 S.W.3d at 914–15. Therefore, *Dodd* does not apply.

Further, the Missouri Supreme Court reasonably applied federal law in determining that the victim-impact evidence did not wrong Shockley. Eighth Circuit precedent provides the constitutional standard for excessively inflammatory evidence: "[t]he admission of evidence at a state trial provides a

basis for federal habeas relief when the 'evidentiary ruling infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process.'" *Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006) (quoting *Turner v. Armontrout*, 845 F.2d 165, 169 (8th Cir. 1988)). Shockley does not argue that the admission of the victim-impact evidence described above infringes upon any specific constitutional protections or amounted to a denial of due process. Doc. 48 at pp. 352–56. He does not give any federal standard for unduly prejudicial evidence that he thinks the Missouri Supreme Court failed to respect. *Id.* Thus, the Court takes "no issue with the Missouri court's application and interpretation of its evidentiary rules." *Skillicorn v. Luebbers*, 475 F.3d 965, 974 (8th Cir. 2007) (citing *Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994)).

Shockley also asks the Court to consider that an elected judge sentenced Shockley in its evaluation of the propriety and impact of the sentencing-phase evidence. Doc. 48 at pp. 355–56. But he cites no binding authority to support the notion that any special standard for victim- impact evidence should apply when an elected judge sentences a defendant. *Id.* The Court declines to hold that an elected judge cannot consider victim-impact evidence in sentencing a defendant.

Third, Shockley says that the Missouri Supreme Court applied the wrong test in deciding whether prejudice existed in this case, because it concluded that Shockley "cannot demonstrate the outcome of the trial would have been different," without including

the words "reasonable probability." Doc. 48 at pp. 353–54 (quoting *Shockley II*, 579 S.W.3d at 915). The Missouri Supreme Court explained *Strickland*'s prejudice test in full earlier in its opinion, *Shockley II*, 579 S.W.3d at 892–93, and need not restate the full test each time it applies *Strickland*. This objection stands on especially weak ground, because the Missouri Supreme Court did not simply find that an objection would likely not succeed, but instead found that "any objection to the admissible exhibits would have been nonmeritorious." *Shockley II*, 579 S.W.3d at 915; *see also Sittner*, 969 F.3d at 853 ("Failure to raise a meritless objection cannot support a claim of ineffective assistance." (citation omitted)). Thus, the Missouri Supreme Court did not unreasonably apply *Strickland*. In sum, each of Shockley's accusations leveled against the Missouri Supreme Court fail. *See* § 2254(d). The Court denies claim 17.

k. Claim 20

In claim 20, Shockley alleges that his trial counsel incompetently failed to object to the introduction of a rifle as demonstrative evidence because "[t]he murder weapon was never found, and the rifle introduced at trial was unrelated to the charged offense." Doc. 48 at p. 374. The Missouri Supreme Court rejected this claim, holding that "any objection to the use of the demonstrative exhibit would not have been meritorious," and that "[t]rial counsel will not be held ineffective for failing to make a nonmeritorious objection." *Shockley II*, 579 S.W.3d at 909 (citing *Tisius*, 519 S.W.3d at 429).

Shockley says that the Missouri Supreme Court's adjudication contradicts federal law, unreasonably applied that law, and unreasonably determined the facts. Doc. 48 at p. 379. Specifically, Shockley says that the Missouri Supreme Court ignored several cases that hold that a court may not introduce a firearm into evidence if that firearm has no relevance to the crime. Doc. 48 at pp. 380–81 (citing *United States v. Goliday*, 145 F. App'x 502, 506 (6th Cir. 2005); *Walker v. United States*, 490 F.2d 683, 684–85 (8th Cir. 1974); *United States v. Matsunaga*, 158 F. App'x 783, 785 (9th Cir. 2005)). Shockley cites these cases for the proposition that "when a defendant is not charged with a firearms violation and a firearm is not relevant to the crimes charged, a district court abuses its discretion in admitting the firearm." *Goliday*, 145 F. App'x at 506. For instance, a court may not admit a firearm simply as propensity or character evidence. *Walker*, 490 F.2d at 684–685.

However, these cases have no bearing on Shockley's case. The Missouri Supreme Court did not deem the rifle admissible as character or propensity evidence; it deemed the rifle relevant to the crime:

> Witnesses testified [Shockley] had inherited a Browning .243 rifle from his father. This rifle was never recovered from any of the searches of [Shockley's] home or property, which comported with the state's theory that [Shockley] disposed of the rifle after shooting [Sergeant Graham]. Both ballistics experts testified the bullet recovered from [Sergeant Graham] belonged to the .22 to .24 caliber

> class of ammunition, which included a Browning .243 caliber rifle. Finally, [lead trial counsel] testified, if [Shockley] would have taken the stand, [Shockley] was prepared to admit ownership of a .243 caliber rifle, and this fact was mentioned in the defense's opening statement.

Shockley II, 579 S.W.3d at 909. According to the Missouri Supreme Court, the rifle presented was "relevant to the crimes charged." *Goliday*, 145 F. App'x at 506; *Shockley II*, 579 S.W.3d at 909. To the extent that this determination turns on Missouri's evidentiary rules, "[a] federal court may not re-examine a state court's interpretation and application of state law." *Skillicorn*, 475 F.3d at 974 (citation omitted). To the extent that this determination turns on the factual relevance of the rifle, the Missouri Supreme Court adjudicated the issue reasonably. *See* § 2254(d). Thus, the Missouri Supreme Court's determination that any objection from trial counsel to the rifle would have been meritless did not contradict or unreasonably apply federal law as clearly established by the Supreme Court and did not determine the facts unreasonably. *See* § 2254(d). "Failure to raise a meritless objection cannot support a claim of ineffective assistance." *Sittner*, 969 F.3d at 853 (citation omitted). Thus, the state court decided the issue reasonably, and this Court denies claim 20.

l. Claim 23

In claim 23, Shockley alleges that his trial counsel provided ineffective assistance when they failed to investigate and present evidence, specifically the

testimony of Shockley's grandfather, that Shockley did not inherit a Browning rifle from his father. Doc. 48 at pp. 444, 448. At trial, the State argued that this rifle had special sentimental value to Shockley, and that the rifle's disappearance after the crime suggests that Shockley used the rifle to murder Sergeant Graham and then disposed of the evidence. Doc. 20-5 at p. 95, Tr. at 2031:2–11. Shockley was willing to testify that he owned a Browning .243 rifle. Doc. 20-53 at p. 18, Tr. at 75:15–18. Lead trial counsel remembered that Shockley received the gun from his father or another relative, Doc. 20-52 at pp. 62–63, Tr. at 53:8–17, and later said that Shockley "received [the rifle] as a gift from his dad," *id.* at p. 63, Tr. at 54:22–23. But Shockley's grandfather testified that Shockley came to live with him at thirteen years old, shortly before Shockley's father's death, and did not possess an inherited Browning rifle while Shockley lived there. Doc. 48-3 at pp. 26–27, Tr. at 20:11–21:24.

Shockley says that trial counsel should have investigated the issue and presented his grandfather's testimony at trial but failed to do either. Doc. 48 at p. 446. Shockley does not cite any evidence to support the notion that counsel failed to investigate the issue. *See* Doc. 48 at pp. 444–54; Doc. 56 at pp. 212–20. *But see Shockley II*, 579 S.W.3d at 908 (noting that "trial counsel did not testify specifically about their strategic reasons for failing to call [Shockley's grandfather] during the guilt phase to rebut the state's witnesses who testified [Shockley] inherited a Browning .243 rifle").

The Missouri Supreme Court found that trial counsel did not represent Shockley ineffectively, because using Shockley's grandfather's testimony to "rebut the state's witnesses" might have harmed the defense. *Shockley II*, at 579 S.W.3d at 908. It held that trial counsel reasonably left open the possibility that Shockley would testify that he owned a .243 rifle. *Id.* at 908–09. Thus, the Missouri Supreme Court judged that "[t]he motion court did not clearly err in denying this claim." *Id.* at 909.

Shockley makes several arguments against the Missouri Supreme Court's factual findings and application of *Strickland*. Doc. 48 at p. 452–54. As to its application of *Strickland*, Shockley first insists the Missouri Supreme Court's decision violated clearly established federal law by discounting the importance of Shockley's grandfather's testimony. *Id.* Yet Shockley overstates the importance of this issue to the trial, *Shockley II*, at 579 S.W.3d at 908, and the Missouri Supreme Court decided the issue reasonably.

Second, Shockley says that the Missouri Supreme Court failed to abide by the holdings of *Williams v. Taylor*, Doc. 56 at p. 219, which says state courts must "evaluate the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." 529 U.S. at 397–98. Because this claim regarding evidence of guilt has nothing to do with aggravating or mitigating evidence, and because the Missouri Supreme Court did evaluate the weight of the evidence, this Court

finds Shockley's citation to *Williams v. Taylor* misses the mark.

Third, Shockley says that counsel acted incompetently by acknowledging in opening statements that Shockley owned a .243 rifle. Doc. 48 at p. 450. But he did not make this argument to the Missouri Supreme Court, *see* Doc. 20-59,[1] and the Missouri Supreme Court did not address this issue, *Shockley II*, 579 S.W.3d at 908–09. Because Shockley did not present this argument to the Missouri Supreme Court, the argument has no relevance to the reasonableness of the state court's adjudication. *See* § 2254(d).

Fourth and finally, Shockley argues that, because he did not testify, trial counsel should have presented testimony from his grandfather. Doc. 48 at p. 454. But Shockley does not support this argument with any discussion of when counsel knew that Shockley would not testify or whether they could have and should have called Shockley's grandfather at that point. *Id.* Thus, the Missouri Supreme Court applied *Strickland* reasonably. *See* § 2254(d).

Against the Missouri Supreme Court's factual findings, Shockley first argues that the Missouri Supreme Court found that Shockley's grandfather's testimony would have contradicted Shockley's testimony, but Shockley says this is incorrect. Doc. 48 at p. 454. "Even if Mr. Shockley had testified that he

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[1] Shockley did not provide the Court with a complete copy of his brief to the Missouri Supreme Court. The Court has accessed the remainder of this filing on Westlaw.

owned a Browning BLR or .243 caliber rifle, this would not have been equivalent to admitting that the [sic] inherited such a gun from his father." Doc. 56 at p. 217. However, lead trial counsel said that Shockley received the rifle from his father, Doc. 20-52 at p. 63, Tr. at 54:21–24, and the postconviction motion court noted this fact in finding that "[i]t was reasonable for [trial counsel] to pursue a defense strategy which would not undermine the credibility of [Shockley] if he chose to testify." Doc. 20-55 at p. 40. Thus, in reviewing the motion court's decision, the Missouri Supreme Court reasonably found that counsel had good reason to avoid a potential contradiction between Shockley and his grandfather.

Second, Shockley argues the Missouri Supreme Court unreasonably determined the facts when it said that "witnesses" testified that Shockley inherited the rifle from his father. Doc. 48 at p. 453; *Shockley II*, 579 S.W.3d at 908 ("However, the state called other witnesses who knew [Shockley] and testified he inherited a rifle from his father."). According to Shockley, the Missouri Supreme Court found that, because the State presented multiple witnesses who testified that Shockley did inherit the rifle from his father, Shockley's grandfather's testimony would have had no effect and so Shockley suffered no prejudice. Doc. 48 at p. 453–54. Shockley says that, at trial, the State presented only one witness who testified to this point. *Id.* at p. 453. The postconviction motion court heard testimony from multiple "individuals who knew [Shockley] and knew he had inherited the rifle," and noted multiple statements

confirming that Shockley received the rifle from his father. Doc. 20-55 at p. 40. Yet, at trial, the prosecution pointed to a single witness who testified to this point. Doc. 20-5 at p. 95, Tr. 2031:2–11. So while it appears that the Missouri Supreme Court overstated the number of witnesses who testified *at trial* that Shockley inherited the rifle, it accurately stated that multiple witnesses testified at trial to the rifle's sentimental value.

Contra Shockley, the Missouri Supreme Court's reference to multiple witnesses played no explicit part in its reasoning. *Shockley II*, 579 S.W.3d at 908–09. Shockley says that "[t]he Missouri Supreme Court was also factually incorrect in the analysis as to why Shockley could not establish prejudice on this issue," Doc. 48 at p. 453, but the Missouri Supreme Court did not mention prejudice in its analysis, *Shockley II*, 579 S.W.3d at 908–09. Because this incorrect finding played no role in the state court's analysis, this error does not make that analysis unreasonable. Instead, the Missouri Supreme Court said that "[b]y not calling [Shockley's grandfather], trial counsel were pursuing a defense strategy that would not undermine [Shockley's] credibility if he chose to testify, which was reasonable." *Id.* at 909. The Court finds the Missouri Supreme Court's analysis reasonable and denies claim 23. *See* § 2254(d).

m. Claim 24

In claim 24, Shockley argues that trial counsel unreasonably failed to investigate, prepare, and rebut the ballistics evidence against Shockley with expert testimony from Steven Howard. Doc. 48 at pp. 455,

459. The Missouri Supreme Court rejected this claim, because "[t]he motion court determined trial counsel presented a sound trial strategy for failing to call Howard on [Shockley]'s behalf." *Shockley II*, 579 S.W.3d at 908; *see also id.* ("Counsel may choose to call or not call almost any type of witness or to introduce or not introduce any kind of evidence for strategic considerations." (quoting *Vaca v. State*, 314 S.W.3d 331, 337 (Mo. 2010))). Specifically, trial counsel "discussed whether to call their own ballistics expert, but after looking at the state's experts, they decided against it." *Shockley II*, 579 S.W.3d at 907. "[Lead trial counsel] stated he had bad experiences in the past with cross-examination of his own ballistic witnesses." *Id.*

Shockley says that lead trial counsel misremembered various details about his experience in a case from over twenty years before Shockley's trial and years before he testified before the motion court. Doc. 48 at pp. 464–65. Shockley's cavil that trial counsel gave an example of a bad experience with an expert on gunshot-residue evidence and not a firearms expert, and that he misremembered that expert's name, does not call into question counsel's substantive reasons for not calling a firearms expert on behalf of Shockley. Doc. 48 at pp. 464–65. The fact remains that lead trial counsel reasonably relied on his experience to judge the risks of calling his own expert witness, and the Missouri Supreme Court reasonably deemed this decision competent, *Shockley II*, 579 S.W.3d at 906–07. "[Lead trial counsel] stated he would rather cross-examine two experts on the

same side and get them to contradict each other than have his own 'hired gun.'" *Id.* "The trial transcript reflects [lead trial counsel] implemented this strategy of pointing out the contradictions between [the state's experts] during his cross-examination of both witnesses and throughout the trial." *Id.* Both the state court's application of *Strickland* and its determination of the facts qualify as reasonable, *see* § 2254(d); thus, the Court denies claim 24.

Shockley's argument about Howard relates to much broader accusations that Shockley directs toward trial counsel's handling of ballistics evidence in claim 21 and the trial court's handling of ballistics evidence in claim 22. *See infra* Sections VI.C.1.h., VI.C.2.b. Shockley attempts to bolster claim 24 with many miscellaneous arguments that the Court addresses in its analysis of claims 21 and 22. S*ee infra* Sections VI.C.1.h., VI.C.2.b.

However, Shockley presents one miscellaneous point in support of claim 24 that he does not mention in claim 21 or 22: Shockley complains that trial counsel incompetently "failed to conduct a complete forensic evaluation of available firearms/ballistics/bullet evidence . . . including, but not limited to analysis by a firearms expert, metallurgist, toolmark expert, and or analytical scientist or forensic expert(s)." Doc. 48 at p. 459 n.14. To the extent that this stands as a separate argument, Shockley fails to develop either an account of what counsel did or what competence requires. *Id.* Shockley raises this point in the context of a larger argument regarding trial counsel's failure to appreciate

developing ballistics evidence, but, as the Court explains in its analysis of claim 22, *see infra* Section VI.C.1.h., Shockley did not raise this argument before the Missouri Supreme Court and cannot support it with evidence or overcome procedural default. *See* § 2254(e)(2); *see also Shinn*, 142 S. Ct. at 1727–28.

1. Other claims adjudicated on the merits in state court

a. Claim 3

In claim 3, Shockley argues that Juror 58 deprived him of his Sixth-Amendment right to a fair and impartial jury by (1) committing juror misconduct, (2) harboring bias, and (3) spreading bias to other jurors. Doc. 48 at pp. 124–26. These allegations arise from the same facts described in claim 1, *see supra* Section VI.B.1.b., where Shockley alleges that Juror 58's novel expressed hostility against criminal defendants and that trial counsel failed to protect Shockley from that hostility. The Missouri Supreme Court found that the facts do not support the three complaints, holding that the "misconduct" amounted to a simple misunderstanding that did not reveal bias, that Juror 58 acted impartially, and that Juror 58 did not promote bias in other jurors. *Shockley II*, 579 S.W.3d at 894–98, 900–05. Shockley sees these three findings as factually and legally unreasonable. Doc. 48 at pp. 105–07. The Court disagrees.

First, the Missouri Supreme Court found that Juror 58 did not commit juror misconduct, and that even if he did, any supposed misconduct did not

prejudice Shockley. *Shockley II*, 579 S.W.3d at 900–05. According to Shockley, Juror 58 committed misconduct by bringing his book to the sequestered jury, Doc. 48 at p. 124, despite the trial judge's instructions to "avoid movies and books about trials, particularly periodicals or legal documentaries," *Shockley II*, 579 S.W.3d at 901. According to Shockley, the fact that other jurors "realized upon reading the book that they should probably not be looking at it" demonstrates that the novel breached the trial court's instructions. Doc. 48 at p. 125. Shockley says that Juror 58's alleged violations of the trial court's instructions "betray Juror 58's bias." *Id.* at p. 132. However, the Missouri Supreme Court found that Juror 58 "felt he complied" with the trial judge's instructions, that these instructions did not have the legal force of a Missouri Approved Instruction, that Juror 58 did not violate the spirit of these instructions, and that the issue amounted to a miscommunication. *Id.* at 903–05. In sum, the Missouri Supreme Court concluded that Juror 58 did not intentionally flout the trial court's demands and did not reveal bias against Shockley through alleged misconduct. *Id.* The Missouri Supreme Court's findings do not unreasonably apply Supreme Court precedent or unreasonably determine the facts. *See* § 2254(d).

Second, Shockley argues that Juror 58's alleged bias against Shockley deprived him of his Sixth-Amendment rights to a fair and impartial jury and to a fair trial. Doc. 48 at pp. 105–07. After considering defense counsel's argument regarding Juror 58's bias

against Shockley, the Missouri Supreme Court deemed this evidence too weak to outweigh the evidence of Juror 58's impartiality. *Shockley II*, 579 S.W.3d at 894–98. Rather than weighing the evidence for itself, the Court must grant the Missouri Supreme Court appropriate deference. § 2254(d)(2); § 2254(e)(1). To grant Shockley relief, the Court must find that the Missouri Supreme Court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(1). The Court can only accept Shockley's argument if "the state court's presumptively correct factual findings do not enjoy support in the record." *Lomholt v. Iowa*, 327 F.3d 748, 752 (8th Cir. 2003) (citations omitted). In other words, if "there is record support for the state court's factual findings," then the Court must reject Shockley's argument. *Bahtuoh v. Smith*, 855 F.3d 868, 873 (8th Cir. 2017).

To support his claim, Shockley notes facts that allegedly raise questions about Juror 58's impartiality: Juror 58's son worked in law enforcement; the plot of Juror 58's novel involves both a DUI-related manslaughter and the murder of a law enforcement officer; the novel depicts the criminal-justice system as consistently failing to punish evil defendants; the novel's main character sees the failings of the criminal-justice system as a reason to enforce gruesome vigilante justice and to detonate a nuclear weapon near St. Louis; Juror 58 described his book as a "fictionalized autobiography"; and, finally, when Shockley's trial counsel, the trial judge, and the

prosecutor learned of Juror 58's book, the issue caused them enough concern that the trial judge removed Juror 58 from the jury's sentencing deliberation. Doc. 48 at pp. 48–52, 78–81, 130–37. In Shockley's view, these facts demonstrate that Juror 58 could not have reasonably evaluated the evidence in Shockley's case. *Id.*

The Missouri Supreme Court rejected each of Shockley's arguments regarding Juror 58. *Shockley II*, 579 S.W.3d at 894–97, 904–05. It found that the contents of Juror 58's book did not reveal a bias against Shockley. *Id.* The mere fact that both the novel and Shockley's case involved a DUI-related manslaughter and the murder of a law-enforcement officer could not demonstrate bias. *Id.* at 895. Thus, Shockley's argument "is premised on a degree of factual congruity between the novel and the facts of the trial that does not exist." *Id.* (quoting *Shockley I*, 410 S.W.3d at 200–01). Likewise, that court rejected Shockley's argument that Juror 58 identified with the viewpoint of his vengeful main character, who attempts to punish the leniency of the criminal-justice system by plunging the United States into a nuclear dystopia. *Id.* at 896; Doc. 32-5 at p. 12.

Further, the Missouri Supreme Court disagreed with Shockley about the importance of the theme of leniency in the criminal-justice system within Juror 58's book. *Shockley II*, 579 S.W.3d at 895. Rather, that court credited Juror 58's testimony at a postconviction hearing, where he described the ways in which his experiences informed the novel, the differences between his experience and the events of the novel,

his views on the criminal-justice system, and what led him to view Shockley as guilty. *Id.* Specifically, Juror 58 testified that he did not share his main character's dark view of the criminal-justice system. *Id.* Weighing Shockley's arguments against Juror 58's detailed statements, the Missouri Supreme Court affirmed the motion court's finding that Juror 58 acted as an impartial juror. *Id.* at 904–05.

The Missouri Supreme Court's factual findings deserve a high degree of deference, and the Court cannot accept Shockley's arguments. The Court can only reject these findings if "every fairminded jurist would disagree" with the state court. *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (citing *Knowles*, 556 U.S. at 123 (giving the standard of deference for a state court's determination on prejudice)). Shockley contends that the book radiates prejudice, going so far as to conflate Juror 58 with the novel's "hero." Doc. 48 at pp. 48–49, 51. However, Juror 58's novel portrays a main character who hopes to use terrorism to create a world where, in the words of the novel, "[t]he weak and timid would die" and "[t]here'd be widespread looting and uncontrollable mobs." Doc. 32-5 at p. 12. As is typical of fiction pieces, the text of Juror 58's novel hardly compels its readers to view the main character as a heroic mouthpiece for the author.

Meanwhile, Juror 58's testimony on his views of the criminal-justice system and his impartial evaluation of the evidence against Shockley serve as "record support for the state court's factual findings." *Bahtuoh*, 855 F.3d at 873. "Juror 58 was questioned extensively about the book's themes and disavowed he

personally held any of those ideas because it was not his personal belief that the court system was not good. . . . Juror 58 said it became clear to him [Shockley] was guilty only after his grandmother testified." *Shockley II*, 579 S.W.3d, 895. Rather than harboring bias against Shockley from the outset, Juror 58 became convinced of Shockley's guilt only after evaluating the testimony of Shockley's grandmother. *Id.* Therefore, § 2254(d)(2) requires that the Court affirm the Missouri Supreme Court's factual findings regarding Juror 58's alleged bias.

Third, Shockley argues that Juror 58 biased the deliberation of other jurors by sharing his book with them, and that the Missouri Supreme Court unreasonably discounted this as "fleeting" contact. Doc. 48 at p. 134. Juror 58 gave his book to three other jurors. *Shockley II*, 579 S.W.3d at 904. Juror 3 said he did not read the book, Doc. 20-24 at p. 196, Tr. at 196:4–7, although Juror 58 said Juror 3 did read his book and liked it, Doc. 32-11 at pp. 15, 17, Tr. at 15:2–12, 17:5–6. Juror 50 said she read two or three pages of the book, but no more. Doc. 20-24 at p. 200, Tr. at 200:1–8. Juror 117 said she skimmed the book, but did not read it. *Id.* at pp. 128–29, Tr. at 128:4–129:19. No juror indicated that he or she read the especially violent segments, or the passages that directly concerned the criminal-justice system. Doc. 20-24.

While Shockley incredulously asserts the "obvious" prejudicial significance of these incidents, Doc. 48 at p. 135, the Missouri Supreme Court found Shockley's arguments about Juror 58's novel unpersuasive, *Shockley II*, 579 S.W.3d at 904.

Because no juror read the relevant sections of the book, "there was no evidence the sequestered jury was distracted by the book to the point it could not give due and fair consideration of the facts . . . ." *Id.* Shockley claims that this analysis contradicts the precedent set by several state cases with allegedly analogous facts but does not cite any factually similar federal cases. Doc. 48 at pp. 132–33 (citations omitted). The Missouri Supreme Court's holding comported with federal law and determined the facts reasonably. *See* § 2254(d). The Court denies claim 3.

b. Claim 4

In claim 4, Shockley argues that after the trial judge learned of Juror 58's book, he unlawfully failed to grant Shockley a mistrial and, alternatively, that he unlawfully failed to conduct an inquiry sua sponte into the jury's partiality. Doc. 48 at p. 138. As described in this Court's analysis of claims 1 and 3, *see supra* Sections VI.B.1.b., VI.B.2.a., Shockley did not gather testimony about juror bias until his case reached the collateral-review stage, where Missouri courts concluded that juror testimony demonstrated an absence of bias. *Shockley II*, 579 S.W.3d at 894–95. Yet, Shockley still tries to convince the Court that the trial judge violated his fundamental rights by refusing to grant his unsupported motion and by declining to search for non-existent evidence of juror bias. Doc. 48 at p. 138.

Missouri law provides several situations in which a court may grant a new trial. Mo. Rev. Stat. § 547.020. Among them, "[t]he court may grant a new trial . . . [w]hen the jury has received any evidence,

papers or documents, not authorized by the court" or "[w]hen the jury . . . has been guilty of any misconduct tending to prevent a fair and due consideration of the case." *Id.* Shockley argued to the Missouri Supreme Court that both of these reasons to grant a new trial apply in this case. Doc. 20-20 at p. 123. Under Missouri precedent, juror misconduct without prejudice does not entitle a defendant to a mistrial. *Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 714 (Mo. 2016) (finding that juror misconduct without prejudice does not warrant a mistrial and affirming the trial court's determination that the alleged misconduct did not prejudice the defense); *see also State v. Viviano*, 882 S.W.2d 748, 712, 751 (Mo. Ct. App. 1994) ("[A] new trial is required *only if a defendant has been prejudiced*." (citing *State v. Kelly*, 851 S.W.2d 693, 695 (Mo. Ct. App. 1993))).

Although the record now contains testimony positively demonstrating a lack of prejudice, *Shockley II*, 579 S.W.3d at 904, the Missouri Supreme Court did not have this evidence when it adjudicated the issue on direct appeal, *Shockley I*, 410 S.W.3d at 199–202. Missouri law holds that because appellate courts trust that trial courts stand in the best position to detect juror bias, appellate courts review a trial court's decision only for abuse of discretion. *Id.*

On direct appeal, the Missouri Supreme Court did not find compelling Shockley's argument that Juror 58 prejudiced the jury against him. *Shockley I*, 410 S.W.3d at 200. In that court's estimation, Shockley exaggerated the similarity between his case and Juror 58's book. *Shockley I*, 410 S.W.3d at 200–01 (finding

that the alleged "factual congruity between the novel and the facts of the trial . . . does not exist"). The Missouri Supreme Court also found unconvincing the idea that Juror 58 shared the violent extremist views depicted in his book. *Id.* Looking through the trial record, the Missouri Supreme Court found nothing suggesting that Juror 58 shared his book with other jurors. *Id.* at 200. Most significantly, the Missouri Supreme Court rejected the notion that Shockley might demand another trial after deliberately choosing not to support his motion for a new trial with testimony. *Id.* In sum, the evidence Shockley presented to prove prejudice failed to convince the Missouri Supreme Court on direct appellate review.

Since Juror 58's actions proved nonprejudicial, the trial court's decision to deny the motion for a mistrial also proved nonprejudicial. Shockley's argument only became weaker as more facts came to light in the postconviction-review process, leading the Missouri Supreme Court to confirm its direct-appeal finding. *Shockley II*, 579 S.W.3d at 894–98, 905. Because each of these findings enjoys support in the record and comports with federal law, this Court defers to the Missouri Supreme Court's findings. *See Bahtuoh*, 855 F.3d at 873; *see also* § 2254(d)(1)–(2).

Shockley insists that the trial judge's decision to remove Juror 58 from the penalty phase shows that the trial judge recognized Juror 58's partiality. Doc. 48 at p. 140. Likewise, he says that Juror 58, as the father of a police officer, could not have judged the case impartially. *Id.* at p. 144. He again insists that the themes of Juror 58's book prove his bias. *Id.* at p.

147. Believing that these facts demonstrate that Juror 58 deprived Shockley of a fair trial, Shockley says that he can demonstrate prejudice under Supreme Court precedent. *Id.* at 145–46 (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)). Shockley notes federal cases holding that courts cannot simply trust a juror's statement that he or she acted impartially. *Id.* at 141 (citing *Williams v. Taylor*, 529 U.S. at 440–45; *Williams v. Netherland*, 181 F. Supp. 2d 604, 609 (E.D. Va. 2002); *Irvin v. Dowd*, 366 U.S. 717, 723–34 (1961)). Yet, the Missouri Supreme Court did not base its finding on bare assurances of impartiality from Juror 58; it looked to the contents of the novel, Juror 58's testimony about his novel, Juror 58's evaluation of the evidence against Shockley, and Juror 58's explanation of his own views on the criminal-justice system. *Shockley II*, 579 S.W.3d at 896–97. Because the Missouri Supreme Court's finding that Juror 58 judged the case impartially enjoys support in the record, this Court cannot reassess the state court's findings. *See Bahtuoh*, 855 F.3d at 873; *see also* § 2254(d).

Shockley also says that the Missouri Supreme Court failed to comply with various state-court rules, including Missouri precedent. Doc. 48 at pp. 143–47. However, the Court can overturn the Missouri Supreme Court's holdings only for contradicting federal law, unreasonably applying federal law, or determining the facts unreasonably. § 2254(d). Thus, Shockley's claim that the trial judge unlawfully denied his motion for a mistrial lacks support.

Alternatively, Shockley contends that the trial court owed him a sua sponte investigation into whether Juror 58 sullied the jury's impartiality. Doc. 48 at p. 138. To support his claim, Shockley points to *Smith v. Phillips*, 455 U.S. 209 (1982), Doc. 48 at 141, where the Supreme Court held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," *Smith*, 455 U.S. at 216. Shockley says that the trial judge denied him such a hearing by failing to immediately tell his trial counsel that Juror 58 gave his book to the bailiff. Doc. 48 at p. 124.

Yet even if the trial judge's failure to disclose this information did amount to a denial of a hearing, the analogy between *Phillips* and Shockley's case still would not hold. "In each . . . *Phillips*-type case, the trial courts had clear evidence of the jury's exposure to extraneous information." *Tunstall v. Hopkins*, 306 F.3d 601, 611 (8th Cir. 2002). On direct appeal, the Missouri Supreme Court held that the trial court did not have clear evidence that Juror 58 shared his book within the jury. *Shockley I*, 410 S.W.3d at 200. Thus, when the Missouri Supreme Court decided that Shockley did not have a right to a sua sponte inquiry into juror bias, its judgment did not contradict "or involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). Now, after the relevant jurors have testified that they did not read Juror 58's book, Shockley still presses his meritless argument that the trial judge should have gathered evidence for him. Because Shockley's

attempts to undermine the Missouri Supreme Court's reasoning fail, the Court denies claim 4.

c. Claim 16

In claim 16, Shockley challenges the trial court's decision not to sua sponte declare a mistrial after the prosecutor allegedly commented on Shockley's decision not to testify, as described in the Court's analysis of claim 15. *See supra* Section VI.B.1.i. Again, "in response to a witness stating that she did not know why Shockley's grandmother's car was across the street from where the victim was killed, the prosecutor pointedly replied, '[s]omeone does.'" Doc. 48 at p. 342; *Shockley I*, 410 S.W.3d at 189. Shockley did not object, though in the presence of the jury, the judge admonished the prosecutor for the comment. *Shockley I*, 410 S.W.3d at 189.

Shockley raised this claim on direct appeal before the Missouri Supreme Court, which found that the prosecutor did not directly comment on Shockley's choice not to testify. *Id.* That court also found on direct appeal that, even if the prosecutor indirectly commented on Shockley's silence, the comment would support a claim for relief only if the prosecutor calculated the remark to draw attention to Shockley's silence. *Id.* at 190 (citing *State v. Neff*, 978 S.W.2d 341, 344 (Mo. 1998)). But the state court found that "[t]he facts do not demonstrate any such calculated attempt by the State to cross the prohibited line." *Id.* Further, the Missouri Supreme Court found that the prosecutor's comment would warrant a mistrial only if Shockley could establish "manifest prejudice affecting substantial rights." *Id.* (citing *State v.*

Parker, 856 S.W.2d 331, 332 (Mo. 1993)). The court found no such prejudice. *Id.*

Although Shockley says that "[t]he state court's denial was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court," he makes no specific objections to the legal principles stated in the Missouri Supreme Court's analysis. Doc. 48 at pp. 346–47. Rather, he objects to the Missouri Supreme Court's factual determination that the prosecutor did not directly comment on his decision not to testify, *id.* at p. 346, its factual determination that the prosecutor did not intend to highlight Shockley's decision not to testify, *id*. at p. 347, and its factual finding regarding prejudice, *id*. But the Court does not find any of those factual determinations unreasonable. *See* § 2254(d)(2). Thus, the Court denies claim 16.

d. Claim 18(a)

In claim 18, Shockley advances two theories. First, he says that he "was deprived of his rights [to due process and a fair trial] under the United States Constitution because of the cumulative prejudicial effect of propensity and character evidence presented by the State," and second, that his "trial counsel similarly provided constitutionally ineffective assistance in violation of his rights . . . when they failed to object properly and request the appropriate remedy." Doc. 48 at pp. 357–63. The Missouri Supreme Court found that Shockley failed to preserve the argument he presents in the first part of this claim. *Shockley I*, 410 S.W.3d at 195. Because Shockley did not raise the second part of this claim in

state court, the Court addresses it with the rest of Shockley's procedurally defaulted claims. *See infra* Section VI.C.1.g.

Shockley claims that the Missouri Supreme Court "denied this claim on the merits," decided "that this cumulative evidence was not prejudicial," and made an "unreasonable determination of the facts." Doc. 48 at pp. 357, 361. Although the Missouri Supreme Court did address the merits of this claim in part, the state court chiefly focused on Shockley's procedural failures. *Shockley I*, 410 S.W.3d at 195–96 (finding that Shockley failed to preserve this argument and waived review of the failure). The state court held that two of the incidents in Shockley's cumulative-prejudice argument had no prejudicial impact and concluded that the motion court did not plainly err, but emphasized that Shockley had waived plain-error review. *Id.* "[A] federal habeas court cannot reach an otherwise unpreserved and procedurally defaulted claim merely because a reviewing state court analyzed that claim for plain error." *Clark v. Bertsch*, 780 F.3d 873, 874 (8th Cir. 2015).

Further, this Court will not question the state court's judgment on Missouri procedural issues. "It is not the office of a federal habeas court to determine that a state court made a mistake of state law." *Sweet v. Delo*, 125 F.3d 1144, 1151 (8th Cir. 1997) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). As the State points out, "[t]he Due Process Clause does not permit the federal courts to engage in finely tuned review of state evidentiary rules." Doc. 51 at p. 110 (quoting *Estelle*, 502 U.S. at 72). Section 2254(d)

allows federal habeas courts to review a state court's ruling only for failure to comport with federal law, reasonably apply federal law, or reasonably determine the facts. It does not authorize federal courts to reject a state court's application of state law. *See* § 2254(d); *Sweet*, 125 F.3d at 1151.

Shockley insists that "[t]o the extent that prior counsel defaulted this aspect of the claim, Shockley can overcome any default of this claim by showing cause and prejudice, including because of the ineffective assistance of appellate and state post-conviction counsel." Doc. 48 at p. 357 (citations omitted). He also states that "imposing default would be a miscarriage of justice." *Id.* at p. 358. The Court addresses these arguments with Shockley's other defaulted ineffective-assistance claims. *See infra* Section VI.C.1.g. The Court denies the first part of claim 18.

e. Claim 19

In claim 19, Shockley challenges the trial court's denial of his motion for a mistrial after a law-enforcement-officer witness commented on Shockley's "violent history." Doc. 48 at pp. 364–74; *Shockley I*, 410 S.W.3d at 190–91. This claim concerns the first of the four incidents at issue in claim 18. *Shockley I*, 410 S.W.3d at 194. Trial counsel objected that this comment constituted improper character evidence. *Id.* at 192–93. Yet, on direct appeal, Shockley argued that this comment constituted improper propensity evidence, not character evidence. *Id.* Finding a mismatch between Shockley's original objection and his appeal, the Missouri Supreme Court rejected this

claim as unpreserved. *Id.* The state court nevertheless addressed Shockley's claim on the merits, finding that the comment did not constitute improper character evidence. *Id.* at 194 (explaining that the officer referenced Shockley's violent history to explain the presence of a SWAT team at his interview with Shockley and did not reference Shockley's character to suggest that he acted in conformity with that character by murdering Sergeant Graham).

Likewise, the state court found that the comment did not prejudice Shockley. *Id.* (noting the evidence before the jury that Shockley threatened investigators by saying, "[d]on't come back to my house without a search warrant, because if you do there's going to be trouble and somebody is going to be shot"). Shockley says that the Missouri Supreme Court's distinction between character evidence and propensity evidence is a "distinction . . . without a difference" and that Missouri's adjudication of the issue contradicts Missouri Rule of Evidence 404 and "the common-law tradition." Doc. 48 at p. 371. By appealing to common law and Missouri's rules of evidence, Shockley acknowledges that whether propensity evidence and character evidence are the same is an issue of state law. But § 2254(d) does not authorize federal courts to overturn state-court rulings for misapplications of state law. "It is not the office of a federal habeas court to determine that a state court made a mistake of state law." *Sweet*, 125 F.3d at 1151. "The Due Process Clause does not permit the federal courts to engage in finely tuned review of state evidentiary rules." *Estelle*, 502 U.S. at 72 (citation omitted). Thus, the Court

cannot question the Missouri Supreme Court's judgment that Shockley procedurally defaulted this claim.

Shockley does not attempt to excuse his procedural default. Doc. 48 at pp. 364–74. And even if he had not defaulted this claim, Shockley states no clear standard from the Supreme Court that the Missouri Supreme Court contradicted or failed to reasonably apply. *See* § 2254(d), *see also* Doc. 48 at pp. 364–74. Instead, Shockley quotes highly general rules. *See* Doc. 48 at p. 368 ("A party seeking to invoke evidentiary error as a basis for habeas relief must show that such error had a 'substantial and injurious effect on the verdict.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993))). So, even if Shockley could overcome the procedural bar on this claim—which he does not attempt to do—the Missouri Supreme Court's treatment of the merits deserves deference under § 2254(d). The Court denies claim 19.

f. Claim 25

In claim 25, Shockley argues that prosecutors deprived him of his Fifth, Sixth, and Fourteenth Amendment rights when they failed to provide alleged *Brady* materials. Doc. 48 at p. 468. According to Shockley, Sergeant Graham had computer files documenting his alleged investigations of official wrongdoing. Doc. 48 at pp. 471–72. These files allegedly reveal other individuals with a motive to murder Sergeant Graham. *Id.* Shockley says that investigators knew the significance of these files and collected Sergeant Graham's home computer, mobile computer, and work computer. *Id.* at p. 471.

Shockley's trial counsel had access to all this evidence and reviewed the evidence, along with law-enforcement reports on the seizure and examination of the hard drives. Doc. 20-56 at p. 35. After an evidentiary hearing, the motion court found:

> The evidence adduced at the evidentiary hearing was that the computer hard drive from the victim's home was taken into evidence in the course of the investigation of his murder. That hard drive remains in evidence even as of the date of this Order. The trial attorneys in this case were provided access to all of the evidence seized in order to investigate potential defenses and evaluate the State's evidence against [Shockley]. The trial attorneys in this case did review that evidence and all law enforcement reports, which included reports that related to the examination and seizure of the victim's computer hard drives, according to their hearing and deposition testimony. Although, as the parties herein have stipulated, the hard drives are no longer accessible due to the passage of time and other factors, there is no evidence that the State, either with or without intent, withheld the files on the computer hard drive.

Id.; *see also* Doc. 20-24 at pp. 477–78, Tr. at 477:16–478:20 (recording the parties' agreement to the stipulation before the postconviction motion court). Yet Shockley now insists that the State suppressed this evidence, in violation of *Brady*. Doc. 48 at p. 470.

To prove a *Brady* violation, Shockley must show that "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Rejecting this claim, the Missouri Supreme Court found each of *Brady*'s three elements absent: the State did not suppress evidence; nothing indicated that the alleged suppressed evidence would favor Shockley; and, likewise, nothing indicated that the alleged suppression prejudiced him. *Shockley II*, 579 S.W.3d at 920–21.

Shockley's argument that the Court should reject the Missouri Supreme Court's adjudication of this issue largely fails to engage with the state court's analysis; instead, he opts to present an elaborate conspiracy theory, relying on unsupported assertions, citations to his own past unsupported assertions, and gross distortions of the record. To address the conspiratorial web of red string that Shockley presents in place of an argument supported by the record, the Court sorts Shockley's allegations into five categories: (1) Shockley's argument that Sergeant Graham maintained files documenting his investigation into official corruption; (2) Shockley's allegations that Sheriff Greg Melton involved himself in a criminal conspiracy; (3) Shockley's general allegations regarding alternative suspects and the alleged criminal conspiracy; (4) Shockley's argument that the State suppressed evidence, including

Sergeant Graham's alleged files; and (5) Shockley's few arguments that directly address the Missouri Supreme Court's reasoning.

i. Allegations regarding files on Sergeant Graham's computers

First, Shockley argues that Sergeant Graham investigated and documented official corruption, the subjects of that investigation may have murdered him, and the State suppressed this evidence. Doc. 48 at p. 470. To support these allegations, Shockley appeals to statements from several people who spoke to Sergeant Graham's fiancée[2] after his murder.

Cathy Runge was Sergeant Graham's fiancée at the time of his murder. Doc. 20-24 at p. 387, Tr. at 386:24–387:3. Runge testified that Sergeant Graham never told her that he was investigating police misconduct, and that she did not recall his mentioning files in his home about other officers. *Id.* at pp. 387–89, Tr. at 387:25–389:25. Although she assumed that Sergeant Graham, as a supervisor, had files about other officers at his home, he did not speak to her about such files, and she had no firsthand knowledge

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[2] Cathy Runge stated that she and Sergeant Graham "were going to get married . . . [but] were not formally engaged." Doc. 20-24 at p. 387, Tr. at 386:24–387:3. Shockley, however, refers to Runge as Sergeant Graham's "fiancé," *see, e.g.,* Doc. 48 at p. 470, and the Missouri Supreme Court referred to her as his "fiancée," *see* Shockley II, 579 S.W.3d at 920—21. For the sake of consistency, the Court will refer to her as Sergeant Graham's fiancée.

of such files. *Id.* at p. 389, Tr. 389:24–25. Sergeant Graham had a home computer and a filing cabinet, but Runge says that she did not know what was in the filing cabinet, and never accessed the computer, saw files on the computer, or saw Sergeant Graham use the computer for work. *Id.* at pp. 393–95, Tr. at 393:14–395:13. She reported having no specific knowledge about any of his files. *Id.* at p. 393, Tr. at 393:14–17. She did not know of any conflict between Sergeant Graham and other law enforcement offices. *Id.* at p. 394, Tr. at 394:11–13. Finally, Runge said that she never told anyone anything that contradicted the testimony described above. *Id.* at p. 396–97, Tr. at 396:24–397:1.

After Sergeant Graham's murder, Runge lived with Mike and Jeanne Kingree for a period of time. *Id.* at p. 390, Tr. at 390:1–17. Jeanne Kingree testified that, during this time, Runge mentioned that Sergeant Graham kept files about other officers on his home computer, but "you could tell she didn't know what was in the files." *Id.* at pp. 401–02 at Tr. at 401:8–402:3; *Id*. at p. 403, Tr. at 403:3–22. When asked more pointedly whether Runge told the Kingrees about files containing negative information about other officers, Jeanne Kingree testified that Runge did not say any such thing, but that Runge said only that "he kept files at his home on his home computer," but Runge had "no idea" whether the files concerned other officers. *Id.* at p. 402, Tr. at 4:02:9–18.

Krista Kingree remembered that Runge mentioned files about other officers but did not

remember if Runge said where Sergeant Graham kept the files. *Id.* at p. 436, Tr. at 436:7–17. She said that the files seemed to have a negative connotation, *id.* at p. 437, Tr. 437:1–4, although she later clarified that "in some positions everyone has a file . . . sometimes the positive, sometimes the negative, everything goes in that file, your reviews," *id.* at p. 441, Tr. at 441:9–12. So, Krista Kingree said that the files Runge mentioned might have been personnel files. *Id.,* Tr. at 441:17–19.

Unlike Jeanne and Krista Kingree, Mike Kingree did not give a postconviction deposition, as he had passed away, *id.* at p. 436, Tr. at 436:4–6, but he did earlier provide statements on the issue to a special prosecutor investigating allegations of Sergeant Graham's secret investigations, Doc. 48-3 at pp. 277–79. The special prosecutor reported that "Michael said [C]athy Runge never told him the files contained embarrassing information or evidence of wrongdoing but that he made that assumption based on his belief that the Patrol would remove embarrassing files." *Id.* at p. 279.

Carly Carter also testified regarding conversations that she had with Runge in the days after Sergeant Graham's murder. Doc. 20-24 at pp. 430–31, Tr. at 430:1–431:23. When asked whether Runge said anything about Sergeant Graham "investigating or looking into another officer," Carter said that "she had mentioned Greg Melton that [sic] he had a case that he was looking into with him." *Id.* at p. 430, Tr. at 430:14–15. Carter's testimony remained somewhat ambiguous as to whether she

remembered Runge saying that Sergeant Graham investigated wrongdoing *by* Melton or that Sergeant Graham investigated wrongdoing *with* Melton. Carter testified that, according to Runge, "[Sergeant Graham] had several cases that he was working on and that Greg Melton was one of them, a traffic stop and there was something that wasn't marked in his car or I mean I don't know all the specifics but she did mention he was looking into an incident with Greg Melton." *Id.* at 430–31, Tr. at 430:23–431:2. When asked whether Sergeant Graham's investigation "pertain[ed] to Greg Melton," Carter said, "yes," *id.* at p. 431, Tr. 431:17–18, and that "[Runge] made another statement again about Greg Melton you know that he was looking into other cases," *id.* at pp. 432, Tr. at 4:32:4–6. She said that "[t]here was a mention of a traffic stop and something unmarked in the car." *Id.* at p. 433, Tr. 433:3–4, *see also* Doc. 48-2 at pp. 592, 633–38, 643–44 (When deposed, Melton stated that he worked with Sergeant Graham on an investigation of Scott Sayler, a Missouri Water Patrol officer, whom Sergeant Graham arrested for possession of methamphetamines during a traffic stop.). However, Carter did not state whether Runge mentioned files documenting Sergeant Graham's alleged investigations and denied any personal knowledge of such files. Doc. 48-3 at pp. 430–33, Tr. at 430:1–433:22.

Shockley attempts to use Jeanne Kingree, Krista Kingree, and Carly Carter's testimony to support the idea that Sergeant Graham kept files documenting police corruption on his home computer. Shockley

says that these witnesses "confirmed in a post-conviction hearing that Graham's fiancé[e] was concerned about her safety due to the ongoing investigations Graham was conducting." Doc. 48 at p. 472. This is false. *See* Doc. 20-24 at pp. 386–405, 428–45, Tr. at 386:13–404:23, 428:13–445:25. If anything, Krista Kingree's testimony indicates that Runge trusted law enforcement, because she first stayed away from her home out of concern for the unknown murderer and "once they found out and put [Lance Shockley] in custody . . . then she may have went back to her own home at night." *Id.* at pp. 444–45, Tr. 444:12–445:4. Shockley asserts that Krista Kingree claimed that Runge said that "Graham maintained files on other officials he was actively investigating." Doc. 48 at p. 472. This too is false. To the extent that Krista Kingree gave any concrete description of Sergeant Graham's alleged files on other officers, she described possible personnel files. Doc. 20-24 at p. 441, Tr. at 441:2–19.

Shockley next claims that Carter said that she and Runge had "'numerous conversations' about investigations Sergeant Graham was involved in." Doc. 48 at p. 473 (quoting Doc. 20-24 at p. 430). This likewise is false. Carter said that she and Runge had "numerous conversations," Doc. 20-24 at p. 430, Tr. at 430:6, and that they "talked about life and all kinds of things," *id.* at p. 431, Tr. at 431:6–7. But she only mentions two occasions when Runge mentioned Graham "investigating something . . . . pertaining to Greg Melton." *Id.* at pp. 430–32, Tr. at 430:11–432:6 ("[Runge] had made another statement again about

Greg Melton you know that he was looking into other cases."). Shockley says that Runge "did not deny that [the conversations with Carter regarding Graham's investigations] took place." Doc. 48 at p. 473. This is false. Runge said that (1) she did not recall telling Carter that "Sergeant Graham was looking into some things that were going on in Carter County," Doc. 20-24 at pp. 391–92, Tr. 391:24–392:1, (2) she did not "say anything similar to that," *id.* at p. 392, Tr. 392:4–5, (3) she was "not aware of any issues between [Sergeant Graham] and any other law enforcement officer," *id.* at p. 394, Tr. at 394:11–13, (4) she had no knowledge of the alleged investigations and files, and (5) she never told anyone anything that contradicted this testimony, *id.* at pp. 396–97, Tr. at 396:3–397:1. In sum, Shockley attempts to use testimony from Carter and the Kingrees to support his idea that Sergeant Graham kept records of his investigations into police corruption, but he repeatedly fails to describe this testimony accurately.

Reviewing these statements, the postconviction motion court did not find that these statements demonstrated that Sergeant Graham maintained files on police corruption:

> The testimony of witnesses about the contents of the home computer is vague and speculative at best. There is no evidence before the court that the contents of any files on the computer hard drive constituted evidence which is material to issues of [Shockley's] own guilt and punishment. At most, the Court is considering speculative

> statements about what the victim's former fiancée assumed could be on the computer due to the nature of the victim's employment, but never once saw for herself.

Doc. 20-56 at p. 35. The Missouri Supreme Court agreed with these findings. *Shockley II*, 579 S.W.3d at 920–21. Because this reasoning enjoys support in the record, these findings are reasonable, and the Court must accept them. *See Ryan*, 387 F.3d at 790.

Shockley attempts to use two juror affidavits to bolster his argument that "[t]his evidence could have been especially powerful to [the] jury." Doc. 48 at p. 497. One juror said she would have considered evidence that Sergeant Graham investigated law-enforcement corruption. Doc. 48-5 at p. 90. Another juror said this evidence would have interested her and that she had heard rumors about suspicious events related to Carter County law enforcement. *Id.* at pp. 94–95. The State argues that "[t]he juror affidavits are not admissible" because the "Federal Rule of Evidence 606 prohibits juror testimony about 'any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental process concerning the verdict.'" Doc. 51 at p. 128 (quoting Fed R. Evid. 606(b)(1)). Shockley says that these affidavits concern what the hypothetical effect of the allegedly suppressed evidence might have been, not the juror's actual mental process.

The Eighth Circuit has held that "the principle behind this prohibition [of Federal Rule of Evidence 606(b)] extends to testimony about what those mental

processes would have been had the evidence at trial been different." *United States v. Burns*, 495 F.3d 873, 875 (8th Cir. 2007). Thus, Federal Rule of Evidence 606(b) bars these affidavits. *C.f. supra* Section V.C.1. (finding that § 2254(d) precludes Shockley from introducing further evidence to support claims adjudicated on the merits in state court). Further, the Court cannot use these affidavits to assess the reasonableness of the Missouri Supreme Court, both because the state court never saw those affidavits and because a couple of jurors' retrospective interest in seemingly non-existent evidence does not affect the Missouri Supreme Court's findings that no reliable evidence shows the files existed and that the State did not suppress evidence. *Shockley II*, 579 S.W.3d at 920–21.

Shockley also says that "[s]hortly after Graham's murder, his fiancé[e] told investigators about [Sergeant Graham's investigations into official misconduct], which prompted her to move out of the house as she was fearful for her life." Doc. 48 at p. 471; *see also id.* at p. 482 ("Graham's fiancé[e] reportedly shared these concerns with investigators before trial."); Doc. 56 at pp. 236, 246 (making the same assertions). But Shockley never cites any source for this notion. *See* Doc. 48 at pp. 471, 482; Doc. 56 at pp. 236, 246.

While Shockley does not attempt to support his allegations about Runge's allegedly informing investigators about Sergeant Graham's alleged files, he does attempt to support the notion that Runge feared law enforcement after Sergeant Graham's

murder. Shockley says that an earlier statement from Krista Kingree reported that Runge told her that "she was 'very scared' about 'some things that had been going on,'" and that "[Runge] reported her fear was based on an investigation 'about other officers' and 'it wasn't a good thing.'" Doc. 48 at p. 482 (citing Doc. 48-3 at pp. 233–43). To support this claim, Shockley cites to one of his state-court filings, describing an investigation by a special prosecutor. *Id.* However, Shockley's earlier filing does not say that Runge was afraid because of "some things that had been going on" or because of "other officers":

> [Krista Kingree] said that Ms[.] Runge had told her that Sgt. Graham had kept files in his home "due to *some things that had been going on*." Ms. Kingree told the investigator: "It was about *other officers* . . . I do know it was about other officers." And: "I just remember . . . it wasn't a good thing." She recalled that Ms[.] Runge had been "*very scared*" about her own safety after Sgt. Graham was murdered, until she learned that "they were[] positive" that Mr. Shockley had committed the crime.

Doc. 48-3 at pp. 239 (second alterations in original) (internal citations omitted). In turn, this statement cites a recording of the special prosecutor's interview of Krista Kingree, *id.*, which Shockley has not included with his filing of the special prosecutor's report, *see* Doc. 48-3. Even taking Shockley's earlier statement at face value, it asserts a vague, fuzzy connection between Sergeant Graham's files and

something negative about other officers. It does not say that Runge feared other officers. To the extent that Shockley's previous filing accurately represents Krista Kingree's earlier statement to the special prosecutor, nothing in that statement clearly contradicts her later testimony. Further, when deposed, Krista Kingree said that she did not recall Runge saying that Sergeant Graham kept "files on another officer that it was due to some things [sic] that he was looking into that had been going on." Doc. 20-24 at p. 438.

ii. Allegations regarding Sheriff Greg Melton

Shockley next supplements his *Brady* claim with a morass of reports, suggestions, and speculation that supposedly support the notion that Sheriff Greg Melton murdered Sergeant Graham. Doc. 48 at pp. 487–96. He acknowledges that "the State did share prior to trial, in discovery, some concerns about Sheriff Melton and his possible involvement in Graham's murder." *Id.* at p. 487. Shockley does not describe what discovery the State produced or cite any source that might lead to this information. *Id.* However, in the course of deposing Melton, Shockley's initial counsel asked Melton about his relationship with Sergeant Graham. Doc. 48-2 at p. 641, Tr. at 128:16–18. Melton said, "I seen [sic] him a lot. I think we had a good working relationship." *Id.*, Tr. 128:19–20. When counsel pressed Melton about any conflict between them, Melton explained that they had a normal level of disagreements, but "didn't have any problems as far as work relationships." *Id.* at p. 642,

Tr. 129:1– 4. Yet Shockley argues Melton took part in criminal wrongdoing that Sergeant Graham might have investigated. Doc. 48 at p. 493.

According to Shockley, "[t]here was evidence that Graham was investigating Sheriff Melton for seizing guns without proper authority to do so. Graham was also investigating . . . Melton on suspicions he was trafficking drugs." *Id.* (citations omitted). Shockley supports his allegation of gun-related misconduct with two citations. First, he cites a statement made by his counsel to the postconviction motion court, which says that "there was a memo from 2003 where Sergeant Graham wrote that one of his lieutenants from the highway patrol was saying Melton is seizing guns that he basically shouldn't be seizing when he's executing these search warrants." Doc. 20-24 at p. 82, Tr. at 82:3–7. However, this statement by Shockley's postconviction counsel about a memo by Sergeant Graham about a statement by a lieutenant about Melton hardly supports Shockley's claim that Melton illegally seized guns. In the same argument to the motion court, Shockley's postconviction counsel also mentioned various kinds of alleged wrongdoing among Carter County police and said that Melton's successor said that a sergeant said "we all know what the deal was with Greg [Melton]." *Id.* at p. 83, Tr. at 83:10–11. Again, these vague statements, buried under layers of hearsay, hardly show that Melton committed misconduct or that Sergeant Graham had records of wrongdoing that somehow attracted the attention of corrupt law-enforcement officers.

Shockley also supports his allegation that "Graham was investigating Sheriff Melton for seizing guns without proper authority" via another citation to a statement by his postconviction counsel. Doc. 48 at p. 493 (citing Doc. 20-43 at p. 18). His postconviction counsel alleged that she learned about Melton's wrongdoing from various sources who "reported information that they had heard and did not have direct knowledge of and many of the sources wanted to remain anonymous." Doc. 20-43 at p. 18. However, neither postconviction counsel nor present counsel give concrete statements to support these speculative allegations. *Id.*; Doc. 48 at p. 493.

Shockley also attempts, with several citations, to support his claim that Melton engaged in drug trafficking. Doc. 48 at pp. 493, 495. First, Shockley cites a statement by postconviction counsel to the motion court, *id.* at p. 493, referring to "an email from a [Holly] Lewis that have [sic] been forwarded and circulated through the Missouri State Highway Patrol that a man named Dale from Van Buren stated that Sheriff Melton had been involved in drugs and was involved in [Sergeant Graham's murder]," Doc. 20-24 at p. 75. According to that email from Lewis, a man named Dale said that Melton and Shockley were coconspirators in a drug-trafficking scheme; that Melton invited Shockley to come attack Sergeant Graham together, but Shockley arrived after Sergeant Graham had already been shot; and that "Melton later made some sort of comment to Shockley about taking care of business, and that Graham should have minded his own business." Doc. 48-3 at p. 295. The

email does not explain how Dale could know any of this but admits that "Dale rattles a lot." *Id.* Unsurprisingly, Shockley does not mention the details of this email in his briefing. *See* Doc. 48 at p. 493. Instead, Shockley attempts to bolster the weight of this email by describing it as a "report[] generated by the State" that "substantiated" the idea that "Sherriff Melton was involved in Graham's murder," *id.* at pp. 495–96, despite the fact that the State did not generate this email and the email did not substantiate Dale's story, Doc. 48-3 at p. 295. Rather, the email stated that "I know that this seems far fetched, and there is a possibility that if questioned on it, Dale will either completely deny it, or change his story." *Id.* So, this rumor lacks credibility, and Shockley's presentation of it lacks candor.

Second, Shockley attempts to support the notion that Melton committed drug-related crimes with a citation to a motion from his postconviction counsel, which again mentions the email about Dale from Van Buren, but also mentions another report that Melton murdered Sergeant Graham. Doc. 20-26 at p. 9 (citing "Bates Stamped Discovery Pages 2523, 6579," where page 6579 gives the email regarding Dale from Van Buren and page 2523 records the second report regarding Melton.). This report describes a Missouri State Highway Patrol officer's interview of a man named Scott Hicks. Doc. 48-3 at pp. 112–13. Hicks said that a man who may have called himself Barney Mayberry told Hicks that Greg Melton killed Sergeant Graham. *Id.* at p. 112. "Barney Mayberry" claimed to be Melton's cousin and said that Melton killed

Sergeant Graham using only a shotgun and then swept his footprints away so that no forensic evidence would point to him. *Id.* The officer taking the interview noted that Hicks "did not have the correct details of the crime scene and seemed to have a grudge against the sheriff," so the report lacked reliability. *Id.* at p. 113. In a deposition, Shockley's first trial team began to ask Melton about this allegation, but then said "[i]t doesn't matter. It's convoluted," and moved on to a different topic. Doc. 48-2 at p. 647, Tr. at 134:1–16.

Again, Shockley does not mention any of the details of this flawed hearsay report in his briefing. Doc. 48 at p. 493. And again, Shockley attempts to bolster the significance of this document by describing it as a report generated by the State that substantiates the idea that Melton murdered Sergeant Graham. Doc. 48 at pp. 495–96 (citing Doc. 48-3 at pp. 112–13 as "App. 001448-001449"). Shockley might have more accurately described this as a report generated by the State that records a rumor and explained why that rumor lacks any credibility.

Third, Shockley again cites the statement by his postconviction counsel about the many sources who "reported information that they had heard and did not have direct knowledge of and many of the sources wanted to remain anonymous." Doc. 20-43 at p. 18. According to prior counsel's description of what these sources said, "Melton was engaged in illegal activities while he was sheriff, including the unlawful seizure of weapons, the use of illegal drugs, and drug

trafficking." *Id*. Because the Court has no record of these statements and, because the sources admittedly lacked first-hand knowledge of the matter, Shockley's reliance on these sources is misplaced.

Fourth, Shockley says that "Sheriff Melton and Officer [Scott] Sayler were dealing drugs together." Doc. 48 at p. 495 (citing Doc. 20-24 at pp. 77–78). Again, Shockley cites statements from postconviction counsel. *Id.* Here, counsel stated that "Sergeant Graham stopped Scott Sayler, who was a former water patrolman in Carter County" and that "Sayler was then charged with several offenses." Doc. 20-24 at pp. 77–78. According to "information" obtained by Shockley's postconviction counsel, "Scott Sayler was associated with Greg Melton." *Id.* Melton said that he knew of Sayler, but he "didn't know a lot about Scott." Doc. 48-2 at p. 592, Tr. 79:5–19. Shockley does not add any substantiated details that indicate that Melton associated with Sayler, let alone that they cooperated in a criminal conspiracy, although he does cite "reports" to disparage Sayler. *See infra* Section VI.B.2.f.iii. (discussing Shockley's allegations against Sayler).

Beyond the various allegations that Shockley attempts to bolster, he makes various accusations against Melton without any attempt to tie those accusations to the record. Shockley says that "[p]ost-conviction counsel was also informed that at the time of Graham's murder, Sheriff Melton was very involved in the meth trade and had a motive to kill Graham because he believed that Graham was investigating his various wrongdoings." Doc. 48 at p. 493. Shockley

asserts that "[a]nother party informed post-conviction counsel that Mark White and Richard Kearby assisted Sheriff Melton in the transportation of drugs through Carter County." *Id.* at p. 494. Shockley further says that "[h]ad Sheriff Melton not died in 2008, he likely would have faced the same criminal charges brought against his successor . . . , since many of the illegal activities [the successor] was charged with . . . were ongoing at the Sheriff's department when Melton was in charge." *Id.* at p. 496. Shockley does not explain why the Court should accept these assertions without support in the record, or how the Court could use these assertions to evaluate the reasonableness of the Missouri Supreme Court's adjudication of this claim. *See id.* at pp. 494–96.

In sum, Shockley argues that Melton engaged in criminal conduct. However, the combined weight of Shockley's citations to his own past statements on Melton's alleged crimes—referring to absurd, unreliable, or unrecorded statements, many of which are double or triple hearsay—does not provide a reasonable basis to believe that Melton murdered Sergeant Graham. Even if the Court accepted Shockley's conspiracy theory, Shockley does not explain how the Court could conclude that Sergeant Graham had secret files about Melton's alleged crimes, that the State obtained these files, and that the record demonstrates the existence of these files so definitively that the Missouri Supreme Court's adjudication of the issue does not enjoy support in the record. While he relies on rumors to support his argument, Shockley fails to appreciate that some of

the rumors of criminal conspiracies also implicate him. *See* Doc. 48-2 at pp. 589–90, Tr. 76:20–77:17 (recording Melton's testimony that he knew Anne Dowdy claimed to have "information that Lance [Shockley] and Scott Sayler might have shot Sergeant Graham"). Thus, even if these were admissible evidence, rumors implicating Shockley and a co-conspirator would not establish a basis to grant Shockley habeas relief. Thus, the Court finds Shockley's argument regarding Melton entirely lacking in merit.

iii. Allegations of a criminal conspiracy

Turning to the third broad category of allegations within claim 25, Shockley makes an even more diffuse argument regarding wrongdoing in Carter County, in hopes of somehow supporting the idea that the State suppressed Sergeant Graham's alleged files. First, Shockley refers to an affidavit about a conversation with Melton's successor, former Sheriff Tommy Adams. Doc. 48 at p. 493 (citing Doc. 48-5 at p. 119). That affidavit does not indicate that Adams had any specific knowledge of Sergeant Graham's alleged secret files but states that "Adams was aware of rumors that Sgt. Graham was starting to investigate other officers and internal police staff about possible corruption." Doc. 48-5 at p. 119. Adams allegedly insinuated that Sergeant Graham drew the ire of corrupt officials and that someone implied that Melton had been murdered for speaking about the criminal conspiracy. *Id.*

The State objects that "[t]he affidavit is essentially a hearsay affidavit that the declarant has no personal knowledge about an investigation of corruption by [Sergeant Graham], but that he has heard rumors. Hearsay is not admissible." Doc. 51 at p. 128. The State adds that the affidavit "is an attempt to expand the current claim beyond what was presented in the Missouri courts and the original petition." *Id.* Shockley admits that the state-court record does not include this affidavit, Doc. 56 at p. 263, but contends that the affidavit does not "fundamentally alter the claim that was considered by the state courts," *id.* at p. 464. He argues that "[b]ecause Adams's affidavit adds relevant support but does not change the nature of the fully exhausted and timely original *Brady* claim, procedural constraints do not bar the affidavit from this Court's consideration." *Id.*

Shockley's argument does nothing to answer the State. First, Shockley fails to address the State's argument that the affidavit is inadmissible hearsay. Second, Shockley's invocation of the rules of procedural default entirely misconstrues the State's argument that Shockley cannot cite information outside the state-court record. Shockley did not present this affidavit to the Missouri Supreme Court and so the Court cannot consider it in evaluating the reasonableness of the Missouri Supreme Court's judgment. *Shoop*, 142 S. Ct. at 2043–44. Further, § 2254(e)(2) provides that a petitioner who fails to develop a claim in State court can develop the record further only with new law or previously unavailable

facts. This affidavit does not fall into either exception, and Shockley does not claim that it does. Doc. 56 at p. 265. So, even if this affidavit contained more than a hearsay report of a rumor of wrongdoing, the Court could not consider it. *See supra* Section V.C.1. (rejecting Shockley's discovery request for claim 25).

Shockley makes further allegations regarding a criminal conspiracy in Carter County to murder Sergeant Graham. He says that "[a]nother party informed post-conviction counsel that Mark White and Richard Kearbey assisted Sheriff Melton in the transportation of drugs through Carter County." Doc. 48 at p. 494. No citation supports this claim. *Id.* Shockley says that Sergeant Graham posed a threat to this conspiracy and that a criminal case against White "was dismissed . . . due to Graham's death." *Id.* (citing Doc. 48-3 at pp. 109–10). Although Shockley implies that White or his alleged coconspirators may have killed Sergeant Graham to avoid White's conviction, the police report Shockley cites does not support this idea. *Id.* That report details Trooper Eric Hackman's interview of White after Sergeant Graham's death. Doc. 48-3 at p. 109. The report notes that Sergeant Graham had arrested White for possession of marijuana and that when Trooper Hackman went to White's residence, White freely admitted that he had just been smoking marijuana and voluntarily handed his bag of drugs over to Hackman. *Id.* Thus, the police report does not support Shockley's depiction of White as a member of a secretive murderous cabal.

Shockley also claims that Scott Sayler took part in the same conspiracy with Mark White and Greg Melton. Doc. 48 at p. 494. Shockley repeatedly mentions that "Sayl[e]r was a trained sniper, which is significant to this case, given that Graham was shot from a substantial distance with pinpoint accuracy." Doc. 48 at pp. 494–95, 514; *but see Shockley II*, 579 S.W.3d at 890–91 ("[Sergeant Graham] was shot from behind with a high-powered rifle that penetrated his Kevlar vest. . . . The killer then approached [Sergeant Graham], who was still alive, and shot him twice more with a shotgun into his face and shoulder."). According to Melton, Sergeant Graham found drugs on Sayler during a traffic stop, but the prosecutor dropped the charges after Sergeant Graham's death. Doc. 48-2 at p. 643, Tr. at 130:10–24. Shockley says that Sayler's arrest—among other factors—resulted in his termination and that Sayler "threatened his supervisor at his employment after his termination." Doc. 48 at p. 495 (citing Doc. 48-3 at pp. 123–24). The police report Shockley cites for these claims supports Shockley's claim regarding Sayler's termination but makes no mention of Sayler threatening anyone. Doc. 48-3 at pp. 123–24.

Finally, Shockley suggests that someone murdered Melton. He claims that "[a]lthough [Melton's] death was ruled a suicide, the investigation conducted during post-conviction proceedings revealed that there were people who believed Sheriff Melton was murdered." Doc. 48 at p. 496. Shockley leaves the Court to draw its own conclusions as to how

this speculation on Melton's death might contribute to his *Brady* claim. *Id.*

Shockley scatters these accusations against various residents of Carter County throughout his *Brady* argument, creating a vague impression of a shadowy network of drug dealers and murderers. *Id.* at pp. 470–71, 473, 477, 486, 493–96. At best, these speculative, hearsay-bound assertions provide a chimerical indication that a possible conspiracy existed for Sergeant Graham to investigate and document. However, the Court cannot view these allegations as a serious legal argument that Sergeant Graham possessed records concerning this alleged criminal conspiracy and that the Missouri Supreme Court unreasonably concluded that Sergeant Graham did not possess these alleged files.

iv. Allegations of suppression of evidence

The Court now turns to the fourth broad category of allegations within claim 25. In addition to Shockley's many arguments that—contra the holdings of the Missouri Supreme Court—Sergeant Graham did possess files that would reveal other suspects, Shockley also presents an extended argument that the State suppressed this evidence. *Id.* at pp. 471, 476–85, 487–88, 492. Shockley says that after Sergeant Graham's murder, investigators "recognized that his electronic files contained valuable information" and seized Sergeant Graham's computers. *Id.* at p. 471 (citing Doc. 48-3 at pp. 100-01, 111 (stating that investigators seized Shockley's and Graham's computers, but found nothing of

evidentiary value on either)). Shockley says that "the Circuit Court ordered the State to turn over all electronic files obtained during the investigation into Graham's death," Doc. 48 at p. 477, and that "[e]lectronic copies of these files were never turned over to defense counsel," *id.* at p. 471.

Although Shockley does not support these claims with citations, statements made by postconviction counsel and the State before the postconviction motion court give more detail on this discovery dispute. Doc. 20-24 at pp. 71–102, Tr. at 71:5–102:24. Postconviction counsel stated that Sergeant Graham had three computers—a home computer, a mobile computer, and a work-zone computer—and that defense attorneys requested a copy of the home computer's hard drive. *Id.* at pp. 71–72, Tr. at 71:25–72:9. The State explained that it attempted to give a copy of Sergeant Graham's home computer hard drive to the defense, but realized it could not copy the hard drive onto a disk and would need to copy it onto another hard drive. *Id.* at pp. 88–89, Tr. at 88:20–89:4. The State asked the defense to provide a hard drive that it could use for this purpose, but according to the State, "the public defender's office never followed up on that so that's why it was never given over to the public defender's office." *Id.* at p. 89, Tr. 89:5–9. The State explained that it received "no further communications" on the issue. *Id.*, Tr. at 89:15. Further, the State argued that it copied the files from Sergeant Graham's work-zone computer onto a disk and disclosed this fact to the defense, but the files from that computer had no apparent relevance to

Shockley's case and the defense never requested a copy of the disk. *Id.* at pp. 92–93, Tr. at 92:21–93:14.

Shockley's postconviction counsel objected that the State still should have disclosed the files from the work-zone computer before the trial. *Id.* at p. 93, Tr. at 93:16–21. During postconviction discovery, Shockley received the files from Sergeant Graham's work-zone computer. *Id.* at p. 69, Tr. 69:16–18. This exchange makes clear that the State did not provide a copy of Sergeant Graham's home computer hard drive or a copy of the files from his work-zone computer to Shockley's trial counsel. Yet, after an evidentiary hearing, the postconviction motion court found that the State provided counsel *access to* these hard drives and Shockley's attorneys *viewed* those hard drives:

> The trial attorneys in this case were provided access to all of the evidence seized in order to investigate potential defenses and evaluate the State's evidence against [Shockley]. The trial attorneys in this case did review that evidence and all law enforcement reports, which included reports that related to the examination and seizure of the victim's computer hard drives, according to their hearing and deposition testimony.

Doc. 20-56 at p. 35.

Shockley does not attempt to refute this finding that his attorneys reviewed the hard drives and the reports about the hard drives. *See* Doc. 48 at pp. 498–501. He does not mention this finding at all. *See id.* at pp. 468–501; Doc. 56 at pp. 233–69. Instead, Shockley disingenuously couches his claims in a way that

sidesteps the fact that counsel accessed the physical hard drive, stating that "[e]lectronic copies of these files were never turned over to defense counsel," Doc. at p. 471, "the electronic records were not accessible," *id.* at p. 472, and "the State failed to turn over electronic files to the defense," *id.* at p. 486. Leaving aside the concerns this raises about whether Shockley's present counsel have fulfilled their duties of candor to this Court (and whether counsel justify such conduct on the basis of the inapplicable ABA guidelines), the motion court's reasonable adjudication of this claim based on the unrebutted evidence in the record dooms Shockley's *Brady* claim.

Shockley never argues that the State must, under *Brady*, go beyond simply giving Shockley access to the hard drives or that it must give Shockley electronic copies of the hard drives. *See* Doc. 48 at pp. 468–501; Doc. 56 at pp. 233–69. Such an argument would contradict *Brady*'s concept of suppression. *See United States v. Stuart*, 150 F.3d 935, 937 (8th Cir. 1998) ("Evidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence." (citing *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992))); *see also United States v. Reed*, 641 F.3d 992, 993 (8th Cir. 2011) ("*Brady* addressed only the government's duty to provide access to evidence favorable to an accused upon request."). Thus, Shockley's argument ignores both the facts and the law.

Shockley also adds a number of details that he does not develop into real arguments that the State suppressed evidence, in an attempt to arouse

suspicion of a general atmosphere of suppression. First, Shockley complains that "[t]he State's response claim[s] that it was 'not aware of any information that would tend to negate the guilt of the defendant,'" Doc. 48 at p. 476 (citation omitted), even though, according to Shockley, the State "withheld evidence involv[ing] other investigations Graham was conducting relating to government corruption," *id.* at p. 471.

Second, Shockley mentions a series of discovery motions denied by state courts. *Id.* at pp. 479–83. But he does not develop an argument that these rulings violated his rights. *See id.*

Third, Shockley complains that the State failed to investigate an alleged report by Runge that Sergeant Graham kept files on police corruption. *Id.* at p. 482. However, whenever Shockley discusses this alleged statement to investigators, he cites no evidence. *See id.* at pp. 471, 482; Doc. 56 at pp. 236, 246.

Fourth, Shockley gives an extended discussion of the conflict between his postconviction counsel and the State leading up to the stipulation that Graham's home hard drive and mobile computer had become inaccessible. Doc. 48 at pp. 483–86. Although Shockley generally insinuates that the State wanted to wrongfully hide something about Sergeant Graham's hard drives, he concludes that "[u]ltimately the dispute between the Circuit Court's Order and the State's refusal to comply with it was resolved." *Id.* at p. 485. Rather than develop a legal argument based on this conflict, Shockley seemingly mentions it as an unwarranted insinuation of wrongdoing by the State.

Fifth, Shockley asserts that the State did not properly investigate the email regarding allegations by Dale from Van Buren that Melton—conspiring with Shockley—killed Sergeant Graham. He complains that "the Missouri State Highway Patrol forwarded the email to Assistant Attorney General Kevin Zoellner and asked, 'What do you think we should [do] about this?'" *Id.* at p. 487 (alteration in original) (quoting Doc. 48-3 at p. 127)). Shockley says that "[n]o response to the email was provided in discovery." Doc. 48 at p. 487. To the extent that Shockley intends to raise this as a distinct argument, rather than an addition to his general complaint about the State's actions, this argument cannot succeed. Shockley does not allege that Zoellner responded to this email and does not argue that, if Zoellner did respond, the State should have produced that response pursuant to *Brady*. *Id.* Further, Shockley did not raise this argument before the Missouri Supreme Court; his *Brady* claim addressed only the alleged secret files. *See* Doc. 20-59. He does not attempt to explain how he could overcome procedural default. *See* Doc. 48 at p. 487. Therefore, his argument remains fundamentally undeveloped.

Sixth, Shockley complains that, although the State produced a memorandum regarding the email about Dale, the State failed to produce records of its investigation and failed to investigate the issue thoroughly. *Id.* at p. 487. The memo, written by Sergeant D.J. Windham, states that, "I was contacted in reference to an email on the Sergeant Dewayne Graham homicide." Doc. 48-3 at p. 125. Windham does

not specify whether this is the email about Dale, but Shockley assumes that the memo concerns the email about Dale's allegations. Windham says that he inquired into the procedures for investigations of police corruption and concluded that Sergeant Graham had no assignment to investigate Melton. *Id.* He further notes that "[d]uring the course of the lengthy investigation of Sergeant Graham's murder by federal, state, and local agencies, there had never been any information obtained or substantiated that Sheriff Melton was involved in drug trafficking or that Sergeant Graham was investigating Sheriff Melton." *Id.* The memo indicates that Windham completed his report later the same day he learned about the email. *Id.*

Shockley complains that discovery indicated no investigation of the email between the date when the State received the email and Windham's eventual memo. Doc. 48 at p. 487. Yet, the memo describes the details of Windham's brief investigation. Doc. 48-3 at p. 298. Shockley gives no reason to think the State investigated this hearsay rumor any further. *See* Doc. 48 at pp. 487–88. Shockley also complains that the memo contradicts both the alleged statement from Runge to investigators and the email about Dale. *Id.* However, Shockley never cites any information indicating that Runge made the alleged statement to investigators. *See id.* at pp. 471, 482; Doc. 56 at pp. 236, 246. Also, an email that explicitly states that Dale is not a reliable source and that his story is farfetched, Doc. 48-3 at p. 295, cannot count as evidence, much less probative evidence

"substantiat[ing] that Sheriff Melton was involved in drug trafficking," *id.* at p. 125. Indeed, the Missouri Supreme Court concluded that no evidence "beyond speculation and conjecture" indicated that these files existed. *Shockley II*, 579 S.W.3d at 920. So, Shockley's complaints about the State's response to the email about Dale from Van Buren constitute innuendo, not legal argument.

Seventh, Shockley makes a series of complaints about two investigations by a special prosecutor into allegations of suppressed evidence. Doc. 48 at pp. 478–83. He complains that a letter from the special prosecutor "declared that no evidence was suppressed," though "the special prosecutor had not even interviewed several key witnesses" at that time. *Id.* at p. 480. In reality, the letter stated that although the special prosecutor had not completed his report, he had "found no evidence that is inconsistent with Mr. Shockley's guilt," Doc. 48-3 at p. 247; the letter did not "declare[] that no evidence was suppressed," Doc. 48 at p. 480.

Shockley complains that a special master, rather than a special prosecutor, should have made these determinations. Doc. 48 at p. 479. But he does not develop any argument that he had a legal right to a special master as opposed to a special prosecutor. *Id.* Shockley also complains that the special prosecutor was not as communicative as Shockley wanted. *Id.* at p. 480. Shockley also asserts without support that a judge, rather than a special prosecutor, should have determined the credibility of the *Brady* allegations. *Id.* at p. 482.

Neither investigation by the special prosecutor revealed a *Brady* violation. The first special-prosecutor investigation concerned a report by Scott Faughn. Doc. 48-3 at p. 250. Faughn—a felon convicted of three counts of forgery—recounted that he, Kyle Walsh, and Rocky Kingree—the recently elected prosecutor for Carter County—had a conversation in which Rocky Kingree displayed a micro cassette tape. *Id.* at p. 251. Rocky Kingree supposedly said that the tape "contained a conversation between Ernie Richardson, the Carter County Prosecutor from January 2007[–]December 2010, and Kevin Zoellner, the Assistant Attorney General assigned to prosecute [Shockley's] case." *Id.* Faughn said that Rocky Kingree said that the conversation recorded on the tape concerned suppressed evidence on Sergeant Graham's murder. *Id.*

But this report had several flaws. First, Richardson had no involvement in Shockley's case. Second, "[t]he allegation is at best second, perhaps third hand information." *Id.* at p. 260. Third, both Rocky Kingree and Walsh recalled the conversation described by Faughn, but said that "there was no mention of Shockley, Zoellner, Richardson or withholding evidence from defense attorneys." *Id.* Rocky Kingree gave his statement under oath. Fourth, Faughn had a motive to disparage Zoellner, as Zoellner prosecuted Faughn. *Id.* at p. 262. Thus, the special prosecutor concluded that "absolutely no credible evidence exists" to support this rumor of a *Brady* violation. *Id.*

The special prosecutor's second report addressed the allegations about Runge's conversation with the Kingrees. Doc. 48-3 at pp. 268–85. During direct-appellate review, Michael Kingree reportedly told Shockley's counsel that Runge told the Kingrees that "Sgt. Graham kept files on people Graham suspected were involved in criminal activity in the Carter County area. . . . [I]t was clear to [counsel] that [Michael] Kingree was including law enforcement officers and troopers, in the suspect group." Doc. 48-3 at p. 275. The special prosecutor concluded that:

> The credible evidence absolutely establishes that Sgt. Graham did not maintain any such files as those described by Michael Kingree. Because there is no evidence that such files ever existed, the Patrol could not have removed any such files from his home and withheld them from the parties in this case.

Id. at p. 285. Thus, Shockley's discussion of the special prosecutor does not support a *Brady* argument.

v. The Missouri Supreme Court's findings

Beyond Shockley's general argument that the State suppressed favorable evidence in his case, Shockley makes more specific arguments against the Missouri Supreme Court's adjudication of the issue. First, Shockley says that "[t]he Missouri Supreme Court's application of the prejudice prong of *Brady* was contrary to federal law" because "the Missouri Supreme Court discounted the tremendous amount of material evidence, claiming that Shockley 'cannot

demonstrate the outcome of his trial would have been different if he had access to [the hard drives].'" Doc. 48 at p. 499 (second alternation in original) (quoting *Shockley II*, 579 S.W.3d at 921). Shockley contends that "[t]his is not only incorrect, it is also an error no fair-minded jurist could make." *Id.*

Shockley's exaggerated rhetoric stands totally divorced from the record. The Court demonstrated above the falsity of Shockley's unsupported assertions regarding Runge. *See supra* Section VI.B.2.f.i. Because Runge testified that she had no knowledge of these files, the Missouri Supreme Court's finding enjoys support in the record and this Court must defer to it. *See Ryan*, 387 F.3d at 790. Further, since no one testified that Sergeant Graham had files on investigations of law-enforcement corruption, Shockley's reference to "the tremendous amount of material evidence" is another exaggeration without support in the record. *See* Doc. 48 at p. 499. In short, the Missouri Supreme Court reasonably adjudicated the issue.

Second, Shockley says that the Missouri Supreme Court contradicted federal law by failing to apply the standard of materiality established by *United States v. Agurs*, 427 U.S. 97, 112 (1976): "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." Doc. 48 at p. 500 (quoting *Agurs*, 427 U.S. at 112). Shockley also quotes *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), stating that "[t]he question is not

whether the defendant would more likely than not have received a different verdict with the evidence." *Id.* at p. 499 (alteration in original). Shockley says that, by not applying the standard set in *Agurs*, "[t]he Missouri Supreme Court egregiously misapplied the proper standard in favor of a standard that the Supreme Court of the United States expressly excluded from any analysis of prejudice in *Brady* claims." *Id.* at p. 500.

Yet, Shockley's quotation of *Kyles* obscures the fact that evidence counts as "material" when it creates a reasonable probability of a different result. 514 U.S. at 434. The full passage reads:

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

According to the Missouri Supreme Court, a *Brady* violation occurs only when the State suppresses evidence "material to either the guilt or penalty phase," and "[e]vidence is material only if

there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Shockley II*, 579 S.W.3d at 920 (citations omitted). So, the Missouri Supreme Court applied exactly the same reasonable-probability standard set in *Kyles*. Applying this standard, the Missouri Supreme Court agreed with the postconviction motion court that "[Shockley] could not demonstrate prejudice because he could not present evidence beyond speculation and conjecture about the hard drives' contents" and concluded that "[Shockley] cannot demonstrate the outcome of his trial would have been different if he had access to what is only vague and speculative information." *Id.* at 921. The Missouri Supreme Court did not rearticulate its statement of the materiality standard in concluding that Shockley's *Brady* claim failed.

Thus, Shockley's argument depends on cherry-picking language from both the United States Supreme Court and the Missouri Supreme Court. Shockley relies chiefly on *Agurs*'s statement of the requirements for materiality under *Brady*. Doc. 48 at p. 500. While the United States Supreme Court has not explicitly repudiated *Agurs*, it has "reformulated the *Agurs* standard for the materiality of undisclosed evidence." *Bagley*, 473 U.S. at 682. In *Bagley*, the Court adopted a reasonable-probability standard for materiality, stating that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*; *see*

also Kyles, 514 U.S. at 434. In turn, *Strickland* says its reasonable-probability standard and a standard requiring a likelihood of a different result should diverge "only in the rarest case." *Strickland*, 466 U.S. at 698. In determining whether a *Brady* violation has prejudiced a petitioner, the Supreme Court continues to use the reasonable-probability standard from *Bagley*. *See, e.g.*, *Turner v. United States*, 582 U.S. 313, 324 (2017).

Shockley mentions none of this. *See* Doc. 48 at p. 499–500. Instead, he appeals to the language from *Agurs* that frames materiality chiefly in terms of reasonable doubt. *Id.* Shockley says that, by not applying the standard set in *Agurs*, "[t]he Missouri Supreme Court egregiously misapplied the proper standard in favor of a standard that the Supreme Court of the United States expressly excluded from any analysis of prejudice in *Brady* claims." *Id.* at p. 500. However, Shockley's failure to mention the standard set forth in *Bagley* and his selective quotation of *Kyles* means that he fails to accurately state the law that the Missouri Supreme Court must apply. Shockley's counsel does not provide any basis for failing to discover this on-point authority or for citing a case that is not good law and has not been for over three decades. *See* Doc. 48 at pp. 499–500; Doc. 56 at p. 267; *see also* Mo. Sup. Ct. R. 4-3.3(a)(3) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .").

Shockley also distorts the Missouri Supreme Court's analysis, plucking language out of context. The Missouri Supreme Court stated that Shockley "cannot demonstrate the outcome of his trial would have been different if he had access to what is only vague and speculative information," *Shockley II*, 579 S.W.3d at 921, and Shockley says that this amounts to a requirement that material evidence "ensure acquittal," which is "a standard that the Supreme Court of the United States expressly excluded." Doc. 48 at pp. 499–500. However, this characterization of the Missouri Supreme Court's analysis treats a single sentence as if it were the whole or the crux of the state court's decision. "[T]he language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute." *Davenport*, 142 S. Ct. at 1528 (second alteration in original) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). Because Shockley's argument depends on both a misstatement of the relevant law and the Missouri Supreme Court's findings, the Court rejects that argument.

Shockley then reiterates his argument that Missouri Supreme Court unreasonably discounted the testimony from Carter and the Kingrees as "vague and speculative at best." Doc. 48 at p. 501. Shockley vehemently asserts that:

> These statements were not speculative. The witnesses were not speculating what was on the hard drive. They were relaying information that Graham's fiancé[e] had directly told them as close family or friends. Testimony at the evidentiary hearing clearly

> established that Graham's fiancé[e] told authorities shortly after his death that he had been investigating other officers and officials in Carter County.

Id. However, these claims lack any fidelity to the record. None of these individuals had any first-hand knowledge of Sergeant Graham's hard drive. None of them testified that Sergeant Graham had files recording official corruption. None of them testified that Runge told investigators that Sergeant Graham had investigated official corruption and that she lived in fear of a cabal of corrupt officials. Any support this testimony might lend to Shockley's case is vague and speculative at best. So, despite Shockley's accusation that the Missouri Supreme Court "egregiously" misapplied federal law and that "no fair-minded jurist" could agree with its factual determinations, *id.* at p. 500, Shockley's briefing of this claim demonstrates a troubling failure to describe the record accurately and raises serious questions about whether counsel have violated the Missouri Rules of Professional Conduct, which govern in this Court. The Court finds the Missouri Supreme Court's adjudication reasonable and denies claim 25. *See* § 2254(d).

g. Claim 28

In claim 28, Shockley alleges three errors that the Missouri Supreme Court addressed and rejected on the merits. He argues that (1) the jury instructions on sentencing improperly shifted the burden onto the defense to establish that the mitigating factors outweighed the aggravating factors; (2) the jury

instructions improperly notified the jury that the judge would sentence Shockley in the event the jury could not agree on a sentence; and (3) the judge, improperly took on the role of the jury when he sentenced Shockley. *Id.* at pp. 519–30. These arguments fail.

First, Shockley claims that, under Missouri law, a defendant can only face a death sentence if the jury finds that the aggravating factors outweigh or equal the mitigating factors. Doc. 48 at pp. 522–23 (citing *State v. Whitfield*, 107 S.W.3d 253, 262 (Mo. 2003)). He adds that, under *Ring v. Arizona*, 536 U.S. 584, 589–609 (2002), if a finding of fact would increase the maximum authorized penalty, then the jury must find that fact beyond a reasonable doubt. Doc. 48 at p. 522 (citing *Ring*, 536 U.S. at 589–609). Therefore, according to Shockley, federal law requires that he could face the death penalty only if the jury had found that the aggravating factors outweighed or equaled the mitigating factors. *Id.* at p. 522–24. This argument depends on Shockley's assertion that Missouri law only authorizes the death penalty where "the weight of the aggravating evidence is at least equal to that of the mitigating evidence." *Id.* at p. 521.

To the contrary, the Missouri Supreme Court concluded that Missouri law "does not impose on the State the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh those in mitigation." *Shockley I*, 410 S.W.3d at 197 & n.9 (*citing* Mo. Rev. Stat. § 565.030.4(3)). Section 565.030.4, which governs the sentencing process for defendants guilty of murder in the first degree,

requires that—unless the defendant waives his right to trial by jury, *see* Mo. Const. art. 1, § 22(a)—the jury must "assess and declare the punishment at life imprisonment" if the jury "concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation." Rather than saying that a finding on the weight of mitigating evidence against aggravating evidence makes a defendant eligible for the death penalty, Missouri law says the opposite—that a specific factual finding makes a defendant ineligible for the death penalty; instead of conditioning an increase in the maximum penalty on this factual finding, Missouri law conditions a decrease of the maximum penalty on this factual finding. *Id.* Shockley argues that the Missouri Supreme Court's interpretation of this statute contradicts Missouri law, Doc. 48 at p. 523, but a federal habeas court cannot correct a state court's view of state law. *Sweet*, 125 F.3d at 1151 (citation omitted). Because Missouri does not condition an increase in the maximum penalty for Shockley's crime on whether the factfinder concluded that the evidence in aggravation outweighs or equals the evidence in mitigation, *Ring* does not apply. 536 U.S. at 589 ("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.").

In response, Shockley argues that, although Supreme Court precedent allows a judge to reweigh aggravating and mitigating evidence, it does not permit a judge "to step into the role of the jury in

evaluating the statutory aggravators for purposes of death eligibility." Doc. 56 at p. 286. Shockley complains that the Missouri Supreme Court's holding "does not require adherence to the jury's findings." *Id.* at pp. 286–87. This argument seems to contemplate a case where a jury finds aggravating factors that would not make a defendant eligible for the death penalty, and then, in the process of weighing aggravating and mitigating factors, a judge finds additional aggravating factors that make a defendant eligible for death. However, this argument stands completely disconnected from both the law and the facts. Missouri law makes only guilt of first-degree murder and at least one aggravating factor prerequisites for the death penalty. Mo. Rev. Stat. § 565.030.4. Further, *Shockley I* held that, for a judge to weigh aggravating and mitigating factors pursuant to § 565.030, the jury must first find at least one aggravating factor. 410 S.W.3d at 198–99. Because a judge can only weigh aggravating and mitigating factors pursuant to § 565.030 once the jury has found the prerequisites for the death penalty, Shockley's arguments have no basis in Missouri law.

Second, Shockley asserts that the Missouri Supreme Court's rejection of his argument—that the jury instruction explaining what would happen if it could not agree on a punishment—contradicted the United States Supreme Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Doc. 48 at pp. 524–27. In accordance with Missouri law, the trial court instructed the jurors "that the court will assess the punishment itself at either death or life imprisonment

only if the jury is *unable* to agree on punishment after it unanimously determines that one or more statutory aggravators have been proved beyond a reasonable doubt and the jury fails to unanimously find that the factors in mitigation outweigh those in aggravation." *Shockley I*, 410 S.W.3d at 198 (citing Mo. Rev. Stat. § 565.030.4); *see id.* at 197 n.10 (providing the complete jury instruction at issue—in another troubling instance of lack of candor by Shockley's present counsel, Shockley omits the lasts sentence of the instruction, which provides "[y]ou must bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.").

In *Caldwell*, the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29. In that case, the prosecutor informed the jury that, even if it sentenced the defendant to death, the sentence would be subject to appellate review. *Id.* at 325–26. The Supreme Court found this comment unlawful and warned that "the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* at 333.

As the Missouri Supreme Court pointed out, the jury instruction that Shockley contests does not inform the jury of the appellate-review process, nor does it "diminish the jury's sense of responsibility for

determining the appropriateness of a death sentence." *Shockley I*, 410 S.W.3d at 198. The state court's decision neither contradicted nor unreasonably applied *Caldwell*: the jury instruction does not mention appellate review, bringing this claim outside the holding in *Caldwell*. Moreover, the instruction neither states nor implies that "the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 329; *see Shockley I*, 410 S.W.3d at 197 n.10. The contested instruction instead advises the jurors what will happen only if the jury cannot agree on a punishment. The instruction does not imply that the trial judge, an appellate court, or any other authority would review the jury's sentencing decision. *Shockley I*, 410 S.W.3d at 198. Shockley adds that the Missouri Supreme Court unreasonably distinguished this case from *Caldwell* by noting that this case involves a statement by a judge, where *Caldwell* involved a statement by a prosecutor. Doc. 48 at p. 527. But this distinction appears nowhere in the Missouri Supreme Court's analysis. *Shockley I*, 410 S.W.3d at 198–99. Further, despite Shockley's omission, the instruction directly advises the jury that "it is the primary duty and responsibility of the jury to fix the punishment." *Shockley I*, 410 S.W.3d at 197 n.10. Thus, the state-court decision comported with and reasonably applied federal law. *See* § 2254(d)(1).

Finally, the Missouri Supreme Court upheld the constitutionality of Mo. Rev. Stat.

§ 565.030.4. This law permits a judge to weigh mitigating evidence against aggravating evidence

when: (1) the sentencing jury finds the state has proved one or more aggravators beyond a reasonable doubt, (2) the factors in mitigation do not outweigh those in aggravation, and (3) the jury cannot unanimously agree on a punishment. *Shockley I*, 410 S.W.3d at 198–99 & n.11. If the jury finds no aggravating evidence or if the jury finds that mitigating evidence outweighs aggravating evidence, then the defendant cannot receive the death penalty and the judge will not weigh the aggravating and mitigating factors. *McLaughlin v. Precythe*, 9 F.4th 819, 823–24 (8th Cir. 2021). Shockley claims the state court decided this claim contrary to *Ring*, 536 U.S. 584, because "nothing in Missouri's statutory scheme requir[es] the trial court follow the jury's [findings]." Doc. 48 at p. 530. Shockley does not explain how he thinks Missouri law allows the trial court to deviate from a jury's findings or how *Ring* applies to the issue. *Id.* at pp. 528–30.

The state court faithfully followed *Ring*. "Under *Ring* . . . a jury must find the aggravating circumstance that makes the defendant death eligible." *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020). However, "a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.* Simply put, "[s]tates that leave the ultimate life-or-death decision to the judge may continue to do so." *Id.* at 708 (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)). "Here, the jurors answered special interrogatories listing three

statutory aggravators that they found unanimously beyond a reasonable doubt," just as *Ring* required. *Shockley I*, 410 S.W.3d at 198. The Missouri Supreme Court made clear that a judge can weigh aggravating and mitigating factors once a jury has already found one aggravating factor and not found that mitigating evidence outweighs aggravating evidence, but cannot agree on the "final step" of determining "whether a death or life sentence is appropriate." *Shockley I*, 410 S.W.3d at 198. Permitting the judge to consider and weigh aggravators and mitigators "does not negate the fact that the jury already had made the required findings." *McKinney*, 140 S. Ct. at 707. The Missouri Supreme Court's adjudication of the issue therefore does not contradict *Ring*.

Shockley also cites *McLaughlin v. Steele*, 173 F. Supp. 3d 855 (E.D. Mo. 2016), to support his argument that the Missouri Supreme Court's interpretation of § 565.030 "sidestep[s] the basic language in the statute and does not resolve the issues concerning the statutory language allowing a trial court to make their own determinations, unguided by the verdict form." Doc. 48 at p. 529. *McLaughlin* held § 565.030 unconstitutional, because it supposedly allowed judges to make a factual finding required to impose death. 173 F. Supp. 3d at 865. Two important details undermine his argument. First, *McLaughlin*'s reasoning hinges its acceptance of the Missouri Supreme Court's interpretation of § 565.030 in *Whitfield*, *id*. at 894, 897, which the Missouri Supreme Court now rejects, *Shockley I*, 410 S.W.3d at 198; *see also State v. Wood*, 580 S.W.3d 566, 585 (Mo.

2019). Second, on appeal, the Eighth Circuit overturned *McLaughlin v. Steele* because Missouri courts no longer follow *Whitfield*. *McLaughlin v. Precythe*, 9 F.4th at 834. In fact, *McLaughlin v. Precythe* rejected exactly the argument Shockley makes here. *Id.*

Shockley incoherently attempts to distinguish his argument from the argument rejected in *Precythe*, insisting that *Precythe* primarily addresses jury instructions, not the constitutionality of § 565.030; that *Precythe* relied on *Wood*, which "focused on the specific jury instructions"; and that *Wood* contradicts the Supreme Court's holding in *Ring*. Doc. 56 at pp. 283–87. Shockley obfuscates the relevant caselaw: *Wood* held that § 565.030 only allows the judge to "confirm[] the [jury's] finding of at least one aggravating circumstance and make[] the non-factual, discretionary determinations that the aggravating circumstances outweigh mitigating circumstances" once "the constitutional role of the jury as the finder of fact has already been fulfilled." *Wood*, 580 S.W.3d at 588. In turn, the Eighth Circuit held that "[w]e do not sit in judgement of a state supreme court's interpretation of state law, and the district court should not have, either." *Precythe*, 9 F.4th at 834. Deferring to *Wood*'s interpretation of Missouri law, the Eighth Circuit rejected the district court's finding that § 565.030 "violates *Ring* because it unconstitutionally vests the authority to make factual findings in the judge." *Id.* at 833. Shockley's attempts to distinguish *Precythe* fail by refusing to squarely address the opinion's text and by failing to intelligibly

explain how he thinks his sentencing violated the rule established in *Ring*. For these reasons, the Missouri Supreme Court's decision does not contradict or unreasonably apply Supreme Court precedent. *See* § 2254(d)(1). Thus, the Court denies Shockley's claim 28.

C. Procedurally defaulted claims

The Court now turns to claims that Shockley did not raise in state court. Generally, the Court cannot apply § 2254(d)'s standards of deference to a state-court adjudication to these claims because no Missouri court has adjudicated these claims on the merits. The Court applies the law of procedural default. Under Missouri law, "[c]laims that were cognizable on direct appeal or in postconviction proceedings are procedurally barred." *State ex rel. Kelly v. Inman*, 644 S.W.3d 554, 556 (Mo. 2020) (citing *Clay*, 37 S.W.3d at 217). So, Shockley has procedurally defaulted any claim he did not raise in state court during his direct appeal and postconviction review. However, this does not necessarily imply that a federal habeas court must deny the claim without reviewing the underlying constitutional issues. Rather, the prisoner must satisfy the standard set by *Coleman v. Thompson*:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation

> of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

501 U.S. at 750.

In the context of *Coleman*'s cause-and-prejudice standard, "cause" means "something *external* to the petitioner, something that cannot fairly be attributed to him." *Id.* at 753. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* (citation omitted). While *Coleman* and its progeny do not give a definitive statement of what does and does not count as cause for default, *Coleman* gives several examples that clarify the issue. "A showing that the factual or legal basis for a claim was not reasonably available to counsel" establishes cause. *Id.* (citation omitted). If "interference by officials made compliance impracticable, [this too] would constitute cause under this standard." *Id.* (cleaned up). "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Id.* at 754 (citation omitted). This last example of cause has inspired many further important holdings, germinating from *Martinez*. *See infra* Section VI.C.1.

To satisfy *Coleman*'s actual-prejudice element, the prisoner "must show a reasonable probability" that, but for the alleged constitutional violation, the prisoner would not face conviction or whatever other harm the prisoner alleges. *Thomas v. Payne*, 960 F.3d

465, 477 (8th Cir. 2020). The Eighth Circuit has found that "reasonable probability" has the same meaning in the *Coleman* context that the phrase has in the *Strickland* context. *Id.* (citation omitted). The Court accordingly applies the same standards relevant to *Strickland*'s prejudice prong to *Coleman*'s actual-prejudice requirement: "[T]he difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Dorsey*, 30 F.4th at 756 (quoting *Harrington*, 562 U.S. at 111–12). So, while *Coleman* does not require a prisoner to prove prejudice by a preponderance of the evidence, its standard is only "slight[ly]" less demanding. *Id.*; *Thomas*, 960 F.3d at 477.

Murray v. Carrier, 477 U.S. 478, 496 (1986), and later Supreme Court cases "recognize[] a narrow exception to the cause requirement where a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent' of the substantive offense." *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (quoting *Carrier*, 477 U.S. at 496); *see also Gordon v. Arkansas*, 823 F.3d 1188, 1197 (8th Cir. 2016) ("[A] state prisoner who fails to satisfy state procedural requirements forfeits his right to present his federal claim through a federal habeas corpus petition, unless he can meet strict cause and prejudice or actual innocence standards." (citation omitted)). This requirement protects against fundamental miscarriages of justice. *Dretke*, 541 U.S. at 393. To benefit from this safeguard, a prisoner cannot simply argue that his conviction is unfair; he must

demonstrate his actual innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence." (citation omitted) (alteration in original)); *see also Coleman*, 501 U.S. at 758.

1. Procedurally defaulted ineffective-assistance claims

The Court analyzes Shockley's procedurally defaulted ineffective-assistance claims under *Martinez*. *Martinez* provides one route for a petitioner to demonstrate "cause" under *Coleman*. 566 U.S. at 9. Specifically, *Martinez* sets the standard for petitioners who hope to establish cause for a procedurally defaulted ineffective-assistance-of-trial-counsel claim by pointing to postconviction counsel's ineffective assistance. *Id.* Under *Coleman*, a violation of the Sixth Amendment's guarantee of effective assistance qualifies as cause for procedural default. 501 U.S. at 754. However, because no constitutional right to postconviction counsel exists, a defendant usually bears responsibility for the incompetence of postconviction counsel, meaning that postconviction counsel's ineffectiveness usually cannot qualify as "cause" under *Coleman*. *Shinn*, 142 S. Ct. at 1733 (citation omitted). In the limited context where state law only allows ineffective-assistance claims at the postconviction-review stage, this would mean that defendants never have the right to effective assistance in litigating ineffective-assistance claims. *Martinez*, 566 U.S. at 11–12; *see also* Mo. Sup. Ct. R. 29.15(a) (providing the "exclusive procedure" to litigate "claims

of ineffective assistance" at the postconviction-review stage).

However, *Martinez* established that, under certain circumstances, "attorney negligence in a postconviction proceeding" can demonstrate "cause" in the context of an "initial-review collateral proceeding for claims of ineffective assistance of counsel at trial." 566 U.S. at 15. So, in this limited context, postconviction incompetence counts as cause for failure to raise trial incompetence, *id.*, even though "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a *ground for relief* in a proceeding arising under section 2254," 28 U.S.C. § 2254(i) (emphasis added).

Because "the right to counsel is the foundation of our adversary system," the Supreme Court created an exception to the usual rules of procedural default, protecting defendants against these cases of double-layered ineffective assistance. *Martinez*, 566 U.S. at 12. The year after *Martinez*, the Supreme Court clarified its holdings in *Coleman* and *Martinez*:

> We consequently read *Coleman* as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial"

> review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (explaining *Martinez*, 566 U.S. at 13–18) (alterations in original).

Likewise, the Eighth Circuit has interpreted *Martinez* as requiring that:

> (1) the claim of ineffective assistance of trial counsel was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; and (3) the state collateral review proceeding was the "initial" review proceeding with respect to the "ineffective-assistance-of-trial-counsel claim."

Marcyniuk, 39 F.4th at 996 (quoting *Harris v. Wallace*, 984 F.3d 641, 648 (8th Cir. 2021)).

The Eighth Circuit has not always analyzed *Martinez* claims under this three-element framework articulated in *Marcyniuk*. *Compare Marcyniuk*, 39 F.4th at 996, *with Dorsey*, 30 F.4th at 756–59 (using only the substantial-claim element), *and Deck v. Jennings*, 978 F.3d 578, 582 (8th Cir. 2020) (merging the substantial-claim element with the ineffective-assistance-of-postconviction-counsel element into a substantial-enough element). Yet, precedent most

strongly supports the standard stated in *Marcyniuk*. First, *Marcyniuk*'s standard mirrors the standard set by the Supreme Court in *Trevino*. *Compare Marcyniuk*, 39 F.4th at 996 (listing the three elements quoted above as the standard for a *Martinez* claim), *with Trevino*, 569 U.S. at 423–29 (listing the three elements in *Marcyniuk* and the further requirement that postconviction review must be the first opportunity for ineffective-assistance claims). Second, *Marcyniuk* gives the Eighth Circuit's most recent statement of the *Martinez* standard. *See Marcyniuk*, 39 F.4th at 996 (decided July 8, 2022). Third, *Marcyniuk* gives the same elements for a *Martinez* claim as the Eighth Circuit's first treatment of a *Martinez* claim after *Trevino*, making it the beneficiary of the first-in-time rule. *See Dansby v. Hobbs*, 766 F.3d 809, 828 (8th Cir. 2014) (giving the three elements listed in *Marcyniuk* as the test for *Martinez* claims); *Mader v. United States*, 654 F.3d 794 (8th Cir. 2011) ("[W]hen faced with conflicting panel opinions, the earliest opinion must be followed 'as it should have controlled the subsequent panels that created the conflict.'" (quoting *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006))). In sum, precedent supports the three elements for a *Martinez* claim listed in *Marcyniuk*.

Three rules further clarify how a petitioner can overcome procedural default under *Martinez* and *Coleman*; these three rules explain *Martinez*'s substantial-claim element, *Martinez*'s postconviction-counsel-incompetence element, and *Coleman*'s actual-prejudice element. First, a "substantial" claim must

have "some merit," which, in turn, requires that the ineffective-assistance-of-trial-counsel claim "must at least be debatable among jurists of reason." *Marcyniuk*, 39 F.4th at 998 (quoting *Dorsey*, 30 F.4th at 756). Second, postconviction counsel's decision not to raise a claim "is not deficient performance unless that claim was plainly stronger than those actually presented." *Deck*, 978 F.3d at 584 (quoting *Davila v. Davis*, 582 U.S. 521, 533 (2017)) (determining the standard for postconviction-counsel performance within a *Martinez* analysis). Third, "the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Dorsey*, 30 F.4th at 757 (quoting *Harrington*, 562 U.S. at 111–12). This prejudice standard requires a "substantial, not just conceivable" likelihood of a different result. *Harrington*, 562 U.S. at 112. This substantial-likelihood standard of prejudice also applies to *Coleman*'s "actual prejudice" element. *See Thomas*, 960 F.3d at 477 (holding that, to demonstrate actual prejudice under *Coleman*, a petitioner would need to show a reasonable probability of a different result under *Strickland*); *see also Schlup*, 513 U.S. at 327 n.45 (citing *Strickland* for the standard for prejudice in the context of the cause-and-prejudice analysis for procedural default).

Together, these rules yield the following approach to *Martinez* and *Coleman*: to overcome the procedural bar on ineffective-assistance-of-trial-counsel claims not presented in state court, a petitioner must show: (1) that reasonable jurists could debate whether trial counsel acted ineffectively, creating a substantial

likelihood of prejudice to the petitioner, *Dorsey*, 30 F.4th at 756; *Harrington*, 562 U.S. at 111–12, and (2) that the ineffective-assistance-of-trial-counsel claim plainly presented a stronger case than the claims actually raised by postconviction counsel, *Deck*, 978 F.3d at 584. After establishing cause in this manner, a petitioner can then proceed to attempt to show actual prejudice, *Coleman*, 501 U.S. at 750, as opposed to merely debatable prejudice, and only then can the petitioner present the merits of the ineffective-assistance-of-trial-counsel claim to a federal habeas court, *Martinez*, 566 U.S. at 17. With these standards in mind, the Court now turns to Shockley's procedurally defaulted ineffective-assistance claims.

a. Claim 6

In claim 6, Shockley argues that trial counsel incompetently failed to "investigate and present mental health evidence in the penalty phase." Doc. 48 at pp. 161–237. However, Shockley did not present this claim in state court, nor did he present any evidence that could support this claim in state court. *Id.* at p. 161. To hurdle the procedural bar on claims not presented in state court, Shockley must meet the standard stated in *Martinez*. 566 U.S. at 14. As Section V.C.1. details, the first step of a *Martinez* analysis requires Shockley to show his claim has debatable merit. *See Dorsey*, 30 F.4th at 756. To expand the record with the evidence necessary to argue that his claim has debatable merit, Shockley must meet the standard set in § 2254(e)(2). Shockley's claim, however, does not rely on "a factual predicate that could not have been previously discovered

through an exercise of due diligence." *Id.* Instead, he argues that counsel should have investigated and developed evidence that was available at the time: his personal history and mental health. Shockley cannot reasonably blame his various former counsel for failing to "find" evidence that he also says they could not have discovered through an exercise of due diligence. Shockley therefore cannot satisfy § 2254(e)(2)'s requirement that the "factual predicate [for the claim] could not have been previously discovered through the exercise of diligence . . . ."

Because Shockley cannot satisfy § 2254(e)(2), he cannot introduce new evidence, leaving this claim without evidentiary support. *See supra* Section V.C.3. (discussing Shockley's motion for further discovery on claims 6, 13, and 26). And because Shockley cannot support his claim with evidence, he cannot show that the claim has debatable merit, thus failing the first step of the *Martinez* analysis. 566 U.S. at 16 (describing an insubstantial ineffective-assistance-of-trial-counsel claim as one "wholly without factual support"). So claim 6 remains procedurally barred; both § 2254(e)(2) and *Martinez* demand that the Court deny this claim.

b. Claim 8

In claim 8, Shockley contends that his trial counsel incompetently failed to adequately investigate and cross-examine witness Rick Hamm. Doc. 48 at p. 248. Shockley acknowledges that he procedurally defaulted this claim, as he "did not fully present" it in state court. *Id.* at pp. 248–50. To excuse his default, Shockley invokes *Martinez*. *Id.* As

described in Section V.C.1., a *Martinez* analysis requires, among its other elements, that Shockley demonstrate the constitutional inadequacy of postconviction counsel's assistance. *See Deck*, 978 F.3d at 582 (holding that, in a *Martinez* analysis, the "key question is whether postconviction counsel was ineffective" in failing to raise a claim). "Moreover, '[d]eclining to raise a claim . . . is not deficient performance unless that claim was plainly stronger than those actually presented.'" *Id.* at 584 (alterations in original) (quoting *Davila*, 582 U.S. at 533). So, to cure his procedural default under *Martinez*, Shockley must show the superiority of this claim to the claims presented by postconviction counsel.

Shockley argues that trial counsel failed to attack the supposed inconsistency and fluidity of Hamm's testimony on the timeline of events surrounding the murder. Doc. 48 at p. 248. At trial, Hamm testified that he saw a red car near Sergeant Graham's house about three times over a half-hour period. Doc. 20-5 at p. 56, Tr. at 1878:2–4. Hamm did not remember the exact timing of this half-hour period, but he stated that the period lay at some time between 3:45 p.m. and 4:45 p.m. *Id.*, Tr. at 1878:5–8. In a deposition, Hamm testified that he saw the red car three times between 3:45 p.m. and 4:45 p.m., that he saw the car for the third time "closer to 4:45 p.m.," and that he did not notice the car between 4:30 p.m. and 4:45 p.m. Doc. 48-2 at pp. 487–88, Tr. at 38:9–42:4. In a statement to the police, Hamm said that he first saw the car at approximately 4:10 p.m. and noticed the car's absence at approximately 4:45 p.m. Doc 48-3 at

p. 105. Shockley says that trial counsel failed to "impeach Hamm with his prior statements [and] the fluidity in his timeline," depriving Shockley of his right to effective assistance. Doc. 48 at p. 254.

The Court sees no contradiction between Hamm's deposition testimony and his trial testimony. Further, the Court does not see these timeframes as excessively fluid, so this claim does not present an especially strong argument for relief. Postconviction counsel raised numerous other claims. *See Shockley II*, 579 S.W.3d at 893–921. Although none ultimately proved successful, counsel could have reasonably concluded that an argument regarding Hamm's testimony "would have only detracted from other, stronger arguments." *Deck*, 978 F.3d at 584. Because Shockley fails to show he received ineffective assistance from postconviction counsel, "[i]t follows that the *Martinez* exception . . . is unavailable to him." *Id.*

Alternatively, even if Shockley could demonstrate that postconviction counsel incompetently decided not to raise this claim, Shockley still would not succeed. Shockley cannot demonstrate that trial counsel's supposed failures prejudiced his case. *See Coleman*, 501 U.S. at 750 (holding that a petitioner can overcome a procedural bar on a claim only after demonstrating "actual prejudice"). To show a "substantial" likelihood of prejudice, Shockley would need to come close to proving that the alleged incompetence probably changed the trial's outcome. *Harrington*, 562 U.S. at 112. That is, if he cannot show that the alleged ineffectiveness "more-probab[ly]-than-not" altered the trial's result, he must hope to

fall into that set of "rarest case[s]" where the substantial-likelihood test requires less than a probably different result. *Id.* But a substantial likelihood of a different result does not exist. Because Hamm's two statements present a consistent and adequately precise sequence of events and because this testimony only added to the State's cumulative case, trial counsel's cross-examination of Hamm did not have a substantial likelihood of altering the trial's outcome. Shockley fails at multiple steps necessary to demonstrate cause under *Martinez* and prejudice under *Coleman*, so the Court denies this claim as procedurally barred.

c. Claim 9(b)

In claim 9, Shockley argues that his trial counsel failed to competently defend him using testimony from Mila Linn. The first part of this claim, which the Court rejected above, challenges trial counsel's decision not to call Linn to testify. The Missouri Supreme Court found that trial counsel presented the most important parts of Linn's testimony by cross-examining an officer who questioned her, that trial counsel had reasonable concerns about the State's ability to impeach Linn, and that trial counsel used Linn's absence to question the State's candor before the jury. *Shockley II*, 579 S.W.3d at 912. The Court finds this adjudication reasonable. *See supra* Section VI.B.1.e. Here, the Court addresses the second part of claim 9, which concerns trial counsel's decision not to investigate Linn.

Shockley argues that trial counsel acted ineffectively by failing to interview or even attempt to

contact Linn. Doc. 48 at pp. 259, 261. Shockley's initial team of attorneys deposed Linn, but his eventual trial counsel did not. Doc. 48-3 at p. 44. Because Shockley did not raise this claim in state court, Doc. 48 at p. 259, he can only proceed by satisfying the elements of *Martinez* and *Coleman* discussed in Section V.C.1.: Shockley's underlying ineffective-assistance claim must have debatable merit, *Dorsey*, 30 F.4th at 756, Shockley's actual postconviction claims must present weaker arguments than this ineffective-assistance claim, *Deck*, 978 F.3d at 584, and trial counsel's failures must have actually prejudiced Shockley, *Coleman*, 501 U.S. at 753–54. Shockley offers no argument that trial counsel's failure to interview Linn prejudiced him. Doc. 48 at pp. 268–69. Given that trial counsel had access to Linn's deposition, *Shockley II*, 579 S.W.3d at 912, Shockley cannot show that counsel's decision not to interview her was anything other than a reasonable trial strategy. Shockley therefore cannot succeed at any step of the *Martinez* analysis. The Court denies the second part of claim 9.

d. Claim 11

In claim 11, Shockley argues that his trial and postconviction counsel incompetently failed to investigate and introduce testimony from Linn's son, Zachary McClure, who was ten or eleven years old at the time of the murder. Doc. 48 at p. 283. Shockley argues that McClure would have testified that he saw a red car driving in the neighborhood where the murder occurred but that he could not identify the driver. *Id.* at pp. 288–89. Shockley initially presented, and then abandoned, this claim in state court, but he

now argues that the Court can hear this claim under *Martinez*. *Id.* at p. 284.

The State argues that this claim lacks merit because no reasonable probability exists that McClure's testimony would have changed the trial's outcome, given that he could not identify the driver of the red car. Doc. 51 at p. 91. At most, McClure's testimony would have served only to corroborate Linn's statements placing a red car away from the murder scene but in the same neighborhood. Doc. 48 at pp. 262, 266. That McClure could not identify Shockley as the driver did not have a substantial probability of affecting the trial's outcome. *See* Doc. 48-3 at p. 103 ("Linn further stated she and her son, Zachary, observed the driver of the vehicle. . . . Linn, [and] her son[] did not identify any of the photos as the driver of the red car."). Although Shockley says that Zachary "denied [Shockley] was the person he observed in the red car," Doc. 48 at p. 291, the police report Shockley cites only says that Zachary did not identify Shockley, Doc. 33-26. Further, Linn's deposition does not support the notion that Zachary denied seeing Shockley in the red car. Doc. 33-27. To support his allegation of postconviction-counsel incompetence, Shockley also mentions, without citing any evidence, that postconviction counsel mistakenly thought that "Zachary was only 4 or 5 years old at the time of the crime." Doc. 48 at p. 290.

Because of these faults, this argument cannot satisfy *Martinez*: it lacks debatable merit, *Dorsey*, 30 F.4th at 756, it presents a weaker claim than those postconviction counsel actually presented, *Deck*, 978

F.3d at 584, and it does not show actual prejudice, *Harrington*, 562 U.S. at 111–12. Further, the Eighth Circuit "generally entrust[s] cross-examination techniques . . . to the professional discretion of counsel." *United States v. Villalpando*, 259 F.3d 934, 949 (8th Cir. 2001) (citations omitted). The Court denies claim 11.

e. Claim 13

In claim 13, Shockley presents several different constitutional claims. Doc. 48 at p. 305. Shockley did not present these claims in state court. *Id.* Hoping to avoid the procedural bar on these claims, Shockley couches each argument as a *Martinez* claim, saying that trial counsel failed to address the underlying constitutional violation and then postconviction counsel failed to make a claim out of trial counsel's supposed incompetence. *Id.* at pp. 305, 313. To undo his past decision to stay silent about these claims, Shockley must meet the requirements of the *Martinez* and *Coleman* body of law, as Section V.C.1. details.

Shockley focuses on two specific instances of alleged police misconduct. First, prosecutors convinced Shockley's uncle to wear a wire into an interview with Shockley's attorney. Doc. 48 at p. 305. At trial, Shockley's uncle testified about this conversation. *Id.* at p. 307. Shockley says that the prosecutor "used the conversation to insinuate that defense counsel attempted to fabricate testimony" and that "the wiring of [Shockley's uncle] created a chilling effect" on the defense's ability to interview witnesses. *Id.* at pp. 316–17. Second, a jail guard allegedly overheard a loud conversation between Shockley and

his attorney, where counsel criticized Shockley for using too many weapons to murder Sergeant Graham. *Id.* at p. 308; Doc. 51-1 at p. 1, Tr. at 457:20–458:21. Although the State chose not to introduce these facts into the trial, Shockley's initial trial counsel thought that they could not continue to represent Shockley. Doc. 48 at p. 308–09. Shockley argues that the State's actions in this first incident violated his Fourth-Amendment right to freedom from unreasonable search and seizure, his Sixth-Amendment right to counsel, his Sixth-Amendment right to a fair trial, and his Fourteenth-Amendment right to due process. *Id.* at p. 305. The jail-guard incident creates a similar set of constitutional issues. *Id.* For the reasons articulated in Section V.C.2., to determine the substantiality of the underlying claims, the Court only considers the materials presented to the state court. However, Shockley cannot meet *Martinez*'s requirements on any of these claims.

Shockley asserts that the State and his uncle violated his Fourth-Amendment right to freedom from unreasonable searches and seizures. *Id.* at p. 305. He provides no explanation of how this recording of a conversation with his lawyer could qualify as an unlawful search of his person or property. *Id.* at p. 305–24. Since Shockley cannot articulate an argument supporting this claim, postconviction counsel did not act incompetently by failing to make this claim. *Martinez* cannot help this meritless argument.

Next, Shockley asserts that the wiring incident "was a clear attempt to invade the attorney-client

relationship." *Id.* at p. 310. To support this argument, Shockley cites *United States v. Valencia*, 541 F.2d 618, 620–21 (6th Cir. 1976), where a government informant worked as the defendant's lawyer's secretary. *Valencia* bears no similarity to this case. Shockley also cites *State v. Martinez*, 220 A.3d 489 (N.J. Super. Ct. App. Div. 2019), which does present similar facts, but at best provides only persuasive authority that a Missouri court might consider. Shockley never explains why a recording of a conversation between trial counsel and a potential witness could count as an intrusion into Shockley's privileged relationship with his lawyer. "To be privileged, attorney-client communications must remain confidential . . . ." *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) (citations omitted). "Comments to a third party . . . are not confidential attorney-client communications." *United States v. Davis*, 583 F.3d 1081, 1090 (8th Cir. 2009). For this reason, courts deciding factually analogous cases have found no privilege. *See, e.g.*, *United States v. Melvin*, 650 F.2d 641, 644–46 (5th Cir. 1981) (citing *United States v. Gartner*, 518 F.2d 633 (2d Cir. 1975)) (finding that government agents did not violate attorney-client privilege and the Sixth Amendment by convincing a third party to wear a transmitting device into a conversation with the defendant and his lawyer, because there was "no reasonable expectation of confidentiality"). Shockley does not address these flaws. *See* Doc. 48 at pp. 305–25.

Turning to the *Martinez* analysis, Shockley immediately faces difficulties. A single case from New

Jersey shows that reasonable jurists could debate whether the State violated Shockley's rights, but the case does not plainly show that reasonable jurists could debate whether trial counsel acted incompetently by not raising this argument. *See Dorsey*, 30 F.4th at 756. Even if Shockley can succeed at this first step, he fails at the next two steps. Shockley cannot plainly show the superiority of this claim to the ones he presented in state court. *Deck*, 978 F.3d at 584. Further, Shockley's argument comes nowhere close to demonstrating that this supposed ineffective assistance "more-probabl[y]-than-not" prejudiced his case. *Harrington*, 562 U.S. at 111–12. This argument remains procedurally barred.

Shockley asserts that the State violated his Sixth-Amendment right to a fair trial by questioning his uncle about the recorded conversation. Doc. 48 at p. 313. However, Shockley dedicates only a single sentence to explaining his Sixth-Amendment argument, dropping that explanation in the middle of his due-process argument. *Id.* at p. 314. Shockley says, "[w]hen there is an intentional intrusion into the attorney-client relationship, there is 'direct interference with the Sixth Amendment rights of a defendant,' 'such an intrusion must constitute a per se violation of the Sixth Amendment,' and 'prejudicial effect on the reliability of the trial process must be presumed.'" *Id.* (citing *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995)). However, the court in *Shillinger* did not contemplate facts like those at issue here, 70 F.3d at 1141 (discussing circumstances that would count as an intrusion into the attorney-client

relationship), and Shockley fails to explain why these events would constitute an intrusion into the attorney-client relationship, Doc. 48 at p. 314. So, Shockley provides a rule of law without any explanation for how that rule could apply to the facts of this case. Because Shockley does not present a true argument supporting the portion of this claim related to the Sixth Amendment, the Court denies this section of claim 13.

Shockley also argues that the State's questioning of his uncle violated his Fourteenth-Amendment right to due process. Doc. 48 at p. 315. Missouri and federal courts interpret the United States Constitution's Due-Process Clause to prohibit outrageous law-enforcement conduct that "violates 'that fundamental fairness, shocking the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment.'" *United States v. Bugh*, 701 F.3d 888, 894 (8th Cir. 2012) (quoting *United States v. Russell*, 411 U.S. 423, 432 (1973)). Shockley presents no precedent indicating that wiring a witness's interview with defense counsel could meet this standard. Doc. 48 at p. 315. Instead, he offers general statements on the importance of the attorney-client privilege. *Id.* (citing *United States v. Grand Jury Investigation*, 401 F. Supp. 361, 369 (W.D. Pa. 1975); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950)). So, Shockley offers no authority for the notion that the facts of this case could support an ineffective-assistance claim. *Id.*

This dearth of support makes *Martinez* an insurmountable obstacle for Shockley. His underlying

ineffective-assistance claim does not have debatable merit. *See Dorsey*, 30 F.4th at 756. It does not stand superior to the actual postconviction-review claims. *See Deck*, 978 F.3d at 584. It does not offer a substantial likelihood of changing the result of the case. *See Harrington*, 562 U.S. at 111–12. Thus, Shockley triply fails to show cause and prejudice. The argument remains procedurally barred.

Shockley presents a similar array of arguments regarding a memo concerning a conversation between Shockley and his first trial counsel. Doc. 48 at p. 308. In the break room of the Carter County Jail, a deputy sheriff overheard a conversation between Shockley and an attorney from his initial defense team. *Id.* at pp. 308–09. The deputy reported hearing Shockley's lawyer speak in a loud voice and say, "[w]hy the [expletive] did you take two guns? Couldn't you just kill him with the deer rifle? It makes no sense to take two guns, period." Doc. 51-1 at p. 1, Tr. at 458:5–7. The deputy reported hearing Shockley respond, "yes," before lowering his voice. *Id.*, Tr. at 458:8–10. The deputy immediately called the prosecutor to recount the conversation and the prosecutor told the deputy to write a memorandum setting out what happened. *Id.*, Tr. at 458:16–21. The parties brought the matter to the trial judge's attention and initial counsel asked to withdraw from the case. *Id.* at pp. 1–3, Tr. at 456:2–467:12. Though the parties disagreed as to whether the attorney spoke so conspicuously that the communication could not count as privileged, the prosecutor stipulated that he would not use the conversation at trial. *Id.* at pp. 2, 4, Tr. at 461:11–13,

472:13–16. The court sustained the motion to withdraw on July 9, 2008, *id.* at p. 9, Tr. at 491:18–22; Shockley's lead trial counsel entered his appearance in the case on September 17, 2008, Doc. 20-13 at p. 162; and jury selection began on March 18, 2009, Doc. 33-54 at p. 30, Tr. at 498:1. Thus, new trial counsel had six months to prepare for trial, *id.*, with the benefit of the several years of discovery and pretrial work having already been completed by initial trial counsel, *see* Docs. 48-1, 48-2, 48-3.

Shockley does not address how a loud conversation with counsel in a jail's breakroom could, without any suggestion of surreptitious or illegal conduct by a jail official, come within the attorney-client privilege. Doc. 48 at pp. 305–24. He gives no factual support for the claim that this incident harmed his case at trial. *Id.* He supplies no relevant precedent on the attorney-client-privilege issue, the ineffective-assistance-of-trial-counsel issue, or the ineffective-assistance-of-postconviction-counsel issue. *Id.* At most, he argues that the attorney in the incident stated that the conversation "was not inculpatory at all and that she was not yelling at the time." Doc. 48 at p. 309. In sum, the argument lacks support.

Shockley does not distinguish various constitutional claims arising from the jail-guard incident and instead tangles these complaints together with his discussion of the wiring incident. Doc. 48 at pp. 313–16. Thus, Shockley's treatment of the jail-guard incident cannot support multiple distinct *Martinez* analyses. However, the overarching

lack of legal and factual support leaves the claim without any reasonably debatable merit, *Dorsey*, 30 F.4th at 756, let alone a showing of postconviction-counsel incompetence, *Deck*, 978 F.3d at 584, or actual prejudice, *Harrington*, 562 U.S. at 111–12.

Although claim 13 arises primarily from two incidents when prosecutors learned information from Shockley's counsel, Shockley also adds diffuse remarks about supposed police misconduct, which allegedly form a "pattern of law enforcement misconduct." *See, e.g.*, Doc. 48 at p. 307 (stating that Shockley's uncle felt pressured by police to change his testimony); *see also* Doc. 20-4 at p. 127, Tr. at 1392:20–21 (recounting when he saw Shockley on the day of the murder, Shockley's uncle stated that "I felt like some of the highway patrolmen wanted me to push the time [that he saw Shockley on the day of the murder] on up, but I think it was between 3:00 and 4:00."). Yet, Shockley does not develop these complaints into genuine legal arguments, and the Court does not consider them. *See id.*; *see also Aulston v. Astrue*, 277 F. App'x 663, 664 (8th Cir. 2008) (refusing to consider an undeveloped argument and citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006), for the proposition that "undeveloped arguments are waived."). Thus, the Court denies claim 13.

f. Claim 15(b)

In claim 15, Shockley argues that his trial counsel incompetently failed to object to two comments by the prosecution allegedly concerning Shockley's choice not to testify. Shockley raised the first of these in state

court, and the Court addresses that first part of claim 15 with the rest of the claims Shockley adjudicated in state court. *See supra* Section VI.B.1.i. Here, the court addresses the part of claim 15 that Shockley did not raise in state court.

Shockley complains of comments the prosecutor made during closing arguments. Doc. 48 at p. 337. The prosecutor argued that only the State had presented an explanation for why Shockley's grandmother's car would appear near the crime scene. *Id.* at p. 337. However, Shockley did not present this portion of claim 15 in state court. *See* Doc. 20-33 at pp. 1–6 (presenting this claim in state court and complaining only of the prosecutor's aside during witness Hart's testimony). Shockley does not invoke *Martinez*. Doc. 48 at pp. 336–40. Because Shockley makes no attempt to invoke *Martinez*'s exception to *Coleman*'s general bar on procedurally defaulted claims, *Coleman*, 501 U.S. at 750, the Court cannot consider this claim.

Even so, were Shockley to present a *Martinez* argument, the Court would find that it fails. Under the *Coleman–Martinez* standard as set forth in *Trevino* and *Marcyniuk*, Shockley first must establish that the claim is "substantial." *See supra* Section VI.C.1. Shockley's claim falls far short of "substantial" for the same reasons the Supreme Court of Missouri denied Shockley's direct-appeal and postconviction claims regarding failure to object. *Shockley I*, 410 S.W.3d at 189–91 and n.5 (citing *State v. Clemons*, 946 S.W.2d 206, 228 (Mo. 1997)); *Shockley II*, 579 S.W.3d at 913–14. Further, Shockley asserts contradictory positions in claims 15 and 16 regarding whether

prosecutors directly or indirectly commented on Shockley's decision not to testify. *Compare* Doc. 48 at pp. 337, 343 (asserting the prosecutor "made additional direct" comments), *with id.* at p. 344 (asserting "the prosecutor did not directly comment on Shockley's decision not to testify").

Because Shockley fails to present a debatable claim, he cannot satisfy *Coleman* and *Martinez*'s other requirements. This claim is too weak to be debatable, and Shockley cannot show the plain superiority of this claim to the claims actually presented by postconviction counsel. *See Deck*, 978 F.3d at 584. Likewise, because the prosecutor's closing statement did not comment on Shockley's decision not to testify, Shockley cannot show that this non-existent comment actually prejudiced his case. *See Coleman*, 501 U.S. at 750. Therefore, the Court denies the second part of claim 15.

g. Claim 18(b)

In claim 18, Shockley advances both a due-process argument and an ineffective-assistance argument that he did not present in state court. The Court addresses the due-process argument in Section VI.B.2.d. The Court now addresses the defaulted ineffective-assistance claim.

In the second part of claim 18, Shockley argues that trial counsel deprived him of his right to effective assistance by failing to request a mistrial based on a purported accumulation of character evidence. Doc. 48 at p. 357. Shockley refers to a law enforcement

officer's comment on Shockley's "violent history," in addition to a series of other events:

> [T]he prosecutor's split-second projection during trial of a photograph that displayed Mr. Shockley in an orange prison jumpsuit; a gratuitous comment by a highway patrol officer who stated that it was Mr. Shockley who shot Sergeant Graham and that the shooting was deliberate; and a comment by the prosecutor in closing argument that, Mr. Shockley alleges, demonstrated Mr. Shockley's propensity to kill and was evidence of bad acts and bad character.

Shockley I, 410 S.W.3d at 194–95.

Although trial counsel objected to some of these incidents individually, Doc. 48 at pp. 358–59, they did not lodge an objection against the cumulative effect of these incidents, *Shockley I*, 410 S.W.3d at 195. Now, Shockley introduces the argument that, by failing to raise this cumulative-error argument, trial counsel represented him incompetently and that postconviction counsel incompetently failed to raise a claim based on trial counsel's supposed incompetence. Doc. 48 at p. 357. Because he did not present this argument in state court, Shockley invokes *Martinez*, without any *Martinez* analysis. *Id.* To show cause and prejudice under *Martinez* and *Coleman*, Shockley must meet the requirements detailed in Section V.C.1.

However, Shockley fails at each step of the analysis. Besides the simple assertion that trial counsel failed to raise a cumulative claim, Shockley offers no argument that trial counsel fell below the

standard of competence. *Id.* at p. 361. His prejudice argument assumes the cumulative prejudicial impact of these incidents and simply brushes aside the effect of the trial judge's curative instructions, while insisting that a vehement cumulative objection had a reasonable likelihood of rectifying the jury's understanding of its role. *Id.* at p. 362. The Missouri Supreme Court's finding that two of these incidents had no prejudicial impact, *Shockley I*, 410 S.W.3d at 194–96, coupled with its finding on postconviction review that direct-appeal appellate counsel was not ineffective in handling these two incidents, *Shockley II*, 579 S.W.3d at 919–920, makes this argument such that no reasonable jurist could find it debatable. Shockley makes no argument regarding postconviction counsel's performance. Doc. 48 at pp. 357–63. Finally, since Shockley cannot demonstrate reasonably debatable prejudice, he cannot demonstrate actual prejudice. Thus, Shockley cannot show cause or prejudice for his failure to raise this claim in state court and, therefore, the Court cannot reach the merits of this claim.

Shockley also asserts that the Court should forgive his procedural default, because "imposing default would be a miscarriage of justice," but he does not support this assertion. Doc. 48 at p. 358, Doc. 56 at p. 128. The miscarriage-of-justice exception to the bar on procedurally defaulted claims applies to actually innocent petitioners who can show that "it is more likely than not that no reasonable juror would have convicted [them] in the light of . . . new evidence." *Schlup*, 513 U.S. at 327. However, Shockley

does not argue that he is actually innocent, Docs. 48, 56, and a reasonable juror could find him guilty, given the cumulative case against him, *see supra* Section VI.A. (discussing the evidence against Shockley and Shockley's failure to make an actual-innocence argument under the relevant caselaw). Therefore, Shockley cannot overcome his procedural default, and the Court denies the second part of claim 18.

h. Claim 22

In claim 22, Shockley alleges that his trial counsel failed to competently challenge the State's firearm and toolmark evidence. Doc. 48 at p. 426. Shockley complains that trial counsel failed to investigate firearms evidence, failed to call an expert witness to contradict the State's witnesses, and failed to attack the kind of firearm-comparison evidence used by the State. Doc. 48 at pp. 427–28. Before the Missouri Supreme Court, Shockley presented a narrower version of this claim, dealing specifically with counsel's choice not to call ballistics expert Steven Howard. *Shockley II*, 579 S.W.3d 906–08; *see supra* Section VI.B.1.m. (discussing Shockley's claim regarding Howard). Shockley now raises a broader version of the claim, which the Missouri Supreme Court did not address, Doc. 56 at p. 196, although Shockley did raise this broader claim before the motion court, Doc. 20-32 at p. 29–40. So, Shockley says that, to the extent that he has procedurally defaulted this claim, he can demonstrate cause for his default under *Martinez*. Doc. 56 at p. 197. Yet, his argument does not have enough factual support to succeed on a *Martinez* analysis, and the Missouri Supreme Court

reasonably adjudicated the portion of this claim that Shockley presented to it.

Trial counsel made a strategic decision not to call their own expert witness. Lead trial counsel preferred to avoid calling a ballistics expert because "he had bad experiences in the past with cross-examination of his own ballistics witnesses." *Shockley II*, 579 S.W.3d at 907. Because one of the State's witnesses found that bullets from Shockley's gun matched those at the crime scene, while another of the State's witnesses found that the ballistics results were inconclusive, lead trial counsel "stated he would rather cross-examine two experts on the same side and get them to contradict each other than have his own 'hired gun.'" *Id.* Trial counsel executed this strategy "during his cross-examination of both witnesses and throughout the trial." *Id.*

Shockley contends that "[d]efense counsel could not have made a strategic decision if they never obtained the information necessary to make a careful consideration of whether to call their own experts or to rely on the State's 'experts.'" Doc. 56 at p. 191. Since trial counsel did not consult with an expert, Shockley says that lead trial counsel unreasonably relied on his knowledge of ballistics evidence from "work performed 21 years before Shockley's trial." *Id.* at p. 200. Supposedly, lead trial counsel's failure to investigate made him incompetent to cross-examine the State's ballistics experts. *Id.* at 206. Shockley claims that "[a]s a result of this failure, the jury heard unrebutted and uncontested evidence of the firearm and toolmark analysis." Doc. 48 at p. 438. Shockley

says that if counsel had investigated the issue they would have discovered "a growing body of evidence around the time of Shockley's trial that [firearm and toolmark] analysis and the basics of pattern evidence were under attack as scientifically unreliable." *Id.* at p. 435. According to Shockley, the law of effective-assistance says that "cross-examination is not enough by itself to challenge [unreliable] evidence." *Id.* at p. 436. Instead, Shockley urges that the Sixth Amendment requires "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" as "the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* (alteration in original) (citing no habeas or ineffective-assistance cases, but instead only citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993)). In Shockley's estimation, trial counsel does not meet Shockley's proposed standard. *Id.*

However, this attack on trial counsel's performance suffers from a number of flaws. First, even though the team that represented Shockley at his trial did not consult experts, Doc. 48-5 at p. 117, Shockley's initial counsel had "sought expert assistance from several people," and "[trial counsel] . . . recognized the significance of the ballistics evidence, . . . [and] reviewed the entire file provided by [initial counsel] including the ballistics information," Doc. 20-55 at p. 34. These facts contradict Shockley's claim that trial counsel "did nothing to prepare." Doc. 48 at p. 432. Because trial counsel had the benefit of the investigations

performed by Shockley's initial counsel, the arguments against trial counsel's performance—that counsel did not make a strategic decision about whether to call an expert, relied on outdated experience with ballistics evidence, and must have cross-examined the State's experts incompetently—all lack support.

Second, Shockley supports his argument that trial counsel's failures prejudiced him with statements from Dr. Scurich and Mr. Nichols, which are outside the state-court record. *Id.* at p. 438; Doc. 48-4 at pp. 437–48, 621–29. As discussed above, *Shinn* precludes this Court from considering any evidence outside the state-court record. *See supra* Section V.C.2.; *Shinn*, 142 S. Ct. at 1734. Even if the Court could consider this evidence, it would not prove Shockley's point. The motion court found that "[t]he initial trial team . . . conducted an extensive investigation into the [ballistics] evidence," Doc. 20-55 at p. 34, yet, Shockley incorrectly argues that "[t]he relevant evidence in this case . . . did not become available until Shockley's federal habeas counsel discovered it," Doc. 56 at p. 167. This undermines Shockley's assertion that, had trial counsel consulted with ballistics experts, they would have uncovered experts questioning the soundness of the State's evidence. So, even if Shockley could expand the record with testimony questioning the State's evidence, the record demonstrates that trial counsel reasonably relied on prior counsel's extensive investigation.

Third, trial counsel made a calculated decision on how to combat the State's evidence. The Missouri

Supreme Court found that trial counsel strategically chose not to add another ballistics expert to the trial, whose testimony they would need to defend. *Shockley II*, 579 S.W.3d at 907. Instead, trial counsel chose to highlight contradictions between the State's two experts during cross-examination, relying on lead trial counsel's many years of experience. *Id.* "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 690. In concluding that trial counsel's strategy regarding ballistics evidence meets the standard of effective assistance, the Missouri Supreme Court affirmed the postconviction motion court's finding that "trial counsel's testimony that they reviewed the first trial team's entire file was credible." *Shockley II*, 579 S.W.3d at 907–08. So, Shockley's argument that trial counsel did not make a strategic decision fails.

Fourth, Shockley says that, because trial counsel did not call their own expert, "the jury heard unrebutted and uncontested evidence of the firearm and toolmark analysis." Doc. 48 at p. 438. But the State's own experts contested each other's conclusions regarding whether the ballistics evidence pointed to Shockley's weapon. *Id.* at p. 428. When Shockley says that trial counsel failed to use expert testimony to defend him, he ignores trial counsel's using the State's experts to defend him by pointing out their contradictions. *Id.* at p. 436. The cases Shockley cites to support the importance of expert testimony do not involve State experts with contradictory testimony and, therefore, are distinguishable from this case.

Doc. 48 at pp. 436–37 (citing *Daubert*, 509 U.S. at 596; *Richey v. Mitchell*, 395 F.3d 660, 685 (6th Cir. 2005); *Knott v. Mabry*, 671 F.2d 1208, 1213 (8th Cir. 1982)). The Missouri Supreme Court found that trial counsel reasonably decided to use the State's own contradictory testimony to undermine the reliability of its claim that the bullets at the crime scene matched bullets fired from Shockley's rifle. For all of these reasons, Shockley's arguments fail.

More generally, Shockley fails to recognize the deference owed to counsel under *Strickland*. He argues as though the Court should accord no deference to his various past attorneys and evaluate trial counsel's strategy through a lens of twenty-twenty hindsight. Judicial scrutiny of counsel must be highly deferential: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

These flaws in Shockley's argument prove fatal in the *Martinez* analysis. Without support from outside the record, no reasonable jurist could debate whether this supposed trial-counsel error created a reasonable probability of prejudice against Shockley. *See Dorsey*, 30 F.4th at 757. Given the weaknesses of this claim,

postconviction counsel reasonably focused on the stronger arguments that they actually presented. *See Deck*, 978 F.3d at 584. Further, because Shockley cannot show that counsel's conduct debatably created a reasonable probability of a different result at the first step of the analysis, he also cannot show actual prejudice. *See Coleman*, 501 U.S. at 750. Because Shockley cannot succeed under *Martinez*, he cannot avoid procedural default.

Alternatively, Shockley argues that the Court should forgive his procedural default because "imposing default would be a miscarriage of justice." Doc. 48 at p. 431. Although Shockley does not develop this argument, this exception to the bar on procedurally defaulted claims exists only for petitioners who are actually innocent and who can show that "it is more likely than not that no reasonable juror would have convicted [them] in the light of . . . new evidence." *Schlup*, 513 U.S. at 327. However, Shockley does not argue actual innocence, *see* Docs. 48, 56; *supra* Section VI.A. (discussing the evidence against Shockley and Shockley's failure to make an actual-innocence argument under the relevant caselaw), and based on the weight of the totality of the evidence of Shockley's guilt, a reasonable juror could find him guilty, *see supra* Section VI.A. (discussing the evidence against Shockley and Shockley's failure to make an actual-innocence argument under the relevant caselaw). So, Shockley cannot avail himself of the miscarriage-of-justice exception to the bar on procedurally defaulted claims. Therefore, the Court denies claim 22.

i. Claim 26

In claim 26, Shockley alleges that further juror misconduct deprived him of a fair trial. Doc. 48 at pp. 502, 504–06. He also argues that counsel incompetently failed to investigate and present these claims, *id.* at p. 502, and admits that he did not raise this claim in state court, invoking *Martinez* to excuse the procedural default. *Id.* at p. 503. Because the federal statute of limitations bars claim 26 as amended, the Court need not determine whether to excuse the default.

The parties do not dispute the timeliness of Shockley's original Petition. *See* Doc. 51 at p. 45 ("The filing appears to have occurred on the 364th day of the one-year limitations period . . . . So, the original petition appears timely."); 28 U.S.C. § 2244(d) (one-year limitation period). With leave of Court, Shockley filed an amended petition approximately ten months after the expiration of the limitations period. *See* Docs. 47, 48. So, to satisfy the statute of limitations, the claims in the Amended Petition must arise out of the same "common core of operative facts" as those alleged in the original, timely Petition. *Mayle v. Felix*, 545 U.S. 644, 664 (2005); *see* Fed. R. Civ. P. 15(c)(1)(B). "In order for the claims in an amended motion to relate back . . . they must be of the same 'time and type' as those in the original motion . . . ." *United States v. Hernandez*, 436 F.3d 851, 858 (8th Cir. 2006) (citing *Mayle*, 545 U.S. at 650, 657, 664). A claim in an amended petition does not relate back to the claim in the original petition simply because both claims involve the same "trial, conviction, or

sentence." *Id.* at 857 (citing *Mayle*, 545 U.S. at 656–57).

Further, two claims do not share a common core of facts simply because both assert that a particular right was violated at trial. *See Dodd v. United States*, 614 F.3d 512, 516 (8th Cir. 2010) (citing several cases holding that an ineffective-assistance claim cannot relate back to an ineffective-assistance claim based on a different set of facts). Although courts generally decide this issue by comparing the concrete facts in the amended petition to concrete facts in the original petition, *see id.*, courts have found that a claim in an amended petition cannot relate back to a claim that asserts no facts, *Clifton v. United States*, No. 4:10-CV-01990-CEJ, 2014 WL 1048584, at *2 (E.D. Mo. Mar. 18, 2014) ("These 'new' facts, however, cannot be said to have 'arisen out of the same set of facts as [the movant's] original claims,' because there was no set of facts set forth in the original claim."); *Robertson v. Pierce*, No. 12-CV-03108, 2016 WL 2593344, at *6 (N.D. Ill. May 5, 2016) ("[B]ecause Petitioner's original ineffective-assistance-of-appellate-counsel claim lacks any factual specificity, it is impossible to conclude that Petitioner's supplemental claim shares a common core of facts with that original claim. To hold otherwise would allow a habeas litigant to avoid AEDPA's one-year limitations period by filing placeholder claims . . . ."). Indeed, reduced to its base, permitting amendments to relate back to placeholder claims would allow a petitioner to file an omnibus placeholder claim preserving "any and all future

claims." The Court thus agrees with the reasoning of the *Clifton* and *Robertson* courts.

As initially pleaded, claim 26 served as a "placeholder" juror-misconduct claim. Shockley admitted that, at the time of filing, he had "no indication that any misconduct ha[d] occurred," but he wished to file claim 26 "in an incomplete state to preserve [his] arguments in regards to the evidence that has yet to be disclosed." Doc. 23 at pp. 461–68. Shockley alleged only that Juror 58 committed misconduct, as detailed in claim 3, and that other jurors may have similarly tainted Shockley's trial, although Shockley mentions no facts supporting this suspicion. *Id.* at pp. 461–68. Then, long after the expiration of the limitations period, Shockley amended claim 26 with specific allegations that Juror 50 knew Shockley's cousin, who was one of the prosecution's witnesses, and both Jurors 50 and 78 overheard negative comments about Shockley's upbringing and saw Shockley in shackles and a bulletproof vest. Doc. 48 at pp. 505–06. The original Petition made no allegations regarding either juror or any such facts mentioned in the Amended Petition; it only stated a hunch that jurors might have committed misconduct. Doc. 23 at pp. 461–68 (citations omitted). Because the original claim pleaded no facts, the amended claim 26 does not arise out of the same "common core of operative fact" as the original claim. *Mayle*, 545 U.S. at 664. Thus, the amended claim 26 does not relate back to the original claim 26, and the Court denies amended claim 26 as time barred.

2. Other procedurally defaulted claims

Shockley presents several other claims that he did not present in state court. Because Shockley did not raise these claims for postconviction review—and because Missouri's deadline for such claims passed nearly a decade ago—Shockley has defaulted these claims and must demonstrate why the Court should excuse this procedural default under *Coleman*. *See* Section VI.C. (discussing Shockley's procedurally defaulted claims in more detail). *Coleman* provides several avenues for prisoners to overcome procedural default without arguing ineffective assistance of counsel. 501 U.S. at 753. For instance, "a showing that the factual or legal basis for a claim was not reasonably available to counsel" establishes cause. *Id.* If a prisoner can also make a showing of actual prejudice, that prisoner overcomes his procedural default. *Id.* at 750. *Coleman* also allows a prisoner to hurdle his procedural bar by demonstrating that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" and, therefore, that his conviction would constitute a miscarriage of justice. *Id.* at 748. Although *Coleman* leaves open other possible ways to demonstrate cause and prejudice, Shockley only asserts not-reasonably-available-to-counsel and miscarriage-of-justice theories, though as noted, he does not argue actual innocence.

a. Claim 2

In claim 2, Shockley argues that the trial judge violated Shockley's Sixth-Amendment rights to a fair

trial and to effective counsel when the trial judge failed to inform trial counsel that he received a copy of Juror 58's book that Juror 58 gave to the court bailiff. Doc. 48 at pp. 115–24. However, Shockley procedurally defaulted this claim by failing to present it to the Missouri Supreme Court.

Shockley presented a cornucopia of complaints regarding the trial judge to the motion court. Doc. 20-34 at p. 42; Doc. 20-35 at pp. 1–8. Chiefly, Shockley argued that the trial court had a duty to inform counsel that Juror 58 gave his book to the bailiff and to warn them about the nature of the book. *Id.* The motion court rejected this claim, relying on *Rushen v. Spain*, 464 U.S. 144 (1983), in which the Supreme Court found no prejudice because jury deliberations remained unbiased. Doc. 20-58 at pp. 24–26. In the motion court's judgment, the trial judge's actions in Shockley's case presented less cause for concern than those in *Rushen*. *Id.*

On postconviction appeal to the Missouri Supreme Court, Shockley dropped the arguments he presented to the motion court regarding the trial judge's nondisclosure of Juror 58's interaction with the bailiff. *See* Doc. 20-59. Instead, Shockley raised a new argument: the trial judge violated Shockley's rights by failing to disclose that Juror 58 brought his book to the *sequestered jury*. *Id.* at p. 40. The Missouri Supreme Court held that Missouri law procedurally barred Shockley's new claim. *Shockley II*, 579 S.W.3d at 899–900. Because it disposed of the claim on procedural grounds, that court said little on the merits of the case, finding only that Shockley's

sequestered-jury claim is not "supported by the record," and that "[t]he motion court did not clearly err in denying this claim." *Id.* at 900.

Now, Shockley reverts to the argument he presented to the motion court, insisting that his claims regarding the trial judge's supposed misconduct have remained the same since the beginning and that "the Missouri Supreme Court never reached the merits of the underlying claim." Doc. 48 at p. 115–16. However, that court did not view these as the same claim. *Shockley II*, 579 S.W.3d at 899. It reasoned that the issue of Juror 58's giving his book to the bailiff stands distinct from the issue of Juror 58's bringing his book to the sequestered jury. *Id.* Although Shockley urges this Court to reject the Missouri Supreme Court's application of Missouri procedural law, Doc. 48 at pp. 118–20, "[a] federal court may not re-examine a state court's interpretation and application of state law," *Skillicorn*, 475 F.3d at 974 (citation omitted). So, Shockley procedurally defaulted this claim under Missouri law. And he makes no attempt to overcome this procedural default. Doc. 48 at pp. 115–24. Therefore, the Missouri Supreme Court's adjudication stands, and the Court denies claim 2.

b. Claim 21

In claim 21, Shockley alleges that the trial court erred when it admitted "fundamentally unreliable forensic evidence" at trial, referencing the firearm and toolmark evidence used to compare the bullets at the murder scene with bullets fired from Shockley's rifle. Doc. 48 at p. 382. Whether Shockley could possibly

succeed in his argument—and what elements he would need to prove to succeed—remains unclear because neither the Supreme Court nor the Eighth Circuit has stated that petitioners have the right to relitigate the scientific reliability of the evidence used to convict them. *See Feather v. United States*, 18 F.4th 982, 986 (8th Cir. 2021) (assuming without deciding that "use of false or discredited scientific evidence could violate a criminal defendant's right to due process," but concluding petitioner "failed to prove that his trial and conviction were fundamentally unfair"). In addition to this substantive problem, Shockley faces a procedural problem: he admits that he did not raise this claim in state court. Doc. 48 at p. 383.

Shockley gives three alternative explanations for how he can overcome his procedural default. First, he argues that, if the information that allegedly undermines the State's ballistics evidence did not exist at the time of trial, then the Court should excuse his failure to raise this claim in state court. Doc. 56 at pp. 161–68. Second, if that allegedly undermining information did exist at the time of trial, then Shockley asserts that his trial counsel unreasonably failed to raise this claim, allowing Shockley to proceed under *Martinez*. *Id.* at pp. 168–73. Third, Shockley claims that, if these two earlier arguments fail, the Court still must hear Shockley's claims to avoid "a fundamental miscarriage of justice." *Id.* at p. 174. None of Shockley's attempts to overcome his procedural default can succeed.

These three arguments depend on evidence from outside the state-court record because Shockley did not raise this claim or any analogous claim in state court. *See Shockley II*, 579 S.W.3d 881. So Shockley must contend with § 2254(e)(2). Shockley correctly notes that, "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Doc. 56 at pp. 186–87 (quoting *Williams v. Taylor*, 529 U.S. at 432). Shockley says that "[t]here has been no lack of diligence on his part." *Id.* at p. 187. He does not elaborate on this assertion, *id.*, but he presumably refers to the same arguments he makes in support of cause for his procedural default: ineffective assistance of counsel and the past unavailability of evidence, *id.* at p. 161–75. However, neither of these attempts to demonstrate his diligence succeeds. First, as the Supreme Court held in *Shinn*, ineffective assistance of counsel does not allow a petitioner to bypass § 2254(e)(2)'s requirements. 142 S. Ct. at 1734. Further, when a party attempts to introduce previously unavailable evidence, the Supreme Court still applies § 2254(e)(2)'s strictures. *See Shoop*, 142 S. Ct. at 2044. Otherwise, § 2254(e)(2)'s rules for when a party may introduce previously unavailable evidence would become entirely meaningless. Thus, § 2254(e)(2)'s strict rules apply.

But Shockley cannot satisfy § 2254(e)(2). To do so, he would need to show that "the facts underlying the claim would be sufficient to establish by clear and

convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254(e)(2)(B). If Shockley had been successful at trial in excluding or discrediting the State's ballistics evidence, other—and substantial—evidence still points to Shockley as the murderer. *See supra* Section VI.A. As in *Feather*, Shockley discredits one piece of a cumulative case. 18 F.4th at 987. And the Court finds that, like in *Feather*, the jury would have faced "at most, conflicting testimony and thus a reasonable juror considering all the evidence . . . could still convict [the defendant]." *Feather*, 18 F.4th at 987 (internal quotation marks and citation omitted). Because Shockley cannot show by clear and convincing evidence that a reasonable juror could not have convicted him, § 2254(e)(2) bars him from introducing new evidence to support his claim and demonstrating cause for his default.

Yet, even if Shockley could introduce evidence to support his argument, he still could not demonstrate cause and prejudice for his default. Shockley presents three arguments to overcome the bar on procedurally defaulted claims: (1) this claim was factually and legally unavailable to him in state court; (2) trial and postconviction counsel incompetence allow him to overcome procedural default, pursuant to *Martinez*; and (3) the Court must reach the merits of this claim to avoid a fundamental miscarriage of justice. Doc. 56 at p. 161. These arguments fail.

i. The factual and legal availability of a ballistics-evidence claim during state-court review

Shockley says that "[t]here is cause for a procedural default if the petitioner was not aware of the important facts that underlie a claim until it is too late to present the claim to state court." *Id.* at p. 161 (citing *Williams v. Taylor*, 529 U.S. at 442). "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel . . . constitute[s] cause" for a procedural default. *Coleman*, 501 U.S. at 753 (quoting *Carrier*, 477 U.S. at 488). Shockley notes that, at the time of his sentencing in May of 2009, "firearm and toolmark examination was routinely accepted in the Missouri courts." Doc. 56 at p. 163 (citing *State v. Woodworth*, 941 S.W.2d 679, 698 (Mo. Ct. App. 1997)). Indeed, the Eighth Circuit continues to accept firearm-and-ballistics-analysis evidence. *See, e.g.*, *United States v. Perry*, 61 F.4th 603, 607 (8th Cir. 2023). According to Shockley, evidence undermining the ballistics evidence presented at his trial first appeared in the months after his sentencing when the National Academy of Sciences' Committee on Identifying the Needs of the Forensic Science Community declared that the methodology of firearm and toolmark analysis lacked "any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline." Doc. 56 at p. 163 (citing Nat'l Rsch. Council, *Strengthening Forensic Science in the United States: A Path Forward* 108 (2009)). In November

2009, the Supreme Court voiced its concern that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Id.* at p. 164 (alteration in original) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 337 (2009) (citing various academic sources, including the National Academy of Sciences report)). Thus, the "groundbreaking report" that questioned the methodology of the ballistics evidence used to convict Shockley was not available to trial counsel. *Id.* at p. 163.

Despite Shockley's argument that he could not have raised this claim until now, Shockley's timeline does not unequivocally support his theory that trial counsel did not have the facts to present this due-process argument. Shockley also mentions a report predating his trial, noting that the scientific validity of firearm and toolmark evidence had not yet been verified. Doc. 48 at p. 397; *see also* Nat'l Rsch. Council, *Ballistics Imaging* 26 (Daniel L. Cork et al. eds., 2008). This undercuts Shockley's claim that "trial counsel would not be expected to be on notice of the issues with the method's underlying reliability." Doc. 56 at p. 166. Further, trial counsel knew from experience that experts on ballistics analysis might not stand up to cross-examination and that the State's experts in this case contradicted each other. *Shockley II*, 579 S.W.3d at 907. So, trial counsel had some notion of the unreliability of ballistics experts and of the State's ballistics experts against Shockley. *Id.* Shockley speculates that trial counsel should have called a witness to explain the unreliability of

ballistics evidence, but he fails to show how the decision not to call an expert of his own fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.

Although Shockley asserts counsel first learned of the factual basis of this argument during federal habeas review after learning of "a researcher's opinions regarding the validity of the studies supporting the forensic science method," Doc. 56 at p. 167, the facts do not support this argument. This subverts Shockley's attempt to argue that counsel did not have the information to present this claim until federal habeas review.

Even if trial counsel had no access to the evidence casting doubt on firearm and toolmark analysis, postconviction counsel certainly did. Shockley says that the evidence casting doubt on the State's ballistics evidence "did not become available until Shockley's federal habeas counsel discovered it," *id.* at p. 167, but Shockley's own briefing proves otherwise, *see id.* at pp. 163–64. As Shockley notes, the National Academy of Sciences published the report—which supposedly undermines the evidence used against Shockley—in 2009. Likewise, in 2009, the Supreme Court highlighted the report's finding of "subjectivity, bias, and unreliability of common forensic tests such as . . . toolmark and firearms analysis." *Melendez-Diaz*, 557 U.S. at 321 (citation omitted). Thus, in 2013, when Shockley's direct appeal process ended, *see Shockley I*, 410 S.W.3d 179, Shockley's postconviction counsel had ample time to notice the concerns about firearm and toolmark analysis stated in *Melendez-*

Diaz and follow the Supreme Court's citations to the National Academy of Sciences' report. Armed with this information, postconviction counsel could have argued that the State's ballistics evidence deprived Shockley of a fair trial and violated his right to due process. *See* Mo. Sup. Ct. R. 29.15(a) (allowing for postconviction review of constitutional claims).

If *postconviction* counsel has access to the factual basis of a claim, then a petitioner cannot demonstrate cause for his or her procedural default arguing only that *trial* counsel had no access to the factual basis of the claim. *Marcyniuk*, 39 F.4th at 1001–02 (affirming the district court's finding that the petitioner failed to overcome the procedural bar because the petitioner failed to show that "the factual or legal basis of his claims was not reasonably available to [the petitioner's] state appellate and post-conviction counsel"). Because "the factual basis for [Shockley's] claim . . . was reasonably available to [him] at the time of his state postconviction hearings," Shockley cannot demonstrate cause for his default. *Cornell v. Nix*, 976 F.2d 376, 380 (8th Cir. 1992) (en banc).

Shockley also suggests that he can demonstrate cause by showing that the legal foundation for this due-process argument only developed recently. According to Shockley, courts first began to consider the kind of argument he presents here in 2012. Doc. 56 at p. 166. However, the direct-appellate review of Shockley's case continued through 2013, *see Shockley I*, 410 S.W.3d 179, meaning that, according to Shockley's own timeline, this due-process claim was legally available to Shockley's counsel both before and

during postconviction review. Shockley also suggests that this claim did not become legally available until *United States v. Tibbs*. Doc. 56 at p. 166; *see also United States v. Tibbs*, No. 2016-CF1-19431, 2019 WL 4359486 (D.C. Super. Ct. Sept. 5, 2019). Although *Tibbs* does question firearm and toolmark analysis, it does not consider any kind of due-process argument. 2019 WL 4359486. So, *Tibbs* had no effect on when this claim became available. Thus, Shockley's timeline demonstrates that postconviction counsel had access to the facts and law that form the basis of Shockley's claim, meaning that Shockley cannot demonstrate cause for his default by arguing that the factual and legal basis for the claim "was not reasonably available to him until now." Doc. 56 at p. 168.

ii. The competence of counsel in choosing not to raise ballistics-evidence claim

Shockley argues that, if the information that supposedly undermines the evidence used to convict him was available to his counsel, then Shockley can demonstrate cause by showing ineffective assistance of trial and postconviction counsel under *Martinez*. *Id.* at p. 161. As the Court details above, Shockley argues that trial counsel had no access to the facts that form the basis of this claim, although evidence indicates otherwise. To the extent that trial counsel had no access to the factual basis of this claim, the Court cannot find that trial counsel unreasonably failed to raise this claim. However, *Martinez* only allows a petitioner to overcome procedural default if he or she

can show both trial-counsel incompetence and postconviction-counsel incompetence. *See Trevino*, 569 U.S. at 421–23 (explaining the elements of *Martinez*). So, to the extent that trial counsel could not have known of the alleged unreliability of firearm and toolmark analysis, *Martinez* cannot help Shockley overcome his procedural default because postconviction counsel could have known these matters.

To the extent trial counsel did know of the subjectivity involved in firearm and toolmark analysis, postconviction counsel acted reasonably in choosing not to argue that this ballistics evidence violated Shockley's right to due process. The Eighth Circuit has pointedly refused to acknowledge that this kind of due process claim could succeed and has only considered such a claim *ad argumentum* in the process of denying the claim. *See Feather*, 18 F.4th at 986. Given the choice between focusing on a proven legal argument and a nebulous, theoretical due-process right, postconviction counsel had good reason to focus on arguments with a sound precedential basis. Some courts have given petitioners a right to relitigate the scientific validity of the evidence used to convict them, but even those courts have required petitioners to show that the State's remaining evidence lacked sufficient weight to prove guilt beyond a reasonable doubt. *See, e.g.*, *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159, 169 (3rd Cir. 2015). To succeed, Shockley would need to contend with the remaining evidence against him. But the State's cumulative case against Shockley presents ample

reason to conclude that he murdered Sergeant Graham, and Shockley does not assert actual innocence, *see supra* Section VI.A.

Thus, Shockley cannot succeed in a *Martinez* analysis. To present a substantive claim, Shockley would need to show he debatably suffered prejudice because of the contested ballistics evidence. *See Dorsey*, 30 F.4th at 756–57 (providing the standard for substantive claims and stating that "*Strickland*'s prejudice standard and a more-probable-than-not standard [differ] 'only in the rarest case.'" (citation omitted)). Given trial counsel's efforts to undermine that evidence and the strength of the other evidence against Shockley, *see supra* Section VI.A., Shockley fails to state a substantive claim. A claim asserting a right without any support from the United States Supreme Court or Eighth Circuit cannot present a plainly stronger argument than the claims actually presented by postconviction counsel. *See Deck*, 978 F.3d at 584. Although Shockley presents an affidavit from postconviction counsel tailored to support an ineffective-assistance argument, "failing to make an argument that would 'require the resolution of unsettled legal questions' is generally not 'outside the wide range of professionally competent assistance.'" *Id.* at 583 (quoting *Dansby*, 766 F.3d at 836). So, postconviction counsel did not act unreasonably in choosing not to raise this due-process claim. Finally, because it is not clear that the right Shockley asserts exists, or that Shockley's conviction depended on ballistics evidence, counsel's decision not to raise this argument did not have a substantial likelihood of

affecting the result of this case. *See Harrington*, 562 U.S. at 111–12. So, to the extent that trial counsel could have raised this claim, trial and postconviction counsel did not represent Shockley incompetently by vigorously cross examining the State's contradictory experts and choosing to focus on other arguments.

iii. The miscarriage-of-justice exception to the bar on procedurally defaulted claims

Shockley argues that the Court must reach the merits of this claim to avoid "a fundamental miscarriage of justice." Doc. 56 at p. 161. A petitioner can bypass *Coleman*'s cause-and-prejudice analysis by showing that "the failure to consider his claims would result in a fundamental miscarriage of justice." *McCall v. Benson*, 114 F.3d 754, 758 (8th Cir. 1997) (citing *Coleman*, 501 U.S. at 750). Only a petitioner claiming that he or she "is actually innocent" can come within this exception to the bar on defaulted claims. *Id.* (citing *Brownlow v. Groose*, 66 F.3d 997, 999 (8th Cir. 1995)). A claim of actual innocence must stem from new evidence and must prove that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. Shockley says that the "the firearms evidence was a critical component" of the State's case and that jurors "afford significant weight to firearm testimony." Doc 56 at p. 174.

Notably, Shockley does not argue that he is actually innocent. *See* Docs. 48, 56; *see also supra* Section VI.A. (discussing Shockley's failure to make

an actual-innocence argument under the relevant caselaw). And, even if the Court accepts the importance of the ballistics evidence, these allegations fail to show that no reasonable juror would find Shockley guilty. Even without the ballistics evidence, a reasonable jurist could find the evidence against Shockley persuasive enough to convict him. *See supra* Section VI.A. (discussing the evidence against Shockley). Thus, Shockley cannot overcome the bar on procedurally defaulted claims.

Shockley supplements this claim with an argument that, even if firearm and toolmark analysis had scientific merit, the State's evidence "was also invalidly applied in this case." Doc. 48 at p. 414. Shockley says that a proper ballistics analysis should have been inconclusive, *id.* at p. 418, as one of the State's experts found, *id.* at p. 410. Shockley also says that bias may have affected the State's ballistics analysis. *Id.* at p. 424. However, Shockley does not address how this as-applied argument can overcome procedural default. *See* Docs. 48, 56.

In summary, Shockley does not attempt to show cause for his default by alleging that facts about the State's methodology remained hidden until recently. *Id.* He vaguely suggests that the State suppressed evidence but does not develop this into an argument. Doc. 48 at p. 399 ("If the State failed to disclose this material evidence to Shockley's defense team, Shockley's due process rights were violated irrespective of good or bad faith."). Finally, Shockley cannot rely on the actual-innocence exception to the bar on procedurally defaulted claims because he does

not argue that he is actually innocent. *See McCall*, 114 F.3d at 758 (citation omitted); *see also* Docs. 48, 56. So, even if Shockley could overcome § 2254(e)(2) to introduce evidence on the reliability of firearm and toolmark analysis, he cannot overcome his procedural default. Therefore, the Court denies claim 21.

c. Claim 27

In claim 27, Shockley presents a placeholder claim, asserting that "there is evidence favorable to his defense (above and beyond what is raised in ground for relief 25), that remains suppressed." Doc. 48 at p. 511. Shockley says that he "intends to promptly amend this claim upon discovery of additional evidence." Doc. 23 at p. 469 (filed Sept. 2, 2020). To date, three years later, Shockley has not attempted to amend this claim to "state specific, particularized facts which entitle him . . . to habeas corpus relief." *Adams v. Armontrout*, 897 F.2d 332, 334 (8th Cir. 1990) (citing Habeas Corpus Rule 2(c)). He assures the Court that, when he does eventually find facts supporting another *Brady* claim, *Mayle* will allow him to relate back those allegations to the placeholder claim in his original Petition. *Id.* at p. 476 (citing *Mayle*, 545 U.S. at 648) (holding that a Fifth-Amendment claim based on the petitioner's pretrial statements did not relate back to an earlier Sixth-Amendment claim based on the introduction of a prerecorded witnesses' statement).

Shockley recounts the factual allegations from the *Brady* claim he raises in claim 25, but he alleges no further facts that might qualify as a *Brady* violation. Doc. 23 at pp. 471–72. Instead, he indulges

in rank speculation about conceivable *Brady* claims. Because a claim in an amended petition can only relate back to a claim with a common core of facts, nothing Shockley could introduce now would relate back to his factually barren placeholder claim. *See supra* Section VI.C.1.i. (describing the relation back to an earlier claim); *see also Clifton*, 2014 WL 1048584, at *2; *Robertson*, 2016 WL 2593344, at *6. Because claim 27 fails to comply with Habeas Rule 2(c)'s requirement that a claim state specific, particularized facts, the Court denies it.

VII. Law-and-justice standard

To receive federal habeas relief as to claims the state court adjudicated, a petitioner must show: (1) that he satisfies the conditions set forth by Congress in AEDPA; and (2) that "law and justice" require relief. *Davenport,* 142 S. Ct. at 1520 (2022) (quoting 28 U.S.C. § 2243) (citing *Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Horn v. Banks*, 536 U.S. 266, 272 (2002)). Shockley—who does not argue that he is actually innocent—fails at step one, as discussed thoroughly above, but he also fails at step two. Given that "a federal court must *deny* relief to a state habeas petitioner who fails to satisfy either [the Supreme] Court's equitable precedents or AEDPA[,]" *Davenport*, 142 S. Ct. at 1524, the Court must deny Shockley's Amended Petition.

Davenport found that "Congress invested federal courts with discretion when it comes to supplying habeas relief—providing that they 'may' (not must) grant writs of habeas corpus, and that they should do so only as 'law and justice require.'" *Id.* (quoting 28

U.S.C. §§ 2241, 2243). So, courts have the authority to deny habeas relief "in light of equitable and prudential considerations" and "[f]oremost among those considerations is the States' 'powerful and legitimate interest in punishing the guilty.'" *Id.* (citations omitted). Federal habeas relief "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, 562 U.S. at 103 (citation omitted). So, even if Shockley could succeed under AEDPA—and he cannot—equitable considerations do not weigh in favor of relief.

In the wake of the Supreme Court's two recent "landmark habeas decisions" in *Davenport* and *Ramirez*, the Fifth Circuit recently held that "[l]aw and justice do not require habeas relief—and hence a federal court can exercise its discretion not to grant it—when the prisoner is factually guilty." *Crawford v. Cain*, 68 F.4th 273, 287 (5th Cir. 2022), *vacated and reh'g en banc granted*, 72 F.4th 109 (2023) (citing *Davenport,* 142 S. Ct. at 1521 (citing *Bushell's Case*, 124 Eng. Rep. 1006, 1009–10 (C. P. 1670))). The *Crawford* court explained that "[r]equiring prisoners to show factual innocence also comports with the federalism principles undergirding AEDPA." *Id.* Adding to the equitable considerations the Supreme Court discussed in *Davenport* and *Harrington*, the *Crawford* court reasoned that requiring factual innocence "protects other parties not before the court." *Id*. Those "other parties" include factually innocent

habeas petitioners with meritorious claims—a particular interest given the explosion of non-meritorious habeas claims in the years since the Supreme Court opened the floodgates in 1953. *Id.* (referring to *Brown v. Allen*, 344 U.S. 443, 537 (1953)).

The Fifth Circuit has since vacated *Crawford* to rehear the case en banc. *Crawford*, 72 F.4th 109. Assuming that *Crawford*'s "factual innocence" standard prevails and applies *Davenport* correctly, Shockley's Amended Petition falls far short. Shockley asserts 28 claims for habeas relief, and his arguments for relief span no fewer than 820 pages of briefing. Yet, nowhere in that vast sea of briefing does Shockley argue for or even clearly assert factual innocence. Instead, Shockley urges this Court, a federal court, to overturn his state conviction that no fewer than five state courts, and 9 state-court judges, have imposed or affirmed. If nothing else, the strictures of AEDPA and the federalism principles underlying the writ of habeas corpus counsel thoughtful deference and restraint.

VIII. Certificate of appealability

For the reasons stated in this order, the Court finds that Shockley has not made a substantial showing of the denial of a constitutional right, as he must do before a certificate of appealability can issue. 28 U.S.C. § 2253(c); *see also Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (explaining that a "substantial showing" means a showing where "issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings" (citing *Flieger v. Delo*, 16 F.3d

878, 882–83 (8th Cir. 1994))). The issues raised in Shockley's Amended Petition lack debatable merit, the Court could not resolve them differently, and now, well past the seventeenth anniversary of Shockley's murder of Missouri Highway Patrol Sergeant Carl DeWayne Graham, Jr., the issues do not deserve further proceedings. Therefore, the Court does not issue a certificate of appealability as to any claims raised in Shockley's Amended Petition.

IX. Conclusion

The Court denies Shockley's [57] Motion for Discovery, [64] Motion for a *Rhines* Stay, and [48] Amended Petition for Writ of Habeas Corpus and dismisses Lance Shockley's Amended Petition with prejudice. The Court does not issue a certificate of appealability.

So Ordered this 29th day of September 2023.

STEPHEN R. CLARK
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

Supreme Court of Missouri, en banc.

Lance C. SHOCKLEY, Appellant,

v.

STATE of Missouri, Respondent.

No. SC 96633
|
Opinion issued April 16, 2019
|
Rehearing Denied September 3, 2019

APPEAL FROM THE CIRCUIT COURT OF CARTER COUNTY, The Honorable Kelly W. Parker, Judge

Attorneys and Law Firms

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

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

Opinion

George W. Draper III, Judge

Lance Shockley (hereinafter, "Movant") was found guilty by a jury of one count of first-degree murder for the death of Missouri highway patrolman

Sergeant Carl DeWayne Graham, Jr. (hereinafter, "Victim"). The jury found the facts required by law to impose a death sentence, but it was unable to agree whether to recommend a sentence of death or life imprisonment. Pursuant to section 565.030.4, RSMo 2000,[1] the circuit court conducted an independent review of the facts and imposed a death sentence. This Court affirmed Movant's conviction and sentence. *State v. Shockley*, 410 S.W.3d 179 (Mo. banc 2013).

Movant appeals the motion court's judgment overruling his Rule 29.15 motion after an evidentiary hearing. This Court has exclusive jurisdiction over this appeal because a death sentence was imposed. Mo. Const. art. V, sec. 10; *see also* Standing Order, June 16, 1988 (effective July 1, 1988). This Court affirms the motion court's judgment.

Factual and Procedural History[2]

On November 26, 2004, Movant was involved in a motor vehicle accident resulting in the death of his passenger. Over the next several months, Victim conducted the investigation of the accident, which criminally implicated Movant.

On March 20, 2005, at approximately 12:20 p.m., Movant borrowed his grandmother's red Pontiac Grand Am (hereinafter, "the red car"), which had a

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[1] All statutory references are to RSMo 2000 unless otherwise indicated.

[2] This recitation incorporates portions of this Court's prior opinion from Movant's direct appeal without further attribution or citation.

bright yellow sticker on the trunk near the driver's side. Between 1:45 p.m. and 4:15 p.m. that afternoon, various witnesses noticed a red car with a bright yellow sticker affixed to the driver's side of the trunk parked on the wrong side of the road a few hundred feet from Victim's residence.

At 4:03 p.m. that day, Victim returned home, backed his patrol car into his driveway, and radioed dispatch he was ending his shift. As Victim exited his vehicle, he was shot from behind with a high-powered rifle that penetrated his Kevlar vest. The bullet severed Victim's spinal cord at the neck, immediately paralyzing him. Victim fell backward and suffered fractures to his skull and ribs upon impact with the pavement. The killer then approached Victim, who was still alive, and shot him twice more with a shotgun into his face and shoulder. The recovered rifle bullet was deformed, but ballistics experts determined it belonged to the .22 to .24 caliber class of ammunition that would fit a .243 caliber rifle. Investigators later learned that, around 7 p.m. on the evening of Victim's murder, Movant's wife gave Movant's uncle a box of .243 caliber bullets and stated, "[Movant] said you'd know what to do with them."

Movant returned the red car to his grandmother between 4:15 p.m. and 4:30 p.m. that same day. Investigators calculated it took approximately eighteen minutes to drive from Movant's grandmother's house to the location where the red car with the yellow sticker had been parked near Victim's home.

Two highway patrol investigators interviewed Movant at his residence that evening. Movant immediately denied killing Victim and stated he spent all day working around his house with his neighbor, Sylvan Duncan (hereinafter, "Sylvan").[3] The next day, Movant again met with investigators and elaborated on the alibi. Movant claimed he was visiting relatives, including his grandmother, and he watched from his living room as Sylvan pushed brush. Movant stated he knew Victim was investigating him for the fatal accident and, without prompting, declared he did not know where Victim lived.

Later that day, Movant visited his grandmother and instructed her to tell the police he had been home all day the day Victim was shot. When his grandmother told Movant she would not lie for him, he put his finger over her mouth and said, "I was home all day."

Police arrested Movant on March 23, 2005, for leaving the scene of the car accident that resulted in his passenger's death. The state subsequently charged Movant with leaving the scene of a motor vehicle accident, first-degree murder for Victim's death, and armed criminal action. The state proceeded to trial only on the first-degree murder charge and sought the death penalty. Movant was represented initially by several public defenders, including Thomas Marshall (hereinafter, "Marshall" and, collectively, "the first trial team"). Movant later obtained private counsel

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[3] Sylvan and his wife, Carol, will be referred to by their first names for ease of clarity. No disrespect is intended.

and was represented at trial by Brad Kessler (hereinafter, "Kessler"), David Bruns (hereinafter, "Bruns"), and Mollyanne Henshaw (hereinafter, "Henshaw" and collectively, "trial counsel").

The state theorized Movant killed Victim to stop the fatal car accident investigation. Movant's defense was it was ridiculous for him to believe, simply by killing Victim, law enforcement would halt its investigation into the accident. Trial counsel also argued the police improperly directed all their investigative attention toward him rather than pursuing other possible perpetrators.

After a five-day guilt phase proceeding, the jury found Movant guilty of first-degree murder. During the penalty phase, the state submitted four statutory aggravators pursuant to section 565.032.2: (1) Victim was a "peace officer" and the "murder was committed because of the exercise of his official duty;" (2) Movant was depraved of mind when he killed Victim and, "as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman;" (3) Victim was murdered "for the purpose of avoiding ... or preventing a lawful arrest;" and (4) Victim was a "potential witness in [a] past or pending investigation ... and was killed as a result of his status as a ... potential witness."

The jury found the first, third, and fourth statutory aggravators were proven beyond a reasonable doubt. The jury did not find unanimously the circumstances in mitigation outweighed those in aggravation. However, the jury was unable to agree

which punishment to recommend. After overruling Movant's motion for new trial, the circuit court imposed a death sentence pursuant to section 565.034.4.

Movant appealed and raised nine points of error. This Court affirmed the circuit court's judgment and conducted an independent proportionality review pursuant to section 565.035.3. Movant filed a timely Rule 29.15 motion for post-conviction relief, alleging several claims of ineffective assistance of trial and appellate counsel. After an evidentiary hearing, the motion court issued findings of fact and conclusions of law, made credibility determinations, and denied Movant relief. Movant now appeals, raising seventeen claims of error.

Standard of Review

This Court reviews the denial of post-conviction relief to determine whether the motion court's findings of fact and conclusions of law are clearly erroneous. Rule 29.15(k). "A judgment is clearly erroneous when, in light of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. banc 2013). The motion court's findings are presumed correct. *Johnson v. State*, 406 S.W.3d 892, 898 (Mo. banc 2013). "This Court defers to 'the motion court's superior opportunity to judge the credibility of witnesses.'" *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014) (quoting *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991)).

To be entitled to post-conviction relief for ineffective assistance of counsel, a movant must show by a preponderance of the evidence his or her trial counsel failed to meet the *Strickland* test to prove his or her claims. *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Movant must demonstrate: (1) trial counsel failed to exercise the level of skill and diligence reasonably competent trial counsel would in a similar situation, and (2) he was prejudiced by that failure. *Id.* at 687.

Movant must overcome the strong presumption trial counsel's conduct was reasonable and effective. *Johnson*, 406 S.W.3d at 899. To overcome this presumption, a movant must identify "specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance." *Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009). Trial strategy decisions may be a basis for finding ineffective assistance of counsel only if that decision was unreasonable. *Id.* "[S]trategic choices made after a thorough investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable...." *Dorsey v. State*, 448 S.W.3d 276, 287 (Mo. banc 2014) (quoting *Strickland*, 466 U.S. at 690).

"To establish relief under *Strickland*, a movant must prove prejudice." *Johnson*, 406 S.W.3d at 899. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Deck v. State*, 68 S.W.3d 418, 429 (Mo. banc

2002) (quoting *Strickland*, 466 U.S. at 694). Prejudice in a death penalty case is "a reasonable probability that, but for counsel's deficient performance, the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009) (quoting *State v. Kenley*, 952 S.W.2d 250, 266 (Mo. banc 1997)). Movant's points on appeal will be addressed out of order for clarity.

Points I through IV – Juror 58

Movant raises four points related to Juror 58's conduct during voir dire and while serving on the jury. Two months before serving on the jury, Juror 58 published a 184-page book, which he described as a fictionalized autobiography. The book contains six pages chronicling the protagonist's brutal and graphic revenge murder of a defendant who killed the protagonist's wife in a drunken-driving accident. The protagonist viewed the defendant as escaping justice in the court system because the defendant received only probation following his conviction. The book's front and back covers contain illustrations of blood spatter. The back cover states the protagonist's life changed forever when his wife was killed and her murderer was set free. The cover states the protagonist "sought vengeance" and "seeks justice" and "knows he will die fighting the system."

Point I – Failure to Question Juror 58 during Voir Dire

Movant argues the motion court clearly erred in denying his claim trial counsel were ineffective for failing to question Juror 58 when he volunteered he

was a published author. Movant claims questioning Juror 58 about the book's contents would have uncovered grounds to strike him for cause. Movant claims he was prejudiced because the book's contents demonstrated Juror 58 could not serve fairly and should have been struck for cause.

A defendant has a constitutional right to a fair and impartial trial. U.S. Const. amends. VI, XIV; Mo. Const. art. I, sec. 18(a). This right includes "adequate voir dire to identify unqualified jurors." *Knese v. State*, 85 S.W.3d 628, 632 (Mo. banc 2002). "[A] veniremember should be asked if he or she holds any prejudices or biases that would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" *Id.* at 632 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). "This inquiry is meant to reveal whether a juror can set aside any prejudices and impartially fulfill his [or her] obligations as a juror." *Id.*; *Wainwright v. Witt*, 469 U.S. 412, 421-22 (1985).

"A challenge for cause will be sustained if it appears that the venireperson cannot 'consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case.'" *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000) (quoting *State v. Rousan*, 961 S.W.2d 831, 839 (Mo. banc 1998)). "In cases in which the death penalty may be imposed, a person who cannot be impartial due to an improper predisposition is unfit to serve on the jury." *Dorsey*, 448 S.W.3d at 299 (quoting *Anderson v. State*, 196

S.W.3d 28, 41 (Mo. banc 2006)). The fitness of a juror is considered in the context of the entire examination of the juror and not by focusing on one response. *Middleton v. State*, 103 S.W.3d 726, 734 (Mo. banc 2003).

Failure to strike a juror who is unfit to serve because of an improper predisposition is structural error. *Anderson*, 196 S.W.3d at 40. When a "defendant is deprived of the right to a fair and impartial jury, prejudice therefrom is presumed." *Strong v. State*, 263 S.W.3d 636, 647 (Mo. banc 2008) (quoting *Everage v. State*, 229 S.W.3d 99, 102 (Mo. App. W.D. 2007)). "Nonetheless, in order to avail himself of this presumption, [Movant] must establish that the errors complained of resulted in his trial by a jury that was not fair and impartial." *Id.*

During the death qualification voir dire, Juror 58 stated he could give meaningful consideration to returning any appropriate sentence if the jury reached that point in the proceedings. Juror 58 approached the bench during a break to inform the circuit court he failed to mention his son was a Springfield police officer and he was a published author. When trial counsel asked the venire panel whether they had family members in law enforcement, Juror 58 spoke about his son but stated it would not affect his ability to be fair in this case. Neither party questioned Juror 58 about being an author.

Juror 58 was chosen for the jury and served as the foreman. The jury returned a guilty verdict. That evening, Movant's aunt provided trial counsel with a

copy of Juror 58's book. Kessler reviewed the book overnight and presented arguments concerning Juror 58's fitness to serve as a juror the next day.

Kessler read excerpts into the record and argued the excerpts demonstrated Juror 58 was not truthful when he answered questions during voir dire. Kessler asked the circuit court to question Juror 58 on the record about the book's contents and his personal beliefs. Kessler also requested the circuit court question all of the jurors about any effect Juror 58's personal beliefs and opinions had on jury deliberations. The circuit court denied the request to question Juror 58 because it found no evidence of juror misconduct and believed questioning Juror 58 might improperly taint the whole jury. Kessler then moved for a mistrial, arguing he would have to concede ineffectiveness for failing to inquire about the book during voir dire. The circuit court overruled the motion but advised Movant he could question the jurors, if necessary, after the trial. Juror 58 later was removed from the jury by the consent of the parties and did not participate in the penalty phase.

In his motion for new trial, Movant argued the circuit court erred in failing to declare a mistrial after the book's contents were revealed. Movant alleged Juror 58 failed to disclose he wrote a book about the criminal justice system. Movant further alleged Juror 58 failed to inform the circuit court during voir dire he believed the court system was weak and vigilante justice was an appropriate remedy. Movant argued the book constituted evidence Juror 58 was not completely truthful about his views about the death

penalty and his experiences with the criminal justice system. The circuit court overruled Movant's motion.

On direct appeal, Movant argued the circuit court should have sustained his motion for a mistrial or motion for new trial because the book's contents were so close to the facts of Movant's case and revealed such an inherent bias it must have meant Juror 58 lied during voir dire when he stated he could be fair and impartial. *Shockley*, 410 S.W.3d at 199. Movant further claimed Juror 58's experiences and beliefs, as illuminated in his book, likely were influential upon the other jurors. *Id.* This Court found Movant's argument without merit, first noting none of the parties asked Juror 58 any questions about his book during voir dire, even after Juror 58 volunteered he was a published author. *Id.* at 200. Hence, Juror 58 could not have lied in response to a question he was not asked. *Id.* This Court further found:

> While the nature of the novel's subject matter caused the court concern, the court determined that nothing in the record demonstrated that Juror 58 lied when he said he could be fair and impartial or that he was willing but reluctant to impose the death penalty. [Movant's] argument to the contrary is premised on a degree of factual congruity between the novel and the facts of the trial that does not exist. Further, [Movant's] argument that Juror 58's assurance of his impartiality was false is premised on the assumption that Juror 58 shared the views expressed by the protagonist in his novel and

> tried to hide that fact from the court and counsel so that he could be seated on the jury. This is inconsistent with the fact that it was Juror 58 himself who brought his book, and his son's police work, to the attention of the court and counsel so they could include these issues in their remaining line of questions.

Id. at 200-01 (footnote omitted).

At the post-conviction evidentiary hearing, Juror 58 testified he was excited about having his first book published, and he brought at least four copies with him to the hotel. Juror 58 described the book as "a love story" with themes in which "[s]ome of them are very violent, some are heart rendering, some will make you laugh, some will make you cry and some will make you feel anger." Juror 58 admitted many of the chapters were filled with his own true life experiences or those of someone he served with in the military. Juror 58 described the book as a fictionalized autobiography, but he denied the graphic contents happened to him. Juror 58 went into great detail outlining which plot points were based on his personal experience and which ones were fictionalized. Juror 58 was questioned extensively about the book's themes and disavowed he personally held any of those ideas because it was not his personal belief the court system was not good. Further, he denied relating or expressing the book's themes to other jurors. Juror 58 was adamant the book had no bearing on his decision and no bearing on anyone else as far as he knew. Juror 58 said it became clear to him Movant was guilty only after his grandmother testified.

Bruns testified one of his concerns during voir dire was to weed out potential jurors who were so pro-law enforcement they could not be fair. When Juror 58 mentioned his son was a police officer and he was a published author, Bruns' attention was drawn to the fact he had a law enforcement family member.

Kessler admitted Juror 58 was not asked any follow-up questions after he revealed he was a published author. Kessler explained, "[O]ne of the reasons I didn't ask any further questions at the time because, I mean, in 2008, '09, '10, self-publishing just sort of meant that ... it was a vanity project" and the book was not distributed widely.[4] Because the central issue concerned contradictory ballistics evidence, Kessler did not see a problem with Juror 58 being a self-published author or see a reason to question him about it. Instead, Kessler testified he noticed Juror 58 had some military experience, his son was a police

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[4] This testimony refutes the dissenting opinion's claim trial counsel had no valid strategic reason for failing to question Juror 58 about being an author. Further, the dissenting opinion would have this Court adopt a rule that a potential juror's employment as an author, standing alone, establishes the juror has "multiple sources of bias," which must be explored for trial counsel to conduct an effective voir dire. However, this proposed rule is based solely upon having the benefit of hindsight regarding the contents of Juror 58's novel. The dissenting opinion cannot point to any of Juror 58's voir dire testimony that revealed "multiple sources of bias" simply from Juror 58's status as a published author. Accordingly, there was nothing to prompt trial counsel's further exploration, especially when also presented with Juror 58's knowledge about guns and his son's law enforcement background, which were germane to the case.

officer, and they both had knowledge about guns. Kessler remembered conceding ineffective assistance of counsel for failing to follow up with Juror 58 after reading the book at trial and stated he never stated that on the record before. Kessler explained he said he was ineffective to try to force the circuit court to allow trial counsel to question Juror 58 about the book or remove him from the jury. Kessler testified had he asked follow-up questions about the book, he would have moved to strike Juror 58 for cause.

The motion court found it was reasonable for trial counsel to focus their attention on Juror 58's relationship with his police officer son and the impact that might have had on his ability to be a fair and impartial juror rather than on Juror 58's participation in a hobby or profession that had no bearing on his suitability as a juror in this particular case. This Court agrees.

Trial counsel articulated strategic reasons why they chose not to question Juror 58 about being a published author. Trial counsel explained the case involved the murder of a law enforcement officer and contradictory ballistics evidence. Trial counsel questioned Juror 58 regarding his son being a police officer and his knowledge of guns, which were crucial parts of their trial strategy in selecting jurors and in presenting their theory of the case. "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a

reasonable strategy." *Clayton v. State*, 63 S.W.3d 201, 207-08 (Mo. banc 2001).[5]

Movant also attacks Juror 58's veracity due to his characterization of the book as "a love story" in the face of its graphic nature criticizing the criminal justice system. After careful review of the book, Juror 58 accurately described the overall storylines within the book as "[s]ome of them are very violent, some are heart rendering, some will make you laugh, some will make you cry and some will make you feel anger." However, even if this Court rejected Juror 58's primary characterization of his book as "a love story," mere authorship of a book expressing unfavorable views of the justice system over the course of six pages does not prove Juror 58 personally held the beliefs espoused in his book rendering him unfit to serve on the jury. It is worth noting this Court found in Movant's direct appeal "*a degree of factual congruity between the novel and the facts of the trial* [*did*] *not exist.*" *Shockley*, 410 S.W.3d at 200-01 (emphasis added).

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[5] Movant argues his case is akin to *Knese*, in which trial counsel was found ineffective after admitting he wholly failed to read the juror questionnaires revealing strong opinions about the death penalty prior to voir dire. *Knese*, 85 S.W.3d at 632-33. *Knese* does not aid Movant's argument. While trial counsel did not question Juror 58 about his book, trial counsel were aware of Juror 58's status as an author but chose to forego that line of questioning in favor of implementing their reasonable trial strategy of uncovering pro-law enforcement bias and helpful knowledge about firearms.

Although Kessler admitted he was ineffective for failing to question Juror 58 about being an author, the record does not support a finding that, had Kessler discovered the book's contents and questioned Juror 58 about them that Juror 58 would have been struck for cause absent some showing the book reflected his personal beliefs. Juror 58 stated during voir dire he could be fair and impartial in a case in which a law enforcement officer was killed because he "has his own mind" in listening to the facts. At the evidentiary hearing, Juror 58 testified he did not hold the personal beliefs in the book. Movant presented no evidence to contradict Juror 58's testimony. Hence, Movant cannot demonstrate he was prejudiced by trial counsel's failure to question Juror 58 about the book. *See Glass v. State*, 227 S.W.3d 463, 474 (Mo. banc 2007) (holding although trial counsel testified it was a mistake to forego questioning the venire panel, the movant could not prove prejudice because he made no showing the jurors were unable or unwilling to consider the evidence presented in light of their testimony they were willing to follow the circuit court's instructions). The motion court did not err in denying this claim.

Point II – Failure to Present Witnesses at Motion for New Trial Hearing Regarding Alleged Juror Misconduct

Movant alleges the motion court clearly erred in denying his claim trial counsel were ineffective for failing to call witnesses at the motion for new trial hearing to demonstrate how Juror 58's actions constituted prejudicial juror misconduct and violated

the circuit court's directive regarding reading materials while sequestered. Movant alleges trial counsel should have called jurors, court personnel, and the trial judge—after seeking his disqualification—when invited to do so by the circuit court to prove this allegation.

Movant can prevail on a claim for ineffective assistance of counsel based on trial counsel's alleged failure to investigate only if he can demonstrate: (1) trial "counsel's failure to investigate was unreasonable" and (2) Movant "was prejudiced as a result of [trial] counsel's unreasonable failure to investigate." *Barton*, 432 S.W.3d at 759. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Collings v. State*, 543 S.W.3d 1, 16 (Mo. banc 2018) (quoting *Strickland*, 466 U.S. at 691).

On March 30, 2009, the circuit court entered an order, contemplating a hearing may be required to present additional testimony, evidence, and arguments by the parties regarding Juror 58's conduct. To avoid the appearance of impropriety, the circuit court ordered "no member of the jury, including all alternates, shall discuss any matter regarding this case with any person, and no one shall be permitted to discuss any matter with them (all jurors and alternates)."

On April 22, 2009, Movant filed his motion for new trial, which contained sixteen claims of trial court error. The motion alleged the circuit court erred in

refusing trial counsel's request to hold a hearing to question Juror 58 about the book's contents and his beliefs. The motion further argued the circuit court erred in refusing trial counsel's request to hold a hearing to question all of the jurors about the effect Juror 58's personal beliefs and opinions had on the jury's guilt phase deliberations.

On April 29, 2009, the circuit court issued a letter to the attorneys stating, "I want to determine whether the state or [Movant] will be requesting (or subpoenaing) any juror in this case to testify about any issue raised at trial or in pending motions." The circuit court advised the attorneys to make arrangements for a conference if either side planned to question any juror at the post-trial hearing. On May 22, 2009, the circuit court held the hearing on Movant's motion for new trial. Kessler stated the defense did not intend to call any additional witnesses, including Juror 58.

On direct appeal, Movant argued the circuit court committed reversible error for failing to conduct its own inquiry sua sponte into whether extraneous information or prejudicial materials were part of the jury's deliberations. This Court found Movant's claim without merit, stating, "Not only did neither counsel take the judge up on this offered opportunity to question Juror 58 about whether he had discussed his novel with other jurors, defense counsel specifically waived any right to such a hearing." *Shockley*, 410 S.W.3d at 201. Because trial counsel affirmatively waived the opportunity to call witnesses, this Court refused to speculate whether Juror 58 shared his

book's themes or viewpoints with other jurors or whether he lied during voir dire about being fair and impartial. *Id.*

At the evidentiary hearing, Kessler testified he was not allowed to contact the jurors prior to filing the motion for new trial because of the March 30, 2009, order. Bruns testified the circuit court indicated it would hold a conference and let trial counsel subpoena jurors, which they discussed but did not do.

Even if this Court believes trial counsel should have taken up the circuit court's invitation to hold a hearing on Juror 58's alleged misconduct, this belief alone is insufficient to find trial counsel ineffective. "The question in an ineffective assistance claim is not whether counsel could have or even, perhaps, should have made a different decision, but rather whether the decision made was reasonable under all the circumstances." *Johnson*, 406 S.W.3d at 901 (quoting *Henderson v. State*, 111 S.W.3d 537, 540 (Mo. App. W.D. 2003)). "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." *Anderson*, 196 S.W.3d at 33. "Ineffective assistance of counsel will not lie where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy, and it is the exceptional case where a court will hold a strategic choice unsound." *State v. White*, 798 S.W.2d 694, 698 (Mo. banc 1990).

This case does not present the exceptional case requiring a finding trial counsel were ineffective in failing to present witnesses on this issue. Trial counsel both testified, after the jury could not agree

on punishment, they believed they were in a better position to argue for a life sentence, which would be the ultimate goal for any reasonable trial counsel after the jury's guilty verdict. Kessler testified he considered it a victory that the jury could not agree on punishment in light of everything that transpired. Bruns testified the trial judge had "been good" to them during the trial and believed—perhaps naively—that not "opening the can of worms" regarding the juror misconduct issue would inure to Movant's benefit. Finally, Kessler had significant trial experience and never had a trial judge impose a death sentence after the jury could not agree on punishment in cases he tried. Even though trial counsel's strategy failed in hindsight, the record clearly demonstrates trial counsel evaluated their options, drew upon their experience, and chose to forego "opening the can of worms" regarding Juror 58's alleged misconduct in exchange for attempting to persuade the circuit court to impose a life sentence to save Movant's life. Trial counsel's decisions were reasonable under all of the circumstances. The motion court did not clearly err in denying this claim.

Point III – Circuit Court's Timely Disclosure Regarding Juror 58's Book

Movant argues the motion court clearly erred in denying his claim the circuit court failed to timely disclose Juror 58 brought his book to the sequestered jury. Movant argues the circuit court had an affirmative duty to apprise trial counsel of Juror 58's misconduct in a timely fashion. By failing to apprise counsel timely, Movant argues he was deprived of an

opportunity to demonstrate prejudice warranting a mistrial or ordering a new trial.

In the April 29, 2009, letter, the circuit court informed the attorneys, "[R]egarding the 'book' referred to at trial, I have been advised that the same juror gave a copy of his book during the week of trial to the [sheriff]." At the motion for new trial hearing, Kessler stated the parties were unaware the circuit court had a copy of the book until he received the April 29, 2009, letter, which was after the motion for new trial was due. The circuit court explained the sheriff brought in the book after the guilty verdict and gave it to his administrative assistant. The circuit court stated, "At that time I didn't know what the books was or its contents.... It was after the argument that I realized that it was the same book." The circuit court later confirmed it did not receive the book until after the guilty verdict was returned.

At the evidentiary hearing, the trial judge testified that, when the parties appeared the morning after the guilty verdict to discuss Juror 58's book, he did not know if he told the attorneys he received a copy of the book. The trial judge did not remember having a conversation with court personnel about the book. The trial judge also did not remember if the April 29, 2009, letter was the first time he informed the parties he had received a copy of the book during the trial.

Bruns and Kessler testified they did not know the trial judge had a copy of the book before they brought it to his attention, and they were told nothing until the April 29, 2009, letter. Kessler stated this constituted another ground to examine Juror 58

because he violated the circuit court's directive not to bring anything crime-related to the trial. Kessler testified he would have included this allegation in the motion for new trial had he known the circuit court had a copy of the book.

The motion court found Movant merely established the trial judge had the ability to know about the book prior to trial counsel addressing the issue. The motion court found Movant failed to prove any misconduct or prejudice from the trial judge's actions in violation of his constitutional rights.

Initially, this Court notes Movant's point on appeal raises different legal arguments than those presented for the motion court's consideration in his Rule 29.15 motion. Movant's motion alleged the trial judge failed to disclose timely he learned before the guilt phase deliberations Juror 58 had given the book to the sheriff and the trial judge questioned the sheriff about the book. Movant's motion further accused the trial judge of: (1) considering information not on the record; (2) prejudging the issue by considering the statements from the sheriff and other court personnel regarding the book; and (3) failing to recuse himself. Movant's motion does not allege the trial judge failed to disclose Juror 58 brought his book to the sequestered jury.

"In actions under Rule 29.15, any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal." *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. banc 2011) (quoting *State v. Clay*, 975 S.W.2d 121, 141-42 (Mo. banc 1998)). "Pleading defects cannot be remedied by the presentation of

evidence and refinement of a claim on appeal." *Id.* Moreover, "there is no plain error review in appeals from postconviction judgments for claims that were not presented in the post-conviction motion." *McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. banc 2012). To the extent Movant now claims the circuit court failed to timely disclose Juror 58 brought his book to the sequestered jury, his claim is not preserved for appeal, nor is it supported by the record. Movant does not raise any of the other grounds from his Rule 29.15 amended motion and specifically disavows his claim concerns ex parte communications.[6] The motion court did not clearly err in denying this claim.

Point IV – Juror Misconduct by Violating the Circuit Court's Directive

Movant argues the motion court clearly erred in denying his claim Juror 58 committed juror misconduct and violated the circuit court's directive regarding bringing his book to the sequestered jury and sharing it with the other jurors. Movant argues Juror 58's book prejudiced his ability to receive a fair trial in that its violent storyline espoused the need for vengeance because the court system was "too lenient"

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[6] Further, even if Movant's point on appeal could be read to encompass this claim, the circuit court's acts or omissions did not prohibit trial counsel from developing a record regarding Juror 58's dissemination of his book to the other jurors. The circuit court provided trial counsel with an opportunity to develop this evidence at the hearing on the motion for new trial. Trial counsel chose to forego this line of inquiry in hopes of strengthening their argument for a life sentence for Movant.

with criminal defendants accused of homicide offenses.

"Issues that could have been raised on direct appeal—even if constitutional claims—may not be raised in postconviction motions, except where fundamental fairness requires otherwise and only in rare and exceptional circumstances." *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992); *State v. Carter*, 955 S.W.2d 548, 555 (Mo. banc 1997). Generally, juror misconduct constitutes trial error and is outside the scope of postconviction relief proceedings. *Eye v. State*, 551 S.W.3d 671, 677 (Mo. App. E.D. 2018). "[A] juror misconduct claim amounting to a constitutional error can only be raised in a Rule 29.15 motion when the factual basis of the juror misconduct was not discovered until after the trial." *Id.*

Movant cites *McQuary v. State*, 241 S.W.3d 446 (Mo. App. W.D. 2007), to support his argument this claim is cognizable because rare and exceptional circumstances require its review due to Movant's fundamental right to a fair and impartial jury in a death penalty case. In *McQuary*, a juror intentionally failed to disclose a significant social relationship with the state's principal witness, and the movant raised this claim for the first time in his Rule 29.15 motion. *Id.* at 450. The Western District found the movant had not been afforded an opportunity to litigate the claim and held, "Given the unique posture of this case, we conclude that [the movant's] post-conviction motion establishes exceptional circumstances that have prevented him from asserting a claim of constitutional

error that may have deprived him of a fair trial." *Id.* at 454.

In this case, Movant had an opportunity to litigate this claim during the hearing on his motion for new trial. However, trial counsel declined to raise the issue in hopes of strengthening their argument for a life sentence for Movant. Further, Movant raised issues related to this claim on direct appeal, arguing he suffered prejudice because Juror 58 may have improperly influenced other jurors by speaking about the book's contents, which he believed impacted the verdict. *Shockley*, 410 S.W.3d at 199-200. This Court found no basis for reversal was demonstrated because it would not speculate about Juror 58's actions or influences when trial counsel declined to question Juror 58 at the hearing on Movant's motion for new trial. *Id.* at 201-02.

While the state agrees Movant could have presented this claim in his direct appeal, it cites *Jackson v. State*, 538 S.W.3d 366 (Mo. App. W.D. 2018), as authority for this Court to deny Movant's claim on the merits. In *Jackson*, the Western District relied on *McQuary* to require the movant to demonstrate rare and exceptional circumstances exist justifying raising a claim of juror misconduct in a Rule 29.15 proceeding when the misconduct was not discovered until after the trial. *Id.* at 370. The court found the movant failed to allege facts demonstrating when the juror's alleged misconduct was discovered, which would make his claim noncognizable. *Id.* at 370-71. Nevertheless, the Western District reviewed the claim on the merits, explaining, "[A]s the circuit court

granted [the movant] an evidentiary hearing on the claim, denied the substantive claim, and this [c]ourt agrees that the substantive juror misconduct claim must also fail on the merits, we will also address the substance of [the movant's] juror misconduct claim." *Id.* at 371. Likewise, this Court will address the merits of Movant's claim only because it presents the same procedural posture as *Jackson* in that the motion court heard evidence on the issue, denied the substantive claim, this Court agrees the claim fails on the merits, and it raises a challenge to the propriety of Movant's capital murder guilty verdict.

In this point, Movant alleges Juror 58 committed intentional juror misconduct and violated the circuit court's directive about bringing his book to the sequestered jury and sharing it with the other jurors. "This Court presumes bias and prejudice occurred if a juror intentionally withholds material information. Accordingly, a finding of intentional nondisclosure of a material issue is tantamount to a *per se* rule mandating a new trial." *State v. Ess*, 453 S.W.3d 196, 205 (Mo. banc 2015) (internal citation omitted).

Movant incorporates and repeats many of the same arguments concerning Juror 58's conduct he raised in his first three points. The issue remains whether Juror 58 intentionally disregarded the circuit court's directive concerning bringing certain personal materials while sequestered and to what extent, if any, Juror 58's conduct prejudiced Movant's right to a fair trial.

The jury was sequestered during trial. The circuit court appointed a jury coordinator to assist the jurors

during sequestration. The jury coordinator prepared a jury information packet, which the parties were invited to review for any objectionable material. Trial counsel requested the jury should not have "crime stories, CSI-kind of things that lead them to believe ... we should have to come up with ... these extraordinary defenses and alibis -- or that the [s]tate has to come up with this extraordinary scientific evidence." As part of a lengthy discussion regarding what to expect during sequestration, the circuit court gave the following directive to the jury:

> You will be able to bring books with you, even movies with you, to trial. The cautionary note on there, the only one the attorneys ask that I mention, avoid movies and books about trials, particularly periodicals or legal documents. That's normally something, again, the law has to be supplied by the judge, not due to your independent research and investigation. So general movies, avoiding crime shows and issues of that nature.

Movant offered testimony from several jurors and court personnel at the evidentiary hearing regarding their interactions with Juror 58 and his book. Juror 3 testified Juror 58 gave him his card, which stated Juror 58 was the book's author. Juror 3 asked Juror 58 about being an author, and Juror 58 said he wrote a book and had it with him. Juror 3 looked at the book, read the back cover, and returned it. Juror 3 never saw other jurors with a copy of the book or reading the book.

Juror 50 testified Juror 58 gave her a copy of his book. Juror 50 read two or three pages but "there was something that made [her] think maybe [she] shouldn't be reading this" and she returned the book to Juror 58.

Juror 117 and her husband operated a gift shop specializing in Native American items. Juror 58 visited their shop several weeks before the trial and spoke with Juror 117's husband about possibly carrying the book in the shop. After Juror 117 arrived at the courthouse to serve on the jury, her husband gave her a copy of Juror 58's book. Juror 117 put the book in her backpack, and she pulled it out later that evening. Juror 117 read the introduction, skimmed through the book, and put it away because she was too tired to read. Juror 117 testified she never looked at the book again during the trial. Juror 117 stated, if she had read the back of the book before putting it in her backpack, she would not have brought it with her because she thought it fell under the circuit court's directive not to bring books about trials or crimes.

A Howell County sheriff testified he was the supervisor of court security for the courthouse where Movant's trial took place. After a day in court, Juror 58 approached the sheriff at the hotel, talked to him about writing a book, and asked the sheriff if he wanted to read it. Juror 58 gave the sheriff a copy of the book. The sheriff testified he either read or glanced at the forward. The sheriff was concerned and brought the book's contents to the circuit court's attention through the court's administrative assistant. The sheriff testified the circuit court

questioned him approximately an hour after he gave the book to the administrative assistant. The sheriff did not see any other copies of the book. The sheriff never heard the jurors talking about writing a book or publishing a book.

The administrative assistant testified she did not remember how the book came into the circuit court's chambers, but the sheriff received the book from Juror 58. The administrative assistant described the book as "fairly graphic in some of its content."

The jury coordinator testified that shortly after being chosen for the jury, Juror 58 approached her and asked her if she liked to read. Juror 58 told her he wrote a book and handed her a copy. The jury coordinator noted Juror 58 was proud to have written the book, so she took a copy, put it in her bag, but never opened or read it. The jury coordinator did not see other copies of the book during the week of the trial nor did she observe Juror 58 give the book to anyone else. The jury coordinator was called into the trial judge's chambers after trial counsel raised the issue regarding the book's dissemination to other jurors. The trial judge spoke to her about the alternate jurors but did not question her about the book.

The trial judge testified he did not see a copy of the book until after the jury reached its guilty verdict, and he believed his administrative assistant placed it on his desk before she left for the day. The trial judge stated he glanced at the book, intended to return the book to Juror 58, and planned to speak to the trial attorneys about the book the next morning. Trial counsel met in the trial judge's chambers the next

morning to discuss removing Juror 58. The trial judge did not know if any of the attorneys saw the book on his desk.

Juror 58 admitted he gave copies of his book to Juror 3, the sheriff, the jury coordinator, and possibly one other female juror. Juror 58 handed the copies out at night after the jury returned to the hotel. Juror 58 did not remember the circuit court telling them to avoid bringing books about trial and crimes with them. After being read the circuit court's directive, Juror 58 felt he complied because his book was not about jury trials, but was "a love story" with only one chapter about the courts.

The motion court found the circuit court's directive did not have the same legal significance as a Missouri Approved Instruction (hereinafter, "MAI"). The motion court further determined the evidence did not establish intentional misconduct but "at most a miscommunication about what the court intended." Movant argues these findings trivialize and demean the circuit court's directive because it was intended to ensure the jurors complied with other MAIs related to the jury's duty to determine the facts only from the evidence presented in court.

The motion court found the trial court's directive was similar to the informational pamphlet given to the jurors in *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995). In *Storey*, the defendant argued the circuit court plainly erred in distributing an information pamphlet—which he equated to jury instructions—to the jury and argued trial counsel was ineffective for failing to object to it. *Id.* at 892. This Court explained

the informational pamphlet was not an instruction because "[a] jury instruction is a 'direction given by the judge to the jury concerning the law of the case.'" *Id.* (quoting *Black's Law Dictionary* 856 (6th ed. 1990)).

In this case, trial counsel sought the directive to prevent the jurors from being exposed to materials that would cause them to require the parties to put on "these extraordinary defenses and alibis -- or that the [s]tate has to come up with this extraordinary scientific evidence" instead of being guided by the evidence and instructions presented. The circuit court's lengthy discussion about how sequestration would work and its directive regarding what jurors could bring with them did not amount to formal jury instructions concerning the law of the case. Moreover, even taking into account the very limited exposure three jurors had to the book, nothing in the book can be construed as requiring either of the parties to put on extraordinary defenses, alibis, or scientific evidence, and Movant does not argue as such.

Movant argues it is irrelevant whether Juror 58's conduct constituted intentional misconduct because Juror 58's conduct and the book's alleged influence over the other jurors is akin to those in *State v. Post*, 804 S.W.2d 862 (Mo. App. E.D. 1991) (*overruled on other grounds by State v. Carter*, 78 S.W.3d 786, 789 n.5 (Mo. App. E.D. 2002)). In *Post*, the Eastern District reversed a first-degree murder conviction due to juror misconduct and law enforcement officers' outrageous conduct. *Id.* at 863. The evidence adduced demonstrated: (1) unauthorized deputies socialized

with the sequestered jurors by playing cards, drinking beer, and one deputy commented about the case; (2) a police officer not assigned to or connected with the case socialized with the jurors and ate dinner with them while dressed in her uniform; (3) an unauthorized deputy had sexual contact with an alternate juror; and (4) a deputy assigned to the jury boasted to other members of the sheriff's department he was having sex with a jury member. *Id.* at 862-63. The trial court found "the jury was denied the opportunity and ability to act as a sequestered jury [because the jurors] were distracted from 'due and fair consideration of the facts'" and the verdict did not command confidence because it "was replete with suspicion of improper bias." *Id.* at 863. The Eastern District concluded, "No one should be on trial for any crime, much less murder, in such a lackadaisical atmosphere." *Id.*

Movant's assertion Juror 58's conduct was more egregious than the jurors' conduct in *Post* due to his book's vengeance theme is unpersuasive. Unlike the jurors in *Post,* three jurors had very fleeting exposure at best, to Juror 58's book over the course of a week-long sequestration. Juror 58 denied any discussion took place with any of the jurors about the book's themes. This testimony is corroborated by the other jurors and court personnel. None of the jurors read the book in its entirety. Rather, the jurors testified they read a few pages from the introduction or skimmed the cover and refrained from any further exposure due to their belief it fell within the circuit court's directive. The sheriff and jury coordinator both testified they

never saw any juror with the book or saw them reading or heard them discussing the book. There was no evidence any of the jurors read the pertinent parts of the book concerning the criminal case, the defendant's lenient sentencing, or the graphic description of how the protagonist avenged his wife's murder. Hence, there was no evidence the sequestered jury was distracted by the book to the point it could not give due and fair consideration of the facts, thus distinguishing this case from *Post*.

"While every party is entitled to a fair trial, as a practical matter, our jury system cannot guarantee every party a *perfect* trial." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. banc 2010). While the circuit court's directive did not amount to a formal jury instruction, this case illustrates how a lay juror may misunderstand or misinterpret the parameters of acceptable materials to bring while sequestered. When trial counsel sought to question Juror 58 about his conduct, the circuit court denied the request because it found no evidence of juror misconduct. "As the trial court presides over the entirety of a trial, it is familiar with the circumstances surrounding a juror's misconduct. Accordingly, it is in the best position to determine what effect, if any, juror misconduct may have had on a jury's verdict." *Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 710-11 (Mo. banc 2016). Further, this Court determined on direct appeal Juror 58 did not intend to conceal his status as an author or hide the contents of his book, as he explicitly brought this fact to the attention of the circuit court and trial counsel.

Shockley, 410 S.W.3d at 201. The record supports the motion court's finding Juror 58's conduct amounted to a miscommunication about what was appropriate rather than intentional misconduct.

Even if Movant's trial was not perfect due to Juror 58 bringing his book to the sequestered jury, the motion court did not err in finding Movant suffered no prejudice. On direct appeal, this Court found nothing in the trial record supported the argument Juror 58 lied about being able to be fair and impartial, or he was willing but reluctant to impose the death penalty. *Shockley*, 410 S.W.3d at 200. Movant has not adduced any evidence contradicting this finding. Further, this Court rejected the idea Juror 58's assurances of impartiality were false because Movant assumed Juror 58 shared the views expressed by the protagonist in his book and tried to hide that fact from the court and trial counsel so he could be seated on the jury. *Id.* at 201. Juror 58 expressly disavowed he personally held the protagonist's views, and again, Movant offered no evidence to the contrary.[7]

Finally, when conducting proportionality review on direct appeal, this Court rejected Movant's

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[7] The dissenting opinion does not analyze whether Juror 58 committed juror misconduct by merely bringing his book to the sequestered jury nor does it argue the motion court's judgment was clearly erroneous in that regard. The dissenting opinion further speculates Juror 58's book "could have affected the jury's inability to decide on punishment," but it fails to cite any evidence to support this supposition or to refute any of the testimony offered by all of the jurors that the book had no influence on their deliberations.

argument his death sentence was excessive because the underlying verdict was based on circumstantial evidence and the jury deadlocked on punishment. This Court found when summarizing the evidence, the circumstantial evidence was strong and his sentence was proportionate. *Shockley*, 410 S.W.3d at 203-04. The record supports the motion court finding there was no evidence the jurors' momentary exposure to Juror 58's book had any influence on the individual jurors, their deliberations, or their verdict. The motion court did not clearly err in denying this claim.

Point XI – Failure to Strike Juror 3

Movant claims the motion court clearly erred in denying his claim trial counsel were ineffective for failing to move to strike Juror 3, who Movant alleges was more inclined to impose a death sentence in a case involving the killing of a law enforcement officer. Movant contends Juror 3 was impaired substantially as to his ability to consider life and reasonably competent counsel would have moved to strike Juror 3 for cause. Movant argues prejudice is presumed but further alleges he was prejudiced because he did not have a full panel of jurors who could consider a life sentence.

"[A] person who cannot be impartial due to an improper predisposition is unfit to serve on the jury." *Dorsey*, 448 S.W.3d at 299 (citing *Anderson*, 196 S.W.3d at 41). "A prospective juror may be excluded for cause only if the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instructions and oath." *Middleton*, 103 S.W.3d at 734.

During the death qualification voir dire, Juror 3 stated he would not consider sentencing until after the verdict. Juror 3 was asked, "Does the fact [Victim] ... has the status of a law enforcement officer then change your deliberation in the second stage? Would you say that you automatically would be more inclined to give the death penalty simply because it was the murder of a law enforcement officer?" Juror 3 answered, "I probably would be more inclined." Kessler explained the state had to prove an aggravating circumstance existed beyond a reasonable doubt during the penalty phase and a finding Movant killed Victim would prove one aggravating circumstance beyond a reasonable doubt. Juror 3 stated, "I respect law officers and what they have to do. I guess I would feel that's more of a crime than just an average --." Kessler responded, "Okay. And that's fair."

Kessler later asked Juror 3 if he was "more inclined to say that the person deserves the death penalty, and, therefore, that's the only punishment you're going to give meaningful consideration to?" Juror 3 answered, "I can't say that I would be more inclined because it would bother me. I respect law officers, but, I mean, I could be impartial." Kessler reiterated, "You would consider that as an aggravating circumstance, but it wouldn't automatically make you vote for the death penalty?" to which Juror 3 responded, "No, it would not." Juror 3 stated he would stand up to law enforcement or Victim's family and friends and base the verdict on the evidence in this case.

Neither Bruns nor Kessler had any recollection of Juror 3 or why they chose not to strike him. The motion court found no evidence in the record suggested a motion to strike Juror 3 would have been successful because his voir dire testimony was clear he could be impartial on the issue of punishment.

When examining the entire context of Juror 3's statements, this Court cannot say trial counsel were ineffective for failing to seek to strike him for cause. While Juror 3 initially stated he "would probably be more inclined" to vote for the death penalty, subsequent questioning revealed he could be impartial and would follow the circuit court's instructions. Juror 3 stated he would not only consider the death penalty for murdering a law enforcement officer, he could be impartial, and he would be able to stand up to law enforcement and Victim's family if the verdict did not include the death penalty. Hence, the record does not demonstrate Juror 3 would not consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the circuit court's instructions. Trial counsel were not ineffective for failing to move to strike Juror 3. The motion court did not clearly err in denying this claim.

Point V – Failure to Call a Ballistics Expert

Movant argues the motion court clearly erred in denying his claim trial counsel were ineffective for failing to call Steven Howard (hereinafter, "Howard") to testify as a ballistics expert on his behalf. Movant alleged Howard would have testified a Browning .243 rifle could not have fired the fatal shot that killed

Victim, and the shotgun wadding recovered from the scene was from a 10-gauge shotgun, not a 12-gauge shotgun. Movant argues this testimony would have countered the state's evidence he used a Browning .243 rifle and a 12-gauge shotgun to shoot Victim.

"Ordinarily the choice of witnesses is a matter of trial strategy and will support no claim of ineffective assistance of counsel." *Barton*, 432 S.W.3d at 750 (quoting *State v. Harris*, 870 S.W.2d 798, 816 (Mo. banc 1994)). "This is because 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Id.* at 750-51.

> To prove ineffective assistance for failure to call a witness, the defendant 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.'

Glass, 227 S.W.3d at 468 (quoting *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004)).[8]

Trial counsel's selection of which expert witnesses to call at trial generally is a question of trial strategy and is virtually unchallengeable. *Goodwin v. State*, 191 S.W.3d 20, 29 (Mo. banc 2006). To show ineffective assistance of counsel based on failure to present an

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[8] *Hutchison* was overruled on other grounds by *Mallow v. State*, 439 S.W.3d 764, 770 n.3 (Mo. banc 2014).

expert witness, a movant is required to show what the evidence would have been if the witness had been called. *Twenter*, 818 S.W.2d at 636. However, the "duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Strong*, 263 S.W.3d at 652 (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)).

Howard testified at the evidentiary hearing he was contacted by the first trial team to conduct a case evaluation, determine which firearm fired the bullet that killed Victim based on general rifling characteristics, and determine whether the bullet could have been fired from a Browning lever action rifle. Howard's expertise was not in firearm and toolmark identification. Howard did not examine the evidence or bullets from this case independently. Instead, Howard's opinions were formed after reviewing the work of Jason Crafton (hereinafter, "Crafton"), a Missouri highway patrol ballistics expert who testified for the state at Movant's trial. Howard did not testify whether he examined the work of the other ballistics expert, John Dillon (hereinafter, "Dillon"), who testified for the state and disagreed with Crafton's trial conclusions. Howard offered no testimony regarding the shotgun wadding at the evidentiary hearing.

At trial, Crafton testified the bullets recovered from Victim and Movant's home were fired from the same gun, finding they shared the same class characteristics. Crafton could not pinpoint a specific

caliber but opined it was a range of .22 to .24 caliber. Crafton further found the shotgun wadding components were consistent with a 10- to 12-gauge shotgun. Crafton excluded all of the firearms recovered from Movant's home as the murder weapon.

Marshall testified Howard told the first trial team the shotgun wadding was "almost certainly a 10-gauge," which was helpful to the defense because there was no evidence Movant ever owned a 10-gauge shotgun. Marshall stated Howard told him a Browning .243 rifle could not have fired the bullet recovered from Victim's body. The first trial team turned over its entire file to trial counsel, including Howard's information.

Bruns testified he and Kessler discussed whether to call their own ballistics expert, but after looking at the state's experts, they decided against it. Kessler testified he was responsible for preparing the ballistics evidence for trial. Kessler admitted he did not contact Howard and never considered calling another ballistics expert to testify. Kessler explained, because he had two expert witnesses testifying for the state who disagreed with one another, he planned to emphasis those differences during cross-examination. Kessler noted even if Howard told him the toolmarks from the Browning .243 rifle were different from the toolmarks on the recovered bullets, he would not have considered calling Howard to testify. Kessler stated he had bad experiences in the past with cross-examination of his own ballistic witnesses. Kessler stated he would rather cross-examine two experts on the same side and get them to contradict each other

than have his own "hired gun." The trial transcript reflects Kessler implemented this strategy of pointing out the contradictions between Crafton and Dillon during his cross-examination of both witnesses and throughout the trial.

The motion court found trial counsel's testimony that they reviewed the first trial team's entire file was credible. The motion court discounted the weight of Howard's testimony concerning his certifications and found he was not as experienced or knowledgeable as the state's ballistics experts. The motion court also rejected Howard's testimony excluding the Browning .243 rifle in lieu of Crafton's trial testimony that no exact firearm can be excluded unless the individual firearm is tested specifically. "This Court will not challenge the motion court's determination of [an expert witness's] credibility as it could make the best observation [of the witness] or trial counsel's strategic decision not to call a witness." *Forrest*, 290 S.W.3d at 715 (internal citation omitted). Moreover, these findings refute the heart of Movant's argument trial counsel's strategy did not address the state's theory a Browning .243 rifle was used to kill Victim. Finally, Howard's alleged testimony about the shotgun wadding was cumulative to Crafton's trial testimony the wadding recovered was consistent with a 10- to 12-gauge shotgun.

"Counsel may choose to call or not call almost any type of witness or to introduce or not introduce any kind of evidence for strategic considerations." *Vaca v. State*, 314 S.W.3d 331, 337 (Mo. banc 2010). The motion court determined trial counsel presented a

sound trial strategy for failing to call Howard on Movant's behalf. Kessler provided strategic reasons for choosing to forego presenting his own ballistics expert and instead chose to exploit the inconsistencies between Crafton's and Dillon's testimony. The motion court did not clearly err in denying this claim.

Point VI – Failure to Refute Inheritance of a Browning .243 Rifle

Movant argues the motion court clearly erred in denying his claim trial counsel were ineffective for failing to call his grandfather, Gerald Sanders (hereinafter, "Sanders"), to testify Movant did not inherit a Browning .243 rifle from his father. Movant argues Sanders' testimony would have refuted the state's theory Movant disposed of this specific rifle only after shooting Victim.

To prevail on a claim trial counsel failed to call a witness to testify, the movant must demonstrate the witness' testimony would have provided a viable defense. *Glass*, 227 S.W.3d at 468. Sanders was not called during the guilt phase and offered no testimony regarding any Browning .243 rifle Movant allegedly inherited from his father. However, the state called other witnesses who knew Movant and testified he inherited a rifle from his father.

Sanders testified at the evidentiary hearing he did not see Movant bring a Browning .243 rifle with him when Movant came to live with Sanders after Movant's father died. Sanders did not know what rifles Movant had at the time of the murder. Bruns testified he prepared and presented mitigating evidence during the penalty phase. Bruns stated it

was "tenuous" whether they would have asked Sanders about Movant inheriting a Browning .243 rifle during his mitigation testimony. Kessler testified he spent a lot of time with Sanders leading up to the trial, and the information about inheriting the rifle would not have come in during mitigation because it would have challenged the jury's verdict.

Movant correctly notes trial counsel did not testify specifically about their strategic reasons for failing to call Sanders during the guilt phase to rebut the state's witnesses who testified Movant inherited a Browning .243 rifle. However, Kessler testified if Movant would have taken the stand during the guilt phase, Movant was prepared to admit ownership of a .243 caliber rifle. In anticipation of Movant testifying, Henshaw stated during her opening statement Movant "will acknowledge that at one time he owned a lever-action .243 [rifle]." Hence, trial counsel employed a trial strategy allowing for the possibility of Movant testifying on his own behalf and offering a viable defense. By not calling Sanders, trial counsel were pursuing a defense strategy that would not undermine Movant's credibility if he chose to testify, which was reasonable. The motion court did not clearly err in denying this claim.

Point VII – Failure to Object to Use of a Demonstrative Exhibit

Movant argues the motion court clearly erred in denying his claim trial counsel were ineffective for failing to object to the prosecutor displaying a Browning .243 rifle as a demonstrative exhibit during the trial because it was not the gun used in the

shooting. Movant claims he suffered prejudice by its admission because the prosecutor used the unrelated rifle while questioning witnesses and during closing argument.

"The mere failure to make objections does not constitute ineffective assistance of counsel." *Dorsey*, 448 S.W.3d at 289 (quoting *Ervin v. State*, 80 S.W.3d 817, 822 (Mo. banc 2002)). "To obtain postconviction relief based on a failure to object, it 'must have been of such character as to deprive the defendant substantially of his right to a fair trial.'" *Id.*

"Demonstrative evidence, including a weapon, is admissible if the evidence is both legally and logically relevant." *State v. Brown*, 337 S.W.3d 12, 15 (Mo. banc 2011). Logical relevance refers to the tendency "to make the existence of a material fact more or less probable." *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010). Legal relevance refers to the assessment of probative value relative to the risk of "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id.* "Therefore, when assessing the relevance of demonstrative evidence, a court must ensure the evidence is a fair representation of what is being demonstrated and that it is not inflammatory, deceptive or misleading." *Brown*, 337 S.W.3d at 15.

The first trial team filed a motion in limine to exclude the prosecutor's use of a Browning .243 rifle as a demonstrative exhibit during the trial. The motion alleged the demonstrative exhibit had no probative value and would be highly prejudicial because no murder weapon was recovered. The motion

was not called up and was deemed overruled prior to trial. Kessler testified he had no reason for failing to call up the motion.

The motion court correctly found there was no basis in the evidence to support a finding the circuit court would have sustained an objection to using the Browning .243 rifle as a demonstrative exhibit. Witnesses testified Movant had inherited a Browning .243 rifle from his father. This rifle was never recovered from any of the searches of Movant's home or property, which comported with the state's theory that Movant disposed of the rifle after shooting Victim. Both ballistics experts testified the bullet recovered from Victim belonged to the .22 to .24 caliber class of ammunition, which included a Browning .243 caliber rifle. Finally, Kessler testified, if Movant would have taken the stand, Movant was prepared to admit ownership of a .243 caliber rifle, and this fact was mentioned in the defense's opening statement. Hence, any objection to the use of the demonstrative exhibit would not have been meritorious. Trial counsel will not be held ineffective for failing to make a nonmeritorious objection. *Tisius v. State*, 519 S.W.3d 413, 429 (Mo. banc 2017). The motion court did not clearly err in denying this claim.

Points VIII and IX – Failure to Call Guilt Phase Witnesses

Movant argues the motion court clearly erred in denying his claim trial counsel were ineffective for failing to call four witnesses who told police they saw Movant driving his pickup truck during the time he was alleged to be driving the red car observed waiting

near Victim's home and fleeing Victim's home after he was shot. Movant argues these witnesses would have corroborated his defense he did not shoot Victim.

To prove ineffective assistance of counsel for failure to call certain witnesses at trial, Movant must establish the witnesses' testimony would have produced a viable defense. *Collings*, 543 S.W.3d at 18. "When defense counsel believes a witness' testimony would not unequivocally support his [or her] client's position, it is a matter of trial strategy not to call him [or her], and the failure to call such witness does not constitute ineffective assistance of counsel." *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002).

Sylvan and Carol Duncan

Sylvan and his wife, Carol (hereinafter and, collectively, "the Duncans"), were questioned by police, deposed by the first trial team, and subpoenaed for trial. The Duncans lived on the same road as Movant and his grandmother. Carol and Movant's grandmother had been friends for many years. On the day of the murder, Movant was supposed to help Sylvan move some brush off of his property, but Movant did not show up. Sylvan saw Movant's truck at Movant's home when he went to move the brush but saw Movant's truck leave between 2 and 3 p.m. Carol told police Movant's grandmother's red car was gone from her house around 12:45 p.m. or 1 p.m. Carol stated she could see Movant's grandmother's driveway from her kitchen window and she saw the red car in the driveway "no more than three hours later."

At 4:30 p.m., the Duncans went for a walk for approximately thirty minutes. Movant was in his truck driving when the Duncans stopped and spoke to him. Carol stated they spoke to Movant at approximately 4:45 p.m. and Sylvan stated it was 5:15 p.m. Movant told Sylvan he was in his home taking a nap when he was supposed to help Sylvan move the brush.

The next day, Movant spoke to the Duncans about Victim's murder. Movant told the Duncans Victim had been shot in the face and "I heard that you could just take the flap -- his face and just pull it back and then lay it back over." Carol told Movant someone would have had to have been "awfully close to do something like that," to which Movant replied, "Not if you were using turkey loads."

During opening statements, Henshaw told the jury the Duncans would testify. Henshaw stated the Duncans would testify that, at the same time the state alleged Movant was in his grandmother's red car parked near Victim's home, they observed the red car through their kitchen window because it had been returned. Henshaw stated the Duncans stopped and spoke to Movant later that afternoon, as Movant was driving home in his pickup truck at the same time the state alleged Movant was fleeing the scene. However, when the defense rested, Kessler stated on the record they were not calling the Duncans to testify.

The Duncans testified at the evidentiary hearing, largely repeating their deposition testimony. Carol testified Movant's grandmother told her Movant borrowed her red car that afternoon. Carol conceded

she did not see the red car leave or return and did not know who was driving it. Carol repeated how Movant described Victim's face after being shot.

Bruns and Henshaw testified they knew the Duncans' statements concerned the red car evidence, but neither articulated a reason why they failed to call the Duncans to testify at trial. Bruns explained, if the Duncans testified about Movant's description of Victim's face, they would not be good witnesses unless they were going to show actual innocence.

Kessler testified Movant had input about whether to call the Duncans as witnesses. Kessler testified they discussed the pros and the cons of having the Duncans testify. Kessler and Henshaw visited the Duncans at their home to speak with them. Kessler explained trial counsel concluded the Duncans offered Movant an imperfect alibi after speaking to them, reviewing the police reports, and reviewing their depositions. Because there was a hole in the timeline, Kessler did not want to put on any witness who offered an imperfect alibi. Kessler described Carol's account as "unsure or she couldn't be as sure" about the timeline, and he did not believe Sylvan would hold up under cross-examination. The motion court found trial counsel were not ineffective for failing to call the Duncans because their testimony would have harmed Movant and benefitted the state.

Trial counsel conducted a thorough investigation regarding the Duncans' testimony, including reviewing all of their pretrial statements and meeting with them in person. Trial counsel determined the Duncans could, at best, provide an imperfect alibi,

which Kessler explained trial counsel were not comfortable presenting. Further, having the Duncans testify about Movant's graphic description of Victim's face after being shot would benefit the state to Movant's detriment. Trial counsel were not ineffective for failing to call the Duncans to testify at trial.

James Chandler

James Chandler (hereinafter, "Chandler") was deposed prior to trial by the first trial team but was not called as a witness at trial. Chandler testified at the evidentiary hearing he saw Movant driving his truck near Chandler's home at 2:30 p.m. on the afternoon of the murder. Kessler testified Movant had input on whether to call Chandler as a witness. Kessler explained Chandler's testimony would only highlight for the jury there was a timeframe in which something could have happened, as opposed to arguing Movant was not there at all, undermining their defense theory.

The motion court found Chandler's testimony would not have provided Movant a viable alibi defense. This Court agrees. Even if the jury believed Chandler's testimony, it would not provide Movant with an alibi because Chandler's testimony does not account for Movant's whereabouts at the time Victim was shot. *See Winfield*, 93 S.W.3d at 739. Trial counsel were not ineffective for failing to call Chandler to testify at trial.

Mila Linn

In claim 8(c) of his Rule 29.15 motion, Movant argued trial counsel were ineffective for failing to call

Mila Linn (hereinafter, "Linn") and her son to testify during the guilt phase that they saw a 1990s two-door red car in the area of Victim's home at the time of the murder. Linn gave statements to police and was deposed prior to trial. Linn stated she lived approximately a half-mile north of Victim's home. On the day of the murder, Linn stated she saw an older red car with a loud muffler driving near the dumpster situated near Victim's home. Linn described the driver as a stranger with shaggy brown hair, a sunken face, and clean-shaven. Linn was later shown a photo array that included Movant but she did not identify Movant as the driver. Linn admitted Victim detained her for a driving while intoxicated charge a day or two before he was murdered. Linn also conceded she could not remember much from this time because she was a heavy drinker. The first trial team provided these materials to trial counsel.

Although Linn was not called as a witness at trial, a police officer testified he showed Linn a photo array and she did not identify Movant as the driver of the red car she observed near Victim's home. During closing argument, Kessler argued the state was hiding the ball because it did not present Linn's testimony about observing the same red car as the other witnesses, but not identifying Movant as the driver. Bruns testified trial counsel considered calling all potential witnesses, including Linn, but he could not remember why she was not called. Bruns acknowledged avoiding impeachment would be a reason not to call a particular witness. Bruns noted

Kessler was free to use Linn's statements during closing argument.

The motion court found Movant failed to present any evidence to support his claim regarding Linn's testimony, hence the claim was deemed abandoned. At the outset of the evidentiary hearing, Movant formally waived claim 8(c) only with respect to presenting testimony from Linn's son, not Linn herself. Movant intended to depose Linn for the evidentiary hearing, but no post-conviction deposition was filed. However, Linn's pretrial deposition was offered as an exhibit and was before the motion court.

Even if this Court found the motion court erred in finding this claim abandoned, Movant would not be entitled to relief because he was not prejudiced by this error. When examining Linn's pretrial deposition, it is clear her testimony would be undermined severely due to her admission her memory of the events was impaired by heavy drinking. Linn would be subjected to impeachment, which Bruns testified would be a reason not to call her to testify. Further, trial counsel were able to use the most helpful portion of Linn's statement when questioning the police officer and during closing argument, while avoiding Linn's impeachment. Trial counsel were not ineffective for failing to call Linn to testify at trial. The motion court did not clearly err in denying these claims.

Point X – Failure to Impeach Guilt Phase Witness

Movant alleges the motion court clearly erred in denying his claim trial counsel were ineffective for failing to impeach Lisa Hart's (hereinafter, "Hart")

trial testimony that she did not know where the yellow sticker was located on the red car she saw near Victim's home on the day of the murder. Movant claims Hart's deposition and written statements indicate she saw the yellow sticker from the front of the car when the sticker was located on the back of the vehicle. Movant argues this impeachment was critical because the state's theory was Movant borrowed his grandmother's red car and Hart identified the car as the one she saw near Victim's home.

"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 trial counsel's decision not to impeach a witness. *McFadden v. State*, 553 S.W.3d 289, 305 (Mo. banc 2018). Movant "has the burden of showing that the impeachment would have provided [him] with a defense or would have changed the outcome at trial." *Id.* (quoting *State v. Phillips*, 940 S.W.2d 512, 524 (Mo. banc 1997)).

At trial, Hart testified she and her husband drove to view a home to purchase near Victim's residence at approximately 1:45 p.m. on the day of the murder. Hart testified she saw a red car and "[f]or some unknown reason there was a yellow fist to softball-sized sticker that stuck out." Hart stated the red car was still on the street when she and her husband left between 3 and 3:30 p.m. Hart later contacted the police after hearing about Victim's murder and went to the command center to speak to an investigator. When she arrived, she saw a red car with a yellow

sticker on it and told her husband, "That's it." Hart stated she was "100 percent sure" it was the "exact same car" she saw parked near Victim's residence. Hart's pretrial deposition testimony and written statements indicated she saw the yellow sticker on the red car's front end, when the yellow sticker was located on the back end of the car.

Henshaw testified at the evidentiary hearing she was responsible for the red car evidence. Henshaw had no recollection of Hart's testimony or a reason why she did not impeach her testimony. Henshaw could not articulate a strategic reason for failing to impeach Hart's testimony, but she explained part of the strategy during opening statement was to concede Movant drove his grandmother's red car that day. Although trial counsel did not attempt to impeach Hart's testimony with her previous statements, they attempted to bring out discrepancies in her testimony by calling her husband. Kessler indicated "it did not go well." Hence, trial counsel made an attempt—albeit an unsuccessful one—to impeach Hart's testimony.

"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." *Anderson*, 196 S.W.3d at 33. Even if this Court found trial counsel's unsuccessful attempt ineffective, Movant suffered no prejudice in light of the other witnesses who testified about the red car. Moreover, impeachment would not undermine Hart's trial testimony she was "100 percent sure" the red car she saw at the command center was the same red car she saw parked near Victim's home, regardless of where

the yellow sticker was placed. Movant has not demonstrated the outcome of the trial would have been different had trial counsel impeached Hart's testimony regarding the yellow sticker's location. The motion court did not clearly err in denying this claim.

Point XIII – Failure to Object to Comment on Movant's Right to Testify

Movant argues the motion court clearly erred in denying his claim trial counsel were ineffective for failing to object, request a curative instruction, and request a mistrial when the prosecutor commented, "someone does" in response to Hart's testimony she did not know why Movant's grandmother's red car was parked near Victim's home. Movant argues the prosecutor's comment was a reference to his right to remain silent and implicated Movant knew why the red car was parked at Victim's home.

During Hart's trial testimony, the prosecutor asked her, "Do you know why [Movant's grandmother's] car would be across from where [Victim] was murdered --?" to which Hart responded, "No." The prosecutor then commented, "Someone does." The circuit court stated, "Keep the comments to yourself. I've already warned defense counsel." Trial counsel did not object to the comment, did not ask the jury to be instructed to disregard it, or request a mistrial. The circuit court later instructed the jury Movant had the right not to testify and the jury could draw no adverse inference from his failure to do so.

Movant raised this claim in his direct appeal, arguing the circuit court committed plain error in not sua sponte granting Movant a mistrial because the

words "someone does" constituted a direct comment about his failure to testify. This Court rejected Movant's claim, finding the comment was not a direct comment nor did it need to determine whether it was an indirect comment because Movant had "fallen far short" of showing his comment had a decisive effect on the jury. *Shockley*, 410 S.W.3d at 189-190. Henshaw did not recall the prosecutor's statement or a reason why she failed to object or seek other relief.

The motion court echoed this Court's finding the statement was not a direct comment about Movant's failure to testify, nor did Movant demonstrate the comment had a decisive effect on the jury. This Court agrees. Any objection to the comment would have drawn additional, unwanted attention to the statement; hence, it was reasonable for trial counsel to refrain from objecting. *Barton*, 432 S.W.3d at 754. Moreover, to obtain postconviction relief based on a failure to object, it "must have been of such character as to deprive the defendant substantially of his right to a fair trial." *Dorsey*, 448 S.W.3d at 289 (quoting *Ervin*, 80 S.W.3d at 822). Trial counsel's attempt to obtain curative relief would not have been meritorious nor can Movant demonstrate had trial counsel objected, this Court would have ordered a new trial if this claim was presented as one for preserved error. Finally, Movant cannot demonstrate he suffered prejudice from trial counsel's failure to object to this single comment when examining the entire trial. The motion court did not clearly err in denying this claim.

Point XII – Failure to Object to State's Penalty Phase Exhibits

Movant claims the motion court clearly erred in denying his claim trial counsel were ineffective for failing to object to victim impact evidence exhibits admitted during the penalty phase, which included a funeral casket photograph, a video montage shown at Victim's funeral, and a drawing by Victim's son depicting what his son described as Movant shooting Victim. Movant argues these victim impact exhibits individually and collectively were so inflammatory they injected passion, prejudice, and arbitrariness into the penalty phase. Movant did not challenge the admission of the exhibits on direct appeal.

"Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *State v. Storey*, 40 S.W.3d 898, 908 (Mo. banc 2001) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). "As a general rule, the trial court has discretion during the punishment phase of trial to admit whatever evidence it deems helpful to the jury in assessing punishment." *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999) (quoting *State v. Kinder*, 942 S.W.2d 313, 331 (Mo. banc 1996)).

Bruns testified the state had a right to present victim impact evidence and he does not object unless it goes "overboard." Bruns explained he generally tries not to object during the state's presentation of aggravating circumstance evidence because he hopes the state will not object during the defense's

presentation of mitigating circumstance evidence. Bruns acknowledged the law concerning what is admissible is broad and very discretionary. Bruns admitted he did not object to each of the complained of exhibits. Regarding the funeral casket photograph, Bruns stated, "Out of everything that's coming in I can't imagine that that sort of photograph is the worst thing...." Regarding the video montage, Bruns explained, "My judgment at the time must have been they could do worse stuff to us quite frankly." Finally, regarding Victim's son's drawing, Bruns conceded the drawing was "terrible and terribly hurtful," but it is "probably going to come in."

Movant argues this Court should apply the holding in *State v. Hess*, 23 A.3d 373 (N.J. 2011), to find Bruns was ineffective for failing to object to showing the video montage from Victim's funeral. In *Hess*, the New Jersey Supreme Court vacated a guilty plea, in part, due to trial counsel's ineffectiveness for failing to object at sentencing to a seventeen-minute victim impact video from the police officer victim's funeral. *Id.* at 394. The video was scored to popular and religious music, professionally produced, included a television news segment about the victim's funeral, had three poems scrolling over photographs, and ended with a photograph of the victim's headstone. *Id.* at 381. The New Jersey Supreme Court explained:

> Undoubtedly, concerns over prejudicial victim-impact statements, including photographs and videos, are less pronounced when a judge rather than a jury is imposing sentence. Nevertheless, judges, no less than

> jurors, are susceptible to the wide range of human emotions that may be affected by irrelevant and unduly prejudicial materials. We are fully aware that judges, who are the gatekeepers of what is admissible at sentencing, will have viewed materials that they may deem non-probative or unduly prejudicial. We have faith that our judges have the ability to put aside that which is ruled inadmissible. However, both the bar and bench should know the general contours of what falls within the realm of an appropriate video of a victim's life for sentencing purposes.

Id. at 392 (internal citation omitted). After examining several cases from other jurisdictions, the New Jersey Supreme Court held, "An overly lengthy video, baby photographs of an adult victim, and a video scored to religious and pop music do not advance any legitimate objective...." *Id.* at 394. The court also noted the photograph of the victim's headstone and the television segment about the victim's life did "not project anything meaningful about the victim's life as it related to his family or others at the time of his death." *Id.*

In this case, the video montage presented to the jury was compiled by Victim's family, was four minutes in length, set to music, and contained photographs from Victim's childhood through adulthood. While there are some similarities to the video in *Hess*, Victim's video was significantly shorter, not produced professionally, and did not contain

photographs of Victim's headstone, poems, a variety of music, or television news coverage. Hence, this Court declines Movant's invitation to find *Hess* dispositive, especially given the New Jersey's Supreme Court's recognition it could not "set forth an exhaustive catalogue of what is and is not permissible in a video, other than to say how *this video* exceeded permissible bounds." *Id.* (emphasis added).

Bruns gave strategic reasons for not objecting to the victim impact evidence presented during the penalty phase. Kessler testified in his experience it was not uncommon to play a funeral video during the penalty phase, and he did not think it was objectionable. Kessler explained objecting would make it appear as if Movant were trying to hide someone's grief, which would not be in anyone's best interest. Moreover, Movant cannot demonstrate the outcome of the trial would have been different had Bruns objected because any objection to the admissible exhibits would have been nonmeritorious. The motion court did not clearly err in denying this claim.

Point XVI – Failure to Call Mitigation Witnesses

Movant argues the motion court clearly erred in denying his claim trial counsel were ineffective for failing to call three mitigation witnesses to highlight Movant was a good father, was a hard worker, and had been impacted by his father's death. Movant believes he would have received a life sentence if these witnesses had testified during the penalty phase.

Prevailing professional standards for capital defense work require trial counsel to "discover *all reasonably available* mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Johnson v. State*, 388 S.W.3d 159, 165 (Mo. banc 2012). This evidence includes "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* 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. *Davis v. State*, 486 S.W.3d 898, 909 (Mo. banc 2016). Further, trial counsel will not be deemed ineffective for failing to present cumulative evidence. *Deck v. State*, 381 S.W.3d 339, 351 (Mo. banc 2012).

Bruns presented three mitigation witnesses during the penalty phase. Laura Smith (hereinafter, "Smith"), the mother of Movant's children, testified about the importance of Movant having a relationship with his children, even if he were incarcerated. Movant's cousin testified about his character, their relationship, and Movant's care of his grandparents. Sanders testified extensively about Movant's life, how Movant came to live with Sanders after his father died, the help he provided Sanders in caring for him and his business, and how he loved Movant like one of his own children.

Bruns described Sanders as a great witness who was well-liked in the community. Further, Bruns specifically testified, when presenting mitigating

evidence, he generally tried to get the "best witnesses" to tell "really good stories" to establish for the jury the person's life was meaningful. Bruns stated they discussed mitigation witnesses with Movant, who had ideas and opinions about the witnesses and the evidence. Kessler testified they did not call any additional witnesses after Sanders' testimony because he was tearful on the stand and elicited an emotional response from the jurors. Despite these witnesses, Movant believes additional testimony would have persuaded the jury to give him a life sentence.

Velma Dowdy

Velma Dowdy (hereinafter, "Dowdy") testified at the evidentiary hearing she had known Movant his entire life. Dowdy was Movant's neighbor and Smith was her granddaughter. Dowdy testified Movant was a good father, and she saw him at family events. Marshall testified he did not remember Dowdy, but a casefile memorandum stated Movant indicated Dowdy was "crazy." Bruns testified he had no contact with Dowdy.

The motion court found trial counsel were not ineffective for failing to call Dowdy to testify because Movant characterized her as "crazy" and, therefore, unreliable. Moreover, Dowdy's testimony would have been cumulative to other witnesses' testimony regarding Movant's family life. Trial counsel were not ineffective for failing to call Dowdy to testify.

Eugene Jackson

Eugene Jackson (hereinafter, "Jackson") testified at the evidentiary hearing he had been friends with

Movant since childhood. Jackson never saw Movant have problems with other people or get into physical fights with anyone. Jackson testified Movant took in the daughter of a friend who was having issues. Bruns testified he had no contact with Jackson. The record is unclear whether Movant or anyone else informed trial counsel Jackson was a potential witness. To find trial counsel ineffective for failing to call a witness, Movant bears the burden of proving "trial counsel knew or should have known of the existence of the witness." *Glass*, 227 S.W.3d at 468 (quoting *Hutchison*, 150 S.W.3d at 304). Hence, trial counsel were not ineffective for failing to call Jackson to testify.

Clarence "Butch" Chilton

Clarence "Butch" Chilton (hereinafter, "Chilton") testified at the evidentiary hearing he was Movant's little league coach and Smith's uncle. Chilton was good friends with Movant's father before he died. Chilton testified Movant took his father's death hard. The motion court correctly found Chilton's testimony cumulative to that of other witnesses who were familiar with Movant's family. Further, Chilton did not offer any recent and specific stories about his interaction with Movant. Trial counsel were not ineffective for failing to call Chilton to testify. The motion court did not clearly err in denying this claim.

Point XIV – Failure to Object to Police Presence during Trial and Sentencing and Failure to Object to Elected Circuit Judge Sentencing[9]

Movant alleges the motion court clearly erred in denying his claim trial counsel were ineffective for failing to object to the visible police presence in and around the courthouse during the trial and sentencing because it sent a message to convict Movant based on Victim's police affiliation and because Movant was an extremely dangerous person. Movant must demonstrate trial counsel's failure to object resulted in a substantial deprivation of his right to a fair trial. *Dorsey*, 448 S.W.3d at 289.

Police Presence during the Trial and Sentencing

Movant's aunt testified at the evidentiary hearing there were approximately fifty to sixty armed, uniformed officers outside the courthouse during voir dire in Carter County. When Movant's trial was conducted in Howell County, Movant's aunt observed armed officers in the courthouse square, on top of buildings, and at every door. Movant's aunt estimated there were seventy-five to one hundred police officers

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[9] This point raises two distinct claims of error in violation of Rule 84.04(d). Rule 84.04 is not merely an exhortation from a judicial catechism nor is it a suggestion of legal etiquette. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). Appellate counsel should be mindful of the dictates of Rule 84.04 to avoid claims being dismissed for failure to comply. However, it is this Court's policy to decide a death penalty case on its merits rather than on technical deficiencies in the brief. *Christeson v. State*, 131 S.W.3d 796, 799 n.5 (Mo. banc 2004).

present each day. Movant's aunt testified there were many people lined up in the square yelling things at Movant as he was escorted in and out of the courthouse.

Kessler testified the circuit court excluded or prevented law enforcement officers from watching or participating in the trial while dressed in their uniforms. As far as a large police presence outside the courtroom, Kessler had no specific recollection of anything other than seeing a newspaper article with a photograph of Movant in a bulletproof vest surrounded by people outside the courthouse. Because the jury was sequestered, Kessler explained they did not come through "a phalanx of uniformed people" to get in and out of the courthouse. Kessler saw rifles while Movant was transported, but he did not believe the jury saw this so he did not bring it to the circuit court's attention. There was never a time Kessler saw anyone with a gun around Movant while in the jury's presence.

Bruns and Henshaw testified there was a large police presence in Howell County when Movant was transported to trial. Bruns testified "there were threats to everybody," including lay people yelling and protesting about Movant's trial. Bruns stated there was a genuine concern someone would shoot Movant as he was transported. Henshaw testified the large police presence was to protect Movant from different threats made against him, and he was transported in a bulletproof vest. Several jurors testified at the evidentiary hearing, and none of them testified they

observed a large police presence during the trial or it influenced their opinion of Movant or their verdict.

Kessler estimated approximately thirty uniformed highway patrol officers attended Movant's sentencing. Kessler did not object because the circuit court knew they were officers regardless of how they were dressed. Bruns testified the courtroom was full during Movant's sentencing, but he did not object to the police presence because he did not believe their presence would affect the circuit court.

The motion court found the need for security in the courthouse and at the trial was important for the circuit court to consider. Hence, the circuit court was in the best position to determine whether the police presence at the trial was distracting or had a prejudicial effect. Further, there was no evidence any of the jurors came into contact with law enforcement officers inside or outside the courthouse during the trial.

In *Johnson*, this Court rejected a similar claim when the evidence demonstrated the jurors were sequestered throughout the proceedings, they had no contact with any of the spectators at any point during the trial, and no officer present caused any disturbance to the proceedings. *Johnson*, 406 S.W.3d at 903. Further, the circuit court retains wide discretion in determining whether to take action to avoid an environment for trial in which there is not a "sense or appearance of neutrality." *State v. Baumruk*, 85 S.W.3d 644, 649-50 (Mo. banc 2002). Here, trial counsel testified they did not believe the large police presence impacted the jury's decision. Further, none

of the jurors testified about observing a large police presence. Trial counsel were not ineffective for failing to object to the large police presence at Movant's trial and at sentencing.

Elected Trial Judge Sentencing

Movant further alleges trial counsel were ineffective for failing to object to the elected circuit judge imposing sentencing in the face of a large police presence. Movant argues reasonable counsel would have objected to an elected circuit judge imposing a sentence due to "electoral pressures to impose death as evidenced by the police presence at sentencing." Movant argues he was prejudiced because he otherwise would not have received a death sentence.

The motion court held this claim was not cognizable in a Rule 29.15 action because it should have been raised on direct appeal in that it challenged the constitutional validity of the death penalty. Assuming arguendo the claim was cognizable, the motion court found Movant did not demonstrate prejudice.

This Court finds Movant failed to present any evidence regarding this claim at the evidentiary hearing. "Allegations in a postconviction motion are not self-proving; rather, a movant bears the burden to prove his claim of ineffective assistance by a preponderance of the evidence." *Gittemeier v. State*, 527 S.W.3d 64, 71 (Mo. banc 2017). "Failure to present evidence at a hearing in support of factual claims in a post-conviction motion constitutes abandonment of that claim." *Id.* (quoting *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. banc 1998)). Trial counsel were not

asked about their failure to object or offer any reason why an elected circuit court judge could not impose sentencing. Alternatively, even if trial counsel's testimony could be construed to include such a claim, Movant offers nothing more than conclusory arguments regarding the outcome of the case. The motion court did not clearly err in denying these claims.

Point XV – Ineffective Assistance of Appellate Counsel

Movant claims the motion court clearly erred in denying his claim appellate counsel was ineffective for combining arguments regarding character and propensity grounds concerning an officer's testimony the police brought a S.W.A.T. team to apprehend him because of his violent history. Movant argues competent appellate counsel would not have combined these claims, causing the claim to be reviewed for plain error only.

"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). Additionally, the movant must prove, "if counsel had raised the claims, there is a reasonable probability the outcome of the appeal would have been different." *Taylor v. State*, 262 S.W.3d 231, 253 (Mo. banc 2008).

During the trial, an officer testified a S.W.A.T. team accompanied him to interview Movant on the night of Victim's murder "due to [Movant's] violent

history." Kessler objected, stating, "I object to any introduction of his history. This goes to character...." The state countered the testimony would not go into Movant's violent history but would be used to explain the officer's actions and address Movant's argument the police unfairly targeted him as a suspect. The circuit court sustained the objection. Kessler then asked the jury to be instructed to disregard the statement, and he requested a mistrial. The circuit court instructed the jury to disregard the comment "regarding any character or reputation of [Movant]" but overruled Kessler's motion for a mistrial.

On direct appeal, Movant argued the circuit court erred in failing to sustain his motion for a mistrial because the reference to Movant's violent history constituted impermissible propensity evidence. The state argued this issue was not preserved and the reference did not constitute propensity evidence. This Court engaged in a lengthy analysis of the objection raised, the arguments presented, and whether they were preserved, which will not be repeated here. *See Shockley*, 410 S.W.3d at 191-96. This Court found the argument on appeal attempted to merge the character and propensity evidence concepts, which are distinct. *Id.* at 193. This Court concluded no plain error occurred because the comment was made to explain the police's actions after Movant opened the door to the issue and there was other evidence presented in which Movant threatened police officers. *Id.* at 194.

Michael Gross (hereinafter, "Gross") represented Movant on appeal. Gross testified he argued the comment was to impugn Movant's character and to

make the jurors more prone to find him guilty of the offense charged in this case because of a propensity to engage in violent criminal behavior. Gross did not believe the issues were separate and based his argument on recent Court precedent that he interpreted to mean propensity evidence had evolved to fit into a character argument. Gross admitted he would have argued the issue differently if he knew the Court would consider them separate issues.

The motion court reviewed the trial transcript, trial counsel's objection, and this Court's analysis in rejecting this claim. The motion court did not find the comment so egregious that it required a mistrial. The motion court further found the curative instruction admonishing the jury to disregard the officer's statement, combined with substantive evidence of guilt, supported a finding the single comment did not play a decisive role in the verdict. This Court agrees. Although this Court did not find the specific propensity argument preserved, the Court engaged in an extensive analysis regarding the comment and its impact on the trial, ultimately denying Movant relief. *Id.* at 195-96. Movant has not offered any additional evidence that, had Gross raised the issue differently, this Court would have reversed his conviction. *Taylor*, 262 S.W.3d at 253. The motion court did not clearly err in denying this claim.

Point XVII – Alleged *Brady* Violations

Movant argues the motion court clearly erred in denying his claim regarding the state's alleged violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), for failing to disclose data Victim possessed relating

to other possible suspects. Movant alleges an investigation regarding possible corruption of Carter County law enforcement would have produced evidence supporting someone other than Movant shot Victim.

If the state suppresses evidence favorable to a defendant and material to either the guilt or penalty phase, due process is violated. *Brady*, 373 U.S. at 87,. The state violates due process regardless of whether it withheld the evidence in good faith or in bad faith. *Id.*; *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2009). A *Brady* violation contains three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [s]tate, either willfully or inadvertently; and prejudice must have ensued." *Johnson*, 406 S.W.3d at 901 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *Taylor*, 262 S.W.3d at 240).

While gathering discovery for the evidentiary hearing, post-conviction counsel indicated there was reason to believe Victim maintained investigative files related to criminal wrongdoing by Carter County law enforcement personnel. Post-conviction counsel sought discovery of Victim's computer drives. While one drive was provided, the parties later stipulated two of the hard drives were no longer accessible due to the passage of time and other factors.

At the evidentiary hearing, three witnesses testified Victim's former fiancée told them Victim was investigating possible corruption by Carter County law enforcement officials before he was murdered.[10] There was testimony adduced Victim kept these files at home on his personal computer. Victim's former fiancée testified and denied having told anyone Victim was conducting any investigation or that he kept the files at home on his personal computer. Victim's former fiancée stated she did not use or look at Victim's personal computer, and she did not see Victim perform any work on his home computer.

Because the parties stipulated the hard drives were no longer accessible, the motion court found there was no evidence the state withheld files on the hard drives. The motion court discounted the three witnesses' testimony about the home computer's contents as "vague and speculative at best." The motion court further found Movant could not demonstrate prejudice because he could not present evidence beyond speculation and conjecture about the hard drives' contents. This Court agrees. Movant cannot demonstrate the outcome of his trial would have been different if he had access to what is only vague and speculative information. The motion court did not clearly err in denying this claim.

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[10] The motion court heard this evidence only to determine whether the state's failure to disclose this information violated *Brady*, not for the truth of the matter asserted.

Conclusion

The motion court did not clearly err in overruling Movant's Rule 29.15 motion for post-conviction relief after an evidentiary hearing. The motion court's judgment is affirmed.

Fischer, C.J., Wilson, Russell, Powell, and Breckenridge, JJ., concur; Stith, J., dissents in part and in result in separate opinion filed.

OPINION DISSENTING IN PART AND IN RESULT

Laura Denvir Stith, Judge

I respectfully dissent from the portion of the principal opinion holding counsel were not ineffective in failing to question Juror 58 during voir dire about the provocative novel he admitted writing and in failing to call other jurors in support of Mr. Shockley's motion for new trial. On direct appeal, this Court held, because of these failures, the record did not support Mr. Shockley's claim that Juror 58 should have been stricken for cause or that the other jurors saw his book and it affected their deliberations. *State v. Shockley*, 410 S.W.3d 179, 201 (Mo. banc 2013). Because the postconviction hearing demonstrates counsel had no valid strategic reason for failing to voir dire Juror 58 and for choosing not to question other jurors about when and how they were exposed to his violent novel, I would find both failures constituted ineffective assistance that may have affected the outcome of the trial.

In explaining why they did not question Juror 58 about his novel during voir dire, defense counsel stated at the postconviction hearing that they focused on Juror 58's statements his son was a police officer and he had a knowledge of guns and therefore, did not further question Juror 58 regarding his novel. Like the motion court, the principal opinion says this was not ineffective because this questioning was closely aligned with the counsel's trial strategy, which the principal opinion explains as using voir dire to uncover pro-law enforcement bias and knowledge

about firearms. In support, the principal opinion cites *Clayton v. State*, 63 S.W.3d 201, 207-08 (Mo. banc 2001), for the proposition that "[i]t is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy."

Clayton does not support the principal opinion's reasoning. It holds merely that it was not unreasonable for counsel to put on evidence of both diminished capacity and reasonable doubt as to guilt, rather than focusing on just one defense. *Id.* at 208. In other words, in *Clayton* counsel had to choose whether it was better to pursue only one defense or whether it was wiser strategy to pursue two theoretically slightly inconsistent defenses at the same time. *Id.* at 207.

A similar strategic choice is not required when a potential juror reveals multiple sources of bias, however. Counsel could, and should, examine the potential juror about all of the revealed biases. It is not reasonable to pick only one disqualifying or biasing issue to examine further. Yet, that is what counsel admitted they did here. Because they wanted to follow up on Juror 58's son's employment as a police officer, they chose not to question him about his novel. This choice was unreasonable.

The principal opinion states that finding counsel's voir dire ineffective would be equivalent to adopting a rule that "a potential juror's employment as an author, standing alone, establishes the juror has 'multiple sources of bias.'" The dispositive fact here is not that Juror 58 was an author. What is relevant here is that Juror 58, on his own initiative,

approached the bench during a break to inform the court he had not revealed as yet during voir dire that he was a published author and he thought "maybe I should be coming out with fact [sic] as well." When a venireperson feels strongly enough that a piece of information may be relevant for consideration in voir dire that he himself suggests it to the court on his own initiative, defense counsel is ineffective in failing to investigate what made the venireperson believe the information needed to be disclosed. For this reason, the principal opinion's attempt to distinguish *Knese v. State*, 85 S.W.3d 628, 632 (Mo. banc 2002), is unavailing. As in that case, the failure here to conduct a basic investigation of the juror's bias was ineffective.

This error was compounded by counsel's rejection of the circuit court's offer to allow counsel to call Juror 58 and other jurors during the hearing on the motion for new trial. The failure to follow up during voir dire and by calling jurors in support of the motion for new trial meant the record before the circuit court and this Court on appeal did not support grant of a new trial, resulting in the conviction being affirmed on appeal.

The principal opinion states the decision not to call jurors in support of the motion for new trial was reasonable in that counsel believed, because the jury was unable to agree whether to impose the death penalty, the trial judge was unlikely to impose death, as they had never had a trial judge impose a death sentence when the jury could not agree on punishment. In other words, counsel filed a motion for new trial but chose not to support it with testimony in

the hopes the judge would give a favorable ruling on death.

If counsel believed errors in the trial merited a new trial, they had a duty to file a proper and supported motion for new trial. They failed to meet their duty by filing a motion they admittedly chose not to fully support with facts. Moreover, if what counsel wanted was to have the judge decide punishment while knowing the jury deadlocked, they could have requested the judge and State consent to doing just that even if a new trial were granted. Failing to investigate juror misconduct, however, was not an option. Yet counsel made the decision to forego any questioning of Juror 58 or the other jurors about whether they were exposed to Juror 58's novel and the extent of that exposure.

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997) (internal quotations omitted) (alteration in original). Defense counsel cannot make a strategic decision not to use evidence if counsel has not investigated the nature of that evidence. *Id.* at 610. "[A]n argument based on trial strategy or tactics is appropriate *only if* counsel is fully informed of facts which should have been discovered by investigation." *Anderson v. State*, 66 S.W.3d 770, 776 (Mo. App. 2002) (quotation omitted) (emphasis added).

While counsel may have believed the better chance of avoiding a death sentence lay in their hope

the judge would continue to "be good" to them rather than in raising prejudicial juror misconduct from Juror 58's deliberate exposure of the other jurors to his novel, this belief was not reasonable as counsel had no idea of the seriousness of the exposure of the other jurors to the virulently anti-defendant violent rhetoric of the book. "The mere assertion that conduct of trial counsel was 'trial strategy' is not sufficient to preclude a movant from obtaining post-conviction relief." *Wilkes v. State*, 82 S.W.3d 925, 930 (Mo. banc 2002). Counsel does not have to choose between hoping for mercy from a judge or presenting valid claims in the client's defense, and this Court should not excuse counsel's failure to follow up here as trial strategy.

The postconviction record reveals multiple instances of the jurors being exposed to the novel and to comments about it by Juror 58. By that point they minimized their exposure to the novel, but this Court long has recognized, in the context of voir dire, a juror cannot be the judge of his or her own qualifications. *Beggs v. Universal C.I.T. Credit Corp.*, 387 S.W.2d 499, 503 (Mo. banc 1965); *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S.W. 354, 359 (Mo. 1905).

The same reasoning applies to the juror's evaluation of the effects of exposure during deliberations to inappropriate influences such as Juror 58's novel. *See Travis v. Stone*, 66 S.W.3d 1, 4, 6 (Mo. banc 2002) (instructing "little weight be given to the offending juror's assessment of the effect of this conduct" and noting prejudice cannot be cured by "statements of the juror tending to minimize the effect

of this conduct"). The difficulty in determining the effect on the jury of this novel and of Juror 58's statements was exacerbated by the long delay before jurors finally were questioned.

Counsel's ineffectiveness may well have affected the decision to leave Juror 58 on the jury for the guilt phase and could well have affected the jury's inability to decide on punishment. This Court should set aside the conviction and sentence of death.

For these reasons, I respectfully dissent.

APPENDIX D

Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Lance C. SHOCKLEY, Appellant.

No. SC-90286.
|
Aug. 13, 2013
|
Rehearing Denied Oct. 29, 2013.

Attorneys and Law Firms

Michael A. Gross, of Sher Corwin LLC, St. Louis, for Shockley.

Missouri Attorney General, Chris Koster and Daniel N. McPherson, Attorney General's Office, Jefferson City, for the State.

Opinion

LAURA DENVIR STITH, Judge.

A jury convicted Lance Shockley of first-degree murder for the 2005 shooting death of Missouri highway patrolman, Sergeant Carl DeWayne Graham, Jr. The jury found the facts required by law to be established in order to impose a death sentence but was unable to agree whether to recommend a

sentence of death or of life imprisonment. Pursuant to section 565.030.4, RSMo 2000 [1], the trial court conducted an independent review of the facts and imposed a death sentence. Mr. Shockley appeals. He argues that errors in the preparation of the trial transcript preclude adequate appellate review, that various evidentiary and instructional errors occurred, that the statute authorizing a trial judge to impose a sentence of death after the jury is unable to agree on punishment is unconstitutional, that a particular juror may have tainted jury deliberations, and that imposition of a death sentence is disproportionate to the strength of the evidence. For the reasons set forth below, this Court finds no reversible error in any of the points raised, finds that the sentence is proportionate to the crime and the defendant and affirms.

I. STATEMENT OF FACTS

Considering the evidence in the light most favorable to the jury's verdict, *State v. Davis,* 318 S.W.3d 618 (Mo. banc 2010), on the evening of November 26, 2004, Mr. Shockley and his sister-in-law's fiance, Jeffrey Bayless, went for a drive in Mr. Bayless' truck. On their drive back home, Mr. Shockley lost control of the vehicle and crashed it into a ditch. Mr. Shockley got out of the truck and walked to the nearby home of Ivy and Paul Napier. He informed the couple that he had been in an accident and needed help. Ivy noticed blood on Mr. Shockley's hands and invited him inside. Mr. Napier

[1] All statutory citations are to RSMo 2000.

accompanied Mr. Shockley to the accident scene and found Mr. Bayless injured beyond help. The two returned to the Napier residence where Mr. Shockley called his wife. Mr. Napier and Mr. Shockley then left and Ms. Napier called 911. She then set out for the crash site, where she spotted the truck off the side of the road and found Mr. Bayless inside. She checked him for a pulse and found none. In the meantime, Mr. Shockley joined Coree Shockley and her sister, Cindy Chilton, in their vehicle. During the drive, Mr. Shockley told Ms. Chilton that her fiancé Mr. Bayless was dead. The women then left Mr. Shockley at his house and joined Ms. Napier at the accident scene. By the time they arrived, Mr. Napier had returned to the scene as well. When local police and highway patrol officers arrived at the scene, they discovered Mr. Bayless' body slumped over in the passenger seat of the vehicle. They also discovered beer cans and a tequila bottle inside the truck and a blood smear above the passenger-side wheel well on the outside of the truck. They instructed the three women and Mr. Napier to head home.

Highway patrol Sergeant Carl DeWayne Graham, Jr., headed the investigation of the accident. The night of the accident he spoke with Mr. Shockley at his home. Mr. Shockley did not admit to being involved in the accident. Before leaving, Sergeant Graham consoled Ms. Chilton and gave her his business card. She made no mention of Mr. Shockley's connection to the accident. Sergeant Graham then visited the Napiers. Although Mr. Shockley had previously confessed to Ms. Napier that he had been

driving the truck, she said she did not know who was involved in the accident.

Four months later, Sergeant Graham visited Ms. Napier again, this time at her place of work. When he falsely told her that Mr. Shockley had admitted his involvement in the accident, Ms. Napier admitted to Sergeant Graham that Mr. Shockley had showed up at her house and asked for help after he wrecked the truck. Later that afternoon, Ms. Napier spoke with Mr. Shockley and learned that he actually had not confessed anything to Sergeant Graham about the accident.

Later that day, Ms. Chilton's mother informed her that Sergeant Graham wanted to speak with her about the accident. Mr. Shockley told Ms. Chilton that she did not have to talk to Sergeant Graham. Mr. Shockley then obtained Sergeant Graham's home address from Ms. Chilton's stepfather, who was a friend of Sergeant Graham's landlord.

At approximately 12:20 p.m. the next day, March 20, 2005, Mr. Shockley borrowed his grandmother's red 1995 Pontiac Grand Am. The car had a bright yellow sticker on the driver's side of the trunk. Between about 1:45 p.m. and 4:15 p.m. that afternoon, various witnesses noticed a red Pontiac Grand Am—with a bright yellow sticker affixed to the driver's side of the trunk—parked on the wrong side of the road a few hundred feet from Sergeant Graham's residence. Mr. Shockley returned the Grand Am to his grandmother between 4:15 p.m. and 4:30 p.m. that same day. Investigators calculated that it took approximately 18 minutes to drive from Mr.

Shockley's grandmother's house to the location where the red Grand Am with the yellow sticker had been parked near Sergeant Graham's house.

At 4:03 p.m. that day, Sergeant Graham had returned home, backed his patrol car into his driveway, and radioed dispatch that he was ending his shift. As Sergeant Graham exited his vehicle, he was shot from behind with a high-powered rifle that penetrated his Kevlar vest. The bullet severed his spinal cord at the neck, immediately paralyzing him. He fell backward and suffered fractures to his skull and ribs upon impact with the pavement. At this point, Sergeant Graham was still alive. The killer then approached Sergeant Graham and shot him twice more with a shotgun—into the face and shoulder. Sergeant Graham's body was discovered around 5:15 p.m. that day. The recovered rifle bullet was deformed, but ballistics experts determined that it belonged to the .22 to .24 caliber class of ammunition that would fit a .243 caliber rifle. Investigators later learned that around 7:00 p.m. on the evening of Sergeant Graham's murder, Ms. Shockley gave Mr. Shockley's uncle a box of .243 caliber bullets and stated, "Lance said you'd know what to do with them."

That night, two Highway Patrol investigators went to the Shockley residence to interview Mr. Shockley. They were accompanied by S.W.A.T. members, who concealed themselves in the woods around the property. Before approaching the door, the investigators called Mr. Shockley on the telephone and informed him that they wanted to speak about the

murder of Sergeant Graham. Mr. Shockley refused to talk, stating that he was a busy man and that they should visit him at work.

After the telephone call ended, the investigators saw Mr. Shockley walk out the front door of his house. They approached and identified themselves. Mr. Shockley immediately denied killing Sergeant Graham and stated that he had spent all day working around his house with his neighbor Sylvan Duncan. Mr. Shockley then told the investigators that the conversation was over and to get off of his property.

Shortly after the investigators departed but before all S.W.A.T. members had left, Mr. Shockley saw a S.W.A.T. member and yelled at him. When the members of S.W.A.T. started to leave, one S.W.A.T. member accidentally discharged his weapon while getting up off of the ground, injuring another S.W.A.T. member.

At about 11:30 a.m. the next day the two investigators with whom Mr. Shockley had spoken the night before approached him outside his workplace, where he was sitting in his car eating lunch with his cousin. Mr. Shockley told the officers he would speak with them when he finished eating. While the investigators waited by their car, Mr. Shockley called his wife on his cousin's cell phone and asked whether she had spoken with the police. She said that she had told the police that Mr. Shockley had been at home the day of the shooting until almost 5:45 p.m., when he went to his uncle's for a few minutes. Mr. Shockley responded, "Okay, that will work, that will be fine."

Mr. Shockley then met with the investigators and elaborated on the alibi he had given them the night before, claiming that he had spent the previous day visiting relatives, including his grandmother, and that he watched from his living room as his neighbor, Sylvan Duncan, pushed brush. He also said he knew Sergeant Graham was investigating him for the fatal truck accident and, without prompting, declared that he did not know where Sergeant Graham lived. Mr. Shockley's parting words to the investigators were, "Don't come back to my house without a search warrant, because if you do there's going to be trouble and somebody is going to be shot."

Later that day, Mr. Shockley visited his grandmother and instructed her to tell the police that he had been home all day on the day Sergeant Graham was murdered. When his grandmother told Mr. Shockley she would not lie for him, he put his finger over her mouth and said, "I was home all day." He also told his cousin, who had overheard his lunch break telephone call with Mrs. Shockley, not to say anything about it.

Police arrested Mr. Shockley March 23, 2005, for leaving the scene of the November 26, 2004, car accident that resulted in Mr. Bayless' death. On March 29, the State charged Mr. Shockley with leaving the scene of a motor vehicle accident, armed criminal action and first-degree murder for the death of Sergeant Graham and sought the death penalty. The State proceeded to trial only on the first-degree murder charge. Its case theory was that Mr. Shockley killed the sergeant to stop the investigation into the

death of Mr. Bayless. Mr. Shockley's defense was that it would have been ridiculous for him to believe that simply by killing Sergeant Graham law enforcement would halt its investigation into the accident. The defense also argued that the police improperly directed all their investigative attention towards him rather than pursuing other leads into the death of Sergeant Graham.

After a five-day guilt phase proceeding, the jury found Mr. Shockley guilty of first-degree murder. The trial then proceeded to the penalty phase. The penalty phase instructions required the jury to answer three special interrogatories. The first required the jury to state whether it unanimously found beyond a reasonable doubt that at least one statutory aggravating circumstance existed. The State submitted four statutory aggravators: (1) that Sergeant Graham was a "peace officer" and the "murder was committed because of the exercise of his official duty," (2) that Mr. Shockley was depraved of mind when he killed Sergeant Graham and, "as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman", (3) that Sergeant Graham was murdered "for the purpose of avoiding ... or preventing a lawful arrest," and (4) that Sergeant Graham was a "potential witness in [a] past or pending investigation ... and was killed as a result of his status as a ... potential witness." § 565.032.2.

In the event that the jury failed to find unanimously and beyond a reasonable doubt the existence of one or more statutory aggravators, the instructions directed it to return a verdict of life

imprisonment without parole. If the jury did, however, find one or more statutory aggravators beyond a reasonable doubt, the instructions required the jury then to determine whether there were circumstances in mitigation of punishment sufficient to outweigh the aggravating circumstances. If the jury unanimously found that mitigating circumstances outweighed the aggravating circumstances, the instructions directed it to return a verdict of life imprisonment without parole. But, if the jury found at least one statutory aggravator and failed to find unanimously that the mitigating circumstances outweighed the aggravating circumstances, then it was instructed to determine whether to impose a sentence of death or one of life imprisonment. § 565.030.4.

Here, the jury found the first, third and fourth statutory aggravators submitted by the State were proven beyond a reasonable doubt. It did not unanimously find that the circumstances in mitigation outweighed those in aggravation. As instructed, the jury then proceeded to the final question, whether to impose a sentence of death or life imprisonment, but the jury was unable to agree on which punishment to recommend.

Pursuant to section 565.030.4, where the jury is unable to agree on punishment, the trial court "shall assess and declare the punishment at life imprisonment ... or death." Before declaring a punishment, the trial court must follow the same procedure that the jury undertook: (1) the court must first determine whether one or more statutory

aggravating circumstances were proven beyond a reasonable doubt, (2) if so, the court must weigh the mitigating and aggravating evidence to determine whether the circumstances in mitigation of punishment outweigh the circumstances in aggravation, and (3) if not, the court must then decide whether to impose a sentence of life imprisonment or death.

In accordance with this procedure, the trial court noted that the jury unanimously found Mr. Shockley guilty of first-degree murder beyond a reasonable doubt, that the jury unanimously agreed that three of the submitted statutory aggravators were present beyond a reasonable doubt, and that "the jury did not unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment." Following an independent review of the evidence and the findings of the jury, the trial court agreed with the jury that the State had proved three statutory aggravating circumstances beyond a reasonable doubt; further, the trial court found that the mitigating circumstances did not outweigh those in aggravation. The court then determined the appropriate sentence to be death.

Mr. Shockley appeals his conviction and death sentence. Because Mr. Shockley received a death sentence, this Court has exclusive jurisdiction. Mo. Const. art. V, § 3.

II. STANDARD OF REVIEW

This Court reviews the evidence in the light most favorable to the verdict. *Davis,* 318 S.W.3d 618; *see*

also State v. Strong, 142 S.W.3d 702, 710 (Mo. banc 2004). Review of preserved issues:

> is for prejudice, not mere error, and the trial court's decision will be reversed only if the error was sufficiently prejudicial that it deprived the defendant of a fair trial. Any issue that was not preserved can only be reviewed for plain error, which requires a finding that manifest injustice or miscarriage of justice has resulted from the trial court error.

State v. McLaughlin, 265 S.W.3d 257, 262 (Mo. banc 2008) (citations omitted).

In cases where the death penalty has been imposed, section 565.035 also requires that this Court independently conduct a proportionality review "to prevent freakish and wanton application of the death penalty." *State v. Deck,* 303 S.W.3d 527, 550 (Mo. banc 2010).

III. GUILT PHASE ERRORS

A. Transcript Preparation

Mr. Shockley asserts that the trial transcript is so inaccurate and incomplete that appellate review would be based on a degree of conjecture and uncertainty that is impermissible in a death penalty case. The State contends that the transcript issues remaining in the record are minor, are not relevant to any of the issues raised on appeal and do not require remand for a new trial or cast doubt on the verdict.

An appellant is "entitled to a full and complete transcript" for appellate review. *State v. Middleton,*

995 S.W.2d 443, 466 (Mo. banc 1999). But, a record that is incomplete or inaccurate "does not automatically warrant reversal of the appellant's conviction." *Id.* The appellant is entitled to relief only if he or she "exercised due diligence to correct the deficiency in the record *and* he was prejudiced by the alleged defects." *Id.; see also State v. Christeson,* 50 S.W.3d 251, 271 (Mo. banc 2001). Here, Mr. Shockley has exercised due diligence in seeking to correct the record. Through diligence, Mr. Shockley successfully ensured that all relevant portions of the trial were included in the transcript on appeal. This Court finds that the prior difficulties in correcting the transcript and the remaining omission of a single inadvertently off-the-record conference do not impede this Court's review and are not prejudicial.

Court reporter Andrea Moore prepared the trial transcript using a voice recognition program that translated her spoken words into text and saved that text on her computer. She also used two microphones attached to digital recording devices, which created two separate audio recordings of the courtroom proceedings. Ms. Moore placed both of these devices in the main courtroom, where all of the testimony occurred. After each day's testimony, Ms. Moore burned the text and audio recording data onto DVDs and made two copies of those DVDs. Upon the trial's completion, Ms. Moore planned to use the original and backup audio recordings to prepare an official typed transcript.

Problems arose when Ms. Moore developed bronchitis on the last day of the trial. No evidence was

presented to support the defense's suggestion that the bronchitis may have affected her ability to record the proceedings or provide copies during trial. But the illness, as well as various unrelated family issues, did preclude her from completing the transcript after the trial's conclusion. She sent the audio and text files and written notes she made during trial to the Office of State Courts Administrator ("OSCA"). She worked with OSCA transcribers to clarify questions about her somewhat unusual recording and backup procedures. She helped transcribers to overcome equipment compatibility issues and to decipher particular portions of her recordings. She also helped transcribe a discussion that occurred before trial but after *voir dire* that had failed to record on her voice recorders but that OSCA had been able to recover from her backup audio files.

After Ms. Moore certified the transcript as accurate, it was filed with this Court May 3, 2010. In October 2010, Mr. Shockley filed a motion with this Court asking that the case be remanded to the circuit court for determination of the sufficiency of the trial transcript and for preparation of a supplemental transcript. His motion claimed that the transcript was unreliable due to the difficulties encountered by OSCA and that it was incomplete because it did not contain a proceeding that, Mr. Shockley asserted, Ms. Moore recorded but failed to include in the transcript concerning what the jury should do if it failed to agree on punishment. This Court remanded the case to the circuit court to determine whether the transcript was sufficient for appellate review.

On December 22, 2010, the circuit court conducted a hearing regarding the transcript. It concluded that two brief conferences between the judge and counsel held in the court anteroom during trial were not included in the transcript on appeal. Ms. Moore did record these proceedings; OSCA simply missed them in their initial transcription because they occurred outside the main courtroom. At the trial court's direction, OSCA prepared a supplemental transcript containing these discussions. Nothing said in either conference is the subject of any point raised on appeal.[2]

An attorney for Mr. Shockley testified at the hearing on remand that he also believed there to have been a record made in a smaller auxiliary courtroom during a meeting between trial counsel and the trial judge. He could not, however, say specifically what that record entailed, only that the discussion involved whether a different juror, Juror No. 58, should be stricken from the jury and whether Mr. Shockley's second attorney should continue with his representation. Ms. Moore testified that although she had set up recording equipment in the smaller

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[2] The first discussion concerned a question from the jury about what to do when it could not reach a verdict. Nothing about this question is at issue on appeal. The second discussion concerned a juror who had been seen smiling and winking at Mr. Shockley's family. The State did not ask that the juror be removed and the Court concluded that there was insufficient evidence to establish that the juror engaged in any misconduct.

auxiliary courtroom, the judge never instructed her to turn on the equipment.[3]

One of the two prosecutors testified that although the failure to turn on recording equipment meant that discussions regarding Juror 58 that occurred in the auxiliary courtroom were not recorded, all of the parties thereafter went into the main courtroom to make a record regarding counsels' positions and what the court intended to do. The prosecutor said this subsequent discussion captured what had occurred during the unrecorded conference. Defense counsel agreed that the subsequent discussion in the main courtroom—which was recorded—included both parties' positions on the issue and the court's ruling.

Mr. Shockley does not claim on appeal that any issue raised in the auxiliary courtroom was not then discussed on-the-record in the main courtroom. Similarly, while he notes that various portions of the remainder of the transcript have inaudible words, he does not identify any such instance that has affected his ability to brief or support issues raised on appeal. He nonetheless asks this Court to remand for a new trial, asserting that the shortcomings in the original transcript and the failure of Ms. Moore to record the auxiliary courtroom conversation demonstrate that there *may* have been other as yet unidentified errors or omissions in the transcript that have not been corrected. These potential shortcomings, Mr. Shockley argues, make "reliance on the transcript by this Court

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[3] The State also indicated this issue was discussed off-the-record in chambers. Those discussions are not at issue on appeal.

... fraught with danger" and should so undermine this Court's confidence in the sufficiency of the record for appellate review that a new trial is warranted.

This Court will not engage in speculation. The court reporter worked with OSCA to prepare the transcript, and OSCA prepared a supplemental transcript of the anteroom conversations excluded from the original transcript. The subject of the single unrecorded auxiliary courtroom bench conference was repeated on the record in the main courtroom. While Mr. Shockley asks this Court to presume that there must be more errors beyond those already identified and corrected, he points this Court to no specific material omission. In these circumstances, Mr. Shockley simply has failed to meet his burden of showing that defects in the transcript caused him undue prejudice.

B. Comment on the Defendant's Failure to Testify

Mr. Shockley argues that a comment made by the prosecutor improperly referred to Mr. Shockley's failure to testify. Mr. Shockley concedes that he did not raise an objection following the prosecutor's statement and that the judge *sua sponte* told the prosecutor to "keep your comments to yourself." Nonetheless, he says, the prejudice was so serious that the trial court committed plain error in not *sua sponte* declaring a mistrial because of the comment. The State argues that the comment was not on Mr. Shockley's failure to testify at all and that, even had the comment indirectly alluded to his silence, it was

not so prejudicial as to constitute plain error requiring a mistrial.

The comment at issue occurred during the cross-examination of Lisa Hart. She testified on direct examination that on the day of the murder she and her husband met with a realtor to look at a home near where Sergeant Graham lived. She said she noticed a red Grand Am with a softball-sized yellow sticker parked near Sergeant Graham's home when they arrived and that the vehicle was still there when they left. She remembered the car because it was facing the wrong direction and because of the bright yellow sticker. After learning of the murder, she informed local police about the car and they asked her to come by the station for further discussion. Without any advanced notice to the officers at the station, Ms. Hart dropped by the station with her husband a few hours after the request. She explained on cross-examination that as she approached the station she saw a police officer backing a red Grand Am out of the police garage. She immediately turned to her husband and stated, "Oh my gosh. That's it." She and defense counsel had the following exchange at trial:

> Q. Do you know [Mr. Shockley's grandmother]?
>
> A. No.
>
> Q. Do you know why her car would be across from where Sergeant Graham was murdered—
>
> A. No.
>
> Q.—on March 20, 2005?

A. No.

[PROSECUTOR] BELLAMY: Someone does.

THE COURT: Keep the comments to yourself. I've already warned defense counsel.

(emphasis added).

Defense counsel did not object to the prosecutor's comment, ask that the jury be instructed to disregard it or ask for a mistrial. Mr. Shockley now asks that this Court remand for a new trial because, he argues, the trial court committed plain error in not *sua sponte* granting a mistrial based on his claim that the words "someone does" constituted a direct comment on his failure to testify.[4]

The State is not permitted to comment, directly or indirectly, about a defendant's failure to testify. *State v. Redman,* 916 S.W.2d 787, 792 (Mo. banc 1996). "A direct reference to an accused's failure to testify is made when the prosecutor uses words such as 'defendant,' 'accused' and 'testify' or their equivalent." *State v. Neff,* 978 S.W.2d 341, 344 (Mo. banc 1998); *see also State v. Lawhorn,* 762 S.W.2d 820, 826 (Mo. banc 1988). The State's comment "someone does" is not a direct comment on Mr. Shockley's failure to testify. The State did not use words such as "defendant" or "accused" to indicate that it was referring to Mr. Shockley, nor did it insinuate that it was referring to

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[4] When a defendant fails to make an objection contemporaneous with the purported error, on appellate review, the issue is evaluated for plain error, which requires a showing that the error resulted in manifest injustice or a miscarriage of justice. *State v. Taylor,* 298 S.W.3d 482, 491 (Mo. banc 2009).

Mr. Shockley's lack of testimony. It is patently evident that someone had to know why the car was parked where it was. That person could have been the driver, a passerby who saw the car being parked or driven away, or someone who lived in the area; it need not have been Mr. Shockley. The comment "someone does" was not a direct comment on Mr. Shockley's failure to testify.

Mr. Shockley argues that if the Court finds that the prosecutor's statement is not a direct comment on his failure to testify, at least it must constitute an indirect comment. An indirect comment is one that does not overtly mention testifying in connection with the defendant but nonetheless is "reasonably apt to direct the jury's attention to the defendant's failure to testify." *Neff,* 978 S.W.2d at 344.

Ultimately, this Court need not determine whether the comment was an indirect one on defendant's failure to testify or was simply an ill-advised and inappropriate remark upon the fact that "someone" could explain the presence of the vehicle near Sergeant Graham's house. Assuming, without deciding, that the comment was an indirect one,[5] even

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[5] This Court has on numerous occasions evaluated whether comments by the State constituted indirect references to a defendant's failure to testify. *See, e.g., State v. Williams,* 673 S.W.2d 32, 36 (Mo. banc 1984), in which this Court held that the following remarks by a prosecutor *would* reasonably be construed as reference to defendant's failure to testify: "[T]here is no eyewitness as to what happened in that bathroom that the State can produce for you today. There's only two people back

when objected to "an indirect reference requires reversal only if there is a calculated intent to magnify that decision [not to testify] so as to call it to the jury's attention." *Id.* The facts do not demonstrate any such calculated attempt by the State to cross the prohibited line. The comment was an isolated, off-the-cuff statement, "not obviously intended to poison the minds of the jurors against the defendant." *Id.* at 347. Any prejudice certainly could have been cured by an instruction to the jury had an objection been made and an instruction been requested. *See, e.g., Neff,* 978 S.W.2d at 345 ("If the prejudice were not immediately correctable short of mistrial, the requirement of a timely objection would be illogical"); *State v. Kempker,* 824 S.W.2d 909, 911 (Mo. banc 1992) (prejudice curable by instruction); *accord State v. Dees,* 916 S.W.2d 287, 296 (Mo.App.1995). Sua sponte declaration of a mistrial was not required. An alleged

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there that knows exactly what happened and can tell you—who knows exactly what happened back there." In *State v. Rothaus,* 530 S.W.2d 235 (Mo. banc 1975), this Court held that the following remarks by a prosecutor *would not* reasonably be construed as reference to defendant's failure to testify: "How does the defendant know that [the prescription is] false, forged and counterfeit? You arrive at that decision by circumstances, by looking at the surrounding facts. The only one who can actually say he knows is the defendant."

In a fact situation most comparable to that before the Court today, *State v. Clemons,* 946 S.W.2d 206, 228 (Mo. banc 1997), holds that multiple comments by a prosecutor that the evidence against appellant was undisputed or uncontradicted were *not* an indirect reference to a defendant's failure to testify because the case did not present a situation where only the defendant could dispute the state's evidence.

comment on the failure to testify, like other unpreserved errors, provides a basis for reversal only when the defendant goes beyond a showing of demonstrable prejudice to establish manifest prejudice affecting substantial rights. *State v. Parker,* 856 S.W.2d 331, 332 (Mo. banc 1993). This "drastic remedy" will be exercised only in those "extraordinary circumstances in which the prejudice to the defendant cannot otherwise be removed." *State v. Ward,* 242 S.W.3d 698, 704 (Mo. banc 2008). This is normally the case only upon a showing by the defendant that the improper comment had a decisive effect on the jury's verdict. *Id.* at 705.

Mr. Shockley has fallen far short of showing that this comment had a decisive effect on the jury. By the time the prosecutor uttered the remark, the jury's attention already was directed to the mystery surrounding who parked the car on Sergeant Graham's street and whether it was the grandmother's car, as that was a central issue in the case. Both counsel inquired of Ms. Hart and other witnesses whether they saw who drove the car parked outside Sergeant Graham's home, where the grandmother's car was at the time of the murder, whether Mr. Shockley asked his grandmother if he could borrow the car, what time Mr. Shockley returned the car to his grandmother and whether Mr. Shockley explained why he was borrowing his grandmother's car. The jury by then was contemplating whether the car parked outside Sergeant Graham's home belonged to Mr. Shockley's grandmother, why the car was there and who drove

the car. The single statement of the obvious, that someone had to know why it was there, a statement that could refer to many people in addition to defendant, did not add to this focus. Moreover, the judge immediately told counsel to keep his comments to himself, and the comment was not repeated or emphasized.

Finally, the trial court, at the request of the defense, submitted MAI–CR 3d 308.14 to the jury. It instructed the jury that Mr. Shockley had the right not to testify and that the jury could not draw an adverse inference from Mr. Shockley's failure to testify. As noted in *Dees,* 916 S.W.2d at 297, the giving of this instruction can help ameliorate any prejudice that otherwise might result from a single comment on the failure to testify.

In these circumstances, the comment could not have been manifestly unjust or caused a miscarriage of justice. The trial court did not commit plain error in failing to grant a mistrial *sua sponte.*

C. Character Evidence

Mr. Shockley argues that the trial court erred in not sustaining his request for a mistrial after a highway patrol officer, Sergeant Jeff Heath, testified that S.W.A.T. accompanied him to interview Mr. Shockley due to Mr. Shockley's history of violence. Mr. Shockley's complaint on appeal is not with the mention of S.W.A.T., nor is it with the actual presence of S.W.A.T. members at the interview; counsel used these same facts to support the defense theory that the police wrongly and prematurely targeted Mr. Shockley. Rather, Mr. Shockley asserts that the trial

court should have granted his motion for mistrial because the prosecutor's reference to his "violent history" constituted impermissible propensity evidence. The State denies that the issue was preserved or that the remark constituted propensity evidence and argues the reference was made only to explain the large police presence, in response to defense counsel's theory that the police unfairly targeted Mr. Shockley.

The challenged comment regarding Mr. Shockley's history of violence occurred during the State's direct examination of Sergeant Heath. The interaction between counsel, Sergeant Heath, and the court was as follows:

> Q. Now, when you became involved in this investigation it was the evening or night that Sergeant Graham was murdered?
>
> A. Yes, sir. March 20, 2005.
>
> Q. And sometime that evening it was decided that you and another officer should go out and interview [Lance Shockley], correct?
>
> A. Yes, sir.
>
> ....
>
> Q. It was late at night?
>
> A. Yes.
>
> Q. It was dark?
>
> A. Yes, sir.
>
> ....

Q. Before going out there were you made aware that your superiors wanted some additional people to go along as—I'll use the term "backup"?

A. Yes, sir.

Q. And who was that that was going to go out there and what role were they supposed to play?

A. It was the Sikeston Department of Public Safety's SWAT team, if you will.

Q. *And why were they going out with you?*

A. ***A decision was made by my bosses, if you will, that due to Lance Shockley's violent history, that—***

MR. KESSLER: Your honor, I object.

THE WITNESS:—police should—

MR. KESSLER: Excuse me, sir.

THE WITNESS:—the SWAT team should go with me.

THE COURT: Hold on.

MR. KESSLER: Excuse me, sir.

THE COURT: You wanted to approach?

MR. KESSLER: Yes.

(At this time counsel approached the bench, and the following proceedings were had)

MR. KESSLER: I object to any introduction of his history. This goes to character. It's only offered for that purpose, period. I object.

MR. ZOELLNER: **Judge, I'm not going into his violent history. It goes to explain why they're out there. They've been beating on these people and they had to open this door as why they went out there and why it happened. It goes to explain this.**

MR. KESSLER: Judge, it doesn't—

MR. ZOELLNER: And I wasn't going into his history.

THE COURT: All right. Hold on. I'm going to sustain the objection. Are you requesting the instruction from the Court?

MR. KESSLER: Yes, Judge. **As I understand it the objection has been sustained as this goes to character and that it's not been introduced because our client hasn't testified and introduced his character. That was our whole objection**

THE COURT: And what do you wish me to instruct the jury?

MR. KESSLER: I ask that the jury be instructed to disregard that statement....

THE COURT: I'll sustain that. I intend on so instructing.

...

MR. KESSLER: **All right, Judge, we'd ask for a mistrial.** I believe that was a statement that was asked for and responded to that apparently Mr. Zoellner knew he was going to ask the question and knew why he was going to introduce it. Those purposes were improper. Now it's put something to the jury they had no information about. This is the first time and it's the last witness. It's been done solely to prejudice my client in the eyes of the jury. There w[ere] no questions ever about—you know put from us to anybody about why there were out there. It was because he was safe or it was a decision at highway patrol to send these people out there. What ended up happening has been the subject, not necessarily cross-examination.

It was introduced by the State as early as their opening statement, and every chance they've had to talk about it, they've characterized it as a silly little incident, that it was an accident, that it was something that just happened. They introduced it into the case, not us. We ask for a mistrial, Judge, because I don't believe there's any way to cure the prejudice that's occurred.

THE COURT: **All right. That request is overruled and denied.**

(Proceeding returned to open court.)

THE COURT: The jury is instructed to disregard any comment made by the witness

> regarding any character or reputation of the defendant and it should not be considered as evidence in this case.

(emphasis added).

Defense counsel did not object to Sergeant Heath's reference to Mr. Shockley's "violent history" on the ground now raised on appeal-that it constituted improper propensity evidence. To the contrary, defense counsel specifically stated that this statement "goes to character and that it's not been introduced because our client hasn't testified and introduced his character. ***That was our whole objection.***" Defense counsel thereby made clear that his "whole objection" was that the comment on his client's violent history was an attempt to impugn his client's character. The trial court agreed, sustaining the objection and instructing the jury to disregard the comment. The only requested relief not granted was the request for a mistrial.

On appeal, however, Mr. Shockley does not argue that the trial court erred in not granting a mistrial because the comment constituted improper character evidence nor does he cite cases holding that a single comment on a defendant's violent character requires a mistrial. Instead he argues that the evidence was improper propensity evidence. "On appeal, a defendant may not broaden the objection presented to the circuit court." *State v. Tisius,* 362 S.W.3d 398, 405 (Mo. banc 2012). Recognizing that he only objected below to the comment as character evidence, he attempts to merge the character and propensity evidence concepts. Mr. Shockley argues that evidence

of his violent character also can be considered to be evidence that he has a propensity for violence and, therefore, his character evidence objection should in parallel fashion be considered as if he had objected to the comment as improper propensity evidence. This argument is meritless. Character and propensity evidence are distinct from one another.

Propensity evidence is "evidence of uncharged crimes, wrongs, or acts" used to establish that defendant has a natural tendency to commit the crime charged. *State v. Bernard,* 849 S.W.2d 10, 13 (Mo. banc 1993). It is evidence of specific and distinct prior acts. "The well-established general rule is that proof 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. Reese,* 364 Mo. 1221, 274 S.W.2d 304, 307 (1954).[6]

By contrast, character evidence does not involve proof of specific prior instances of conduct, but

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[6] Although propensity evidence generally is inadmissible due to its potential to cause undue prejudice, there are numerous well-settled exceptions to the general rule. *Bernard,* 849 S.W.2d at 13 states that propensity evidence is admissible if it is relevant to establish "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; [or] (5) the identity of the person charged with the commission of the crime on trial.'" *But see State v. Vorhees,* 248 S.W.3d 585 (Mo. banc 2008) (signature *modus operandi* corroboration exception cannot be used to admit propensity evidence).

constitutes evidence that concerns a person's reputation, such as whether someone in the defendant's community views the defendant as a law-abiding citizen, a peaceable person, a truthful person, or as having any other general character trait. *Haynam v. Laclede Elec. Co–op., Inc.,* 827 S.W.2d 200, 205–06 (Mo. banc 1992). Here, the comment was not a specific instance of conduct, but concerned general character. Accordingly, defense counsel objected that because he had not attempted to show that Mr. Shockley had a good character, the State could not introduce evidence of his bad character. Defense counsel is correct that (while there are a variety of reasons why character evidence is admissible) if the purpose of the evidence is "to prove the defendant is the kind of person who would commit the crime" charged, the state can introduce it only if the defendant first puts his or her character in issue. *Haynam,* 827 S.W.2d at 205.

In any event, it is evident from the transcript that the prosecution witness did not mention Mr. Shockley's violent history in order to prove that Mr. Shockley had acted in conformity with that character for violence in killing the victim. He made the statement to explain why *the police* acted as they did. As the State notes, it was entitled to show why the police brought extensive backup because defendant had opened the door to such testimony. Otherwise inadmissible evidence "can nevertheless become admissible because a party has opened the door to it with a theory presented in an opening statement," *State v. Rutter,* 93 S.W.3d 714, 727 (Mo. banc 2002),

or through cross-examination. *State v. Watson,* 391 S.W.3d 18, 23 (Mo.App.2012). Where "the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Lingar,* 726 S.W.2d 728, 734–35 (Mo. banc 1987). Similarly, otherwise inadmissible evidence can become admissible if its purpose is to explain subsequent police conduct. *See State v. Edwards,* 116 S.W.3d 511, 533 (Mo. banc 2003); *accord State v. Dunn,* 817 S.W.2d 241, 243 (Mo. banc 1991).

In its opening statement, defense counsel argued that members of the Missouri highway patrol targeted Lance Shockley to the exclusion of other possible perpetrators. Counsel continued to press the targeted investigation theme during cross-examination of several State's witnesses, asking questions such as: "He was the suspect to the exclusion of everybody else, right?," "Were anybody—Any of these leads, anybody else's house surrounded by 10, 20 officers from around the state?", and "Are you aware of anybody else that was standing in his own front yard when someone accidentally, a sniper, a trained sniper accidentally discharged his firearm? ... Only happened to Lance Shockley, didn't it?"

Sergeant Heath was the State's last witness. The State did not focus on Mr. Shockley's violent history or go into detail about it. It simply allowed the witness to explain why the police brought so many officers when they wished to question Mr. Shockley. Moreover, evidence of Mr. Shockley's violent

character otherwise was properly before the jury through evidence that he told the investigators who came to question him at his work, "Don't come back to my house without a search warrant, because if you do there's going to be trouble and somebody is going to be shot." No manifest injustice occurred as a result of the witness' single reference to his violent history to explain why the police brought so many officers to Mr. Shockley's property when they questioned him.

D. Cumulative Non-Error Does Not Constitute Error

Mr. Shockley alternatively argues in his next point relied on that even if the "violent history" comment considered by itself did not cause manifest injustice, three other actions or comments made during trial worked collectively with it to "impugn Mr. Shockley's character and to make jurors more prone to find him guilty of the offenses charged in this case because of a supposed propensity to engage in criminal behavior."

The claimed additional actions and comments include the prosecutor's split-second projection during trial of a photograph that displayed Mr. Shockley in an orange prison jumpsuit; a gratuitous comment by a highway patrol officer who stated that it was Mr. Shockley who shot Sergeant Graham and that the shooting was deliberate; and a comment by the prosecutor in closing argument that, Mr. Shockley alleges, demonstrated Mr. Shockley's propensity to kill and was evidence of bad acts and bad character. Mr. Shockley does not claim on appeal that any of

these occurrences in themselves caused prejudicial error, no doubt because as to each he either did not object or was granted all the relief that he requested during trial. He does argue that they had the cumulative negative effect of highlighting his violent nature, however.

A key difficulty with this argument is that defense counsel never argued to the trial court that Mr. Shockley was entitled to a mistrial due to the cumulative effect of the "violent history" comment when considered in conjunction with these other actions or comments. The trial court has broad discretion to exclude or admit evidence at trial. This Court will reverse only upon a showing of a clear abuse of discretion. *State v. Morrow,* 968 S.W.2d 100, 106 (Mo. banc 1998). This Court does not find that the trial court abused its discretion in denying a motion for mistrial on a basis that was not raised. *See State v. Simmons,* 944 S.W.2d 165, 178 (Mo. banc 1997).

This failure to request a mistrial based on the alleged cumulative effect of these occurrences may be why, although Mr. Shockley's argument discusses whether a *mistrial* would have been appropriate and cites to the law regarding mistrials, his point relied on says without citation that the error was in not granting a *new trial.* Even were this disconsonance between the point relied on and the argument overlooked, however, the trial court did not err in overruling Mr. Shockley's motion for new trial.

"The purpose of a motion for new trial 'is to allow the trial court the opportunity to reflect on its action

during the trial.'" *State v. Bartlik,* 363 S.W.3d 388, 391 (Mo.App.2012) (citations omitted). "Raising an issue for the first time in a motion for new trial, when an objection could have been made at trial, is insufficient to preserve the claimed error for appellate review." *State v. Goeman,* 386 S.W.3d 873, 881 (Mo.App.2012). As he failed to claim a cumulative effect of these occurrences at trial, he therefore could not have preserved the cumulative error point he now asserts even had he properly raised it in his motion for new trial. But, he did not try to do so.

The only two comments that the motion for new trial claimed had a cumulative negative effect were the combination of the comment that Mr. Shockley had a violent history with the highway patrol officer's comment that he believed Mr. Shockley had shot the victim deliberately. The other two occurrences therefore are not further considered. Even as to the highway patrolman's comment, counsel failed to explain in his motion for new trial how the patrolman's comment, that he believed Mr. Shockley deliberately shot the victim, cumulatively could have caused manifest injustice where, as here, Mr. Shockley was on trial for first-degree murder for shooting the victim deliberately. All of the state's evidence was focused on proving that he did so. The highway patrolman's gratuitous comment did not affect that focus. This may be why in his motion for new trial Mr. Shockley argues only that the patrolman's comment was "non-responsive," which would not in itself be unduly prejudicial or necessarily act cumulatively with a comment about his character.

This is especially true when one considers that at trial not only did counsel choose not to object to the comment, but he actually used it to his advantage by showing it supported his theory that the police were biased against Mr. Shockley and did not conduct a fair investigation.[7] As explained in *State v. Johnson,* 284

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[7] The exchange with defense counsel was as follows:

Q: And so you can't tell the jury that that happened before you all went out there to search?

A: I know there was an accidental discharge. That's all I know for sure.

Q: All right. And that was an accidental discharge by someone other than Mr. Shockley, correct?

A: Yes. I don't believe his shots were accidental.

Q: It was—And now, let's examine that ignorant statement, can we? All right. The question to you, sir, as I understand, was you can't say that Mr. Shockley fired any shot that night and that it was fired by law enforcement officer. Your response was that, "I don't believe his shots were accidental," thus suggesting that he shot Sergeant Graham, right?

A: Yes, sir.

Q: That's your bias, correct?

A: That's the results of the investigation, sir.

Q: Your investigation, correct?

A: It was a combination of many people's investigation.

Q: All right. And yet, we haven't heard any results. We haven't heard one piece of DNA evidence that ties Lance Shockley to the scene, have we?

A: No, sir.

S.W.3d 561, 582 (Mo. banc 2009), plain error review is waived when "counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence." This Court's review of the record shows no error in failing to grant a new trial due to the alleged prejudicial cumulative effect of this evidence.

IV. PENALTY PHASE ERRORS

A. Instructing on Mitigating and Aggravating Circumstances

Mr. Shockley argues that Instruction 14 was improper because it failed to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the aggravating circumstances equaled or outweighed the mitigating circumstances. [8] This

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Q: We haven't heard one identification from anybody there that says he was at the scene, have we?

A: No sir.

[8] Instruction 14 stated:

If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 13 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.

In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating

argument is unpersuasive. Section 565.030.4(3) directs the jury to weigh the mitigating circumstances to see if they outweigh those in aggravation. *Id.* If the jury unanimously so determines, then the jury is directed to return a verdict of life imprisonment. *Id.* The section does not impose on the State the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh those in mitigation. This Court has on numerous prior occasions rejected arguments similar to Mr. Shockley's.[9]

> circumstances submitted in Instruction No. 13, and evidence presented in support of mitigating circumstances submitted in this instruction.
>
> You shall also consider any facts or circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

[9] *See State v. Anderson,* 306 S.W.3d 529, 539–40 (Mo. banc 2010); *State v. Johnson,* 284 S.W.3d 561, 587–89 (Mo. banc 2009); *State v. Taylor,* 134 S.W.3d 21, 30 (Mo. banc 2004). *See also Kansas v. Marsh,* 548 U.S. 163, 169–80 (2006) (upholding the constitutionality of a Kansas death penalty statute that placed the burden on the State to prove beyond a reasonable doubt that mitigators do not outweigh aggravators, noting the

Here, the jury's verdict form shows that the jury followed the required statutory procedure in unanimously finding three statutory aggravating circumstances and in failing to find unanimously that the mitigating circumstances outweighed those in aggravation. Mr. Shockley cites no other authority to support his argument that the constitution or Missouri statutes require otherwise.

B. The Jury Was Instructed Properly on What Would Happen if it Could Not Agree on Punishment

Section 565.030.4 sets out the procedure the jury must follow in returning a penalty phase verdict in a death penalty case. It states:

> If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. *If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of*

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constitutionality of an Arizona statute that places the burden on the defendant to prove that mitigators outweigh the aggravators and stating "that a State enjoys a range of discretion in ... the manner in which aggravating and mitigating circumstances are to be weighed.").

> *the governor or death.* The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

§ 565.030.4(4) (emphasis added). Instruction 16 instructed the jury in accordance with this statute.[10] Mr. Shockley asserts that the emphasized portion of the statute, repeated in Instruction 16, unconstitutionally reduces jury responsibility for

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[10] Instruction 16 stated in pertinent part:

> ....
>
> If you do unanimously find at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 13, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstance in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 13 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment. If you return a verdict indicating that you are unable to decide or agree upon the punishment, the court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

reaching a verdict by depriving him of his constitutional right to have a jury determine his sentence. In support, he cites *Caldwell v. Mississippi,* 472 U.S. 320 (1985).

Caldwell does not support this argument. In *Caldwell,* the prosecutor informed the jury that even if it fixed the defendant's sentence at death, the sentence would be subject to appellate review. *Id.* at 325–26. The Court found that the prosecutor's suggestion could have led the jurors to believe that the ultimate determination of death rested not with them, but with an appellate court, thereby minimizing the importance of the jury's role. *Id.* at 330–34. *Caldwell* warned that "the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* at 333.

Section 565.030.4 does not require the jury be told that its decision to assess a sentence of death is subject to appellate review, as occurred in *Caldwell.* Instead, the law requires that the court instruct the jurors that the court will assess the punishment itself at either death or life imprisonment *only if* the jury is *unable* to agree on punishment after it unanimously determines that one or more statutory aggravators have been proved beyond a reasonable doubt and the jury fails to unanimously find that the factors in mitigation outweigh those in aggravation. Mr. Shockley offers no authority holding that the requirements of section 565.030 improperly diminish the jury's sense of responsibility for determining the appropriateness of a death sentence, and this Court

finds no reason to do so. Accordingly, this Court rejects Mr. Shockley's claim that section 565.030 deprives him of his constitutional right to jury sentencing.

C. Section 565.030.4 Does Not Require Improper Judge Factfinding

Mr. Shockley argues that section 565.030.4 is unconstitutional because it impermissibly permits the judge, rather than the jury, to weigh the aggravators and mitigators and determine punishment if the jury is unable to reach a verdict. He misreads the statute. Section 565.030.4 and the other statutory provisions governing death penalty cases require the jury to find a statutory aggravator beyond a reasonable doubt, to consider other aggravating and mitigating circumstances and to determine whether the factors in mitigation outweigh those in aggravation. §§ 565.032.1, 565.030.4. If the jury finds that the mitigators outweigh the aggravators, it must impose a life sentence. § 565.030.4(3). Only if it does not so find do the statutes direct the jury then to consider whether a death or life sentence is appropriate. It is solely when the jury is unable to agree on this final step that the statutes allow the jury to return a verdict stating that it is unable to agree on punishment. *Id.*

Here, the jurors answered special interrogatories listing three statutory aggravators that they found unanimously beyond a reasonable doubt. They answered that they did not find unanimously that the mitigating circumstances outweighed those in aggravation. The special interrogatories showed that

the jury deadlocked only on the issue of whether to assess a penalty of death or of life imprisonment.

Permitting a judge to consider the presence of statutory aggravators and to weigh mitigating evidence against that in aggravation in deciding whether to impose a death sentence when the jury did not unanimously agree on punishment does not negate the fact that the jury already had made the required findings that the State proved one or more statutory aggravators beyond a reasonable doubt and that it did not unanimously find that the factors in mitigation outweighed those in aggravation. Rather, the statute provides an extra layer of findings that must occur before the court may impose a death sentence. Mr. Shockley's argument is without merit.[11]

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[11] As this Court held in *State v. McLaughlin,* 265 S.W.3d 257 (Mo. banc 2008), *State v. Whitfield,* 107 S.W.3d 253 (Mo. banc 2003):

> ... does not state that a judge cannot enter a death sentence if the jury deadlocks; it says, rather, that under the principles set out in *Ring* [*v. Arizona,* 536 U.S. 584 (2002)], the jury must make the required factual findings that increase the punishment from a life sentence to death. *Whitfield,* 107 S.W.3d at 261–62.
>
> Since *Whitfield,* Missouri's instructions in capital cases have been revised to require the jurors to answer special interrogatories indicating whether they found a statutory aggravating factor to be present, and if so, what factor, and whether they found that mitigating evidence did not outweigh aggravating evidence. *See* MAI CR 3d 314.40, 314.58.... *Whitfield* did not hold

D. Alleged Improper Juror Influence

Mr. Shockley argues that he suffered prejudice because Juror 58 may have improperly influenced other jurors. Juror 58 served as the foreman during the guilt phase of Mr. Shockley's trial but the court removed him just prior to the penalty phase deliberations after counsel for Mr. Shockley objected to his continued involvement in the trial due to the content of a novel previously written by the juror. The novel, a fictional autobiography, chronicled the protagonist's brutal and graphic revenge murder of a teenager who killed the protagonist's wife in a drunken driving accident and who the protagonist viewed as escaping justice in the court system because he received only probation following his involuntary manslaughter conviction. When defense counsel learned of the contents of the novel just prior to penalty phase deliberations, he asked the trial court to question Juror 58 on the record as to the contents of the book and the juror's personal beliefs as well as to inquire of all the jurors as to any effect that Juror 58's personal beliefs and opinions had on jury deliberations. The court denied the request to question Juror 58 at that time because it found no evidence of juror misconduct and believed any

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> that a judge could not consider the facts and make a determination whether to impose death once a jury had found the facts necessary to make a defendant eligible for a death sentence under section 565.030.4, and such a procedure does not violate *Ring*.

McLaughlin, 265 S.W.3d at 264.

questioning of Juror 58 at that point might improperly taint the whole jury. Mr. Shockley then moved for a mistrial. The trial court overruled the motion but did advise Mr. Shockley that following the trial he could inquire of the jurors if necessary. After additional arguments, the court dismissed Juror 58 by consent of both parties, replacing him with an alternate juror for the penalty phase deliberations. The alternate juror listened to the penalty phase closing argument and participated in the penalty phase deliberations. No error is claimed in this substitution.

Mr. Shockley asserts that the trial court should have granted his motion for mistrial or subsequent motion for new trial because the content of Juror 58's novel is so close to the facts of Mr. Shockley's case and reveals such an inherent bias that it must mean that Juror 58 lied during *voir dire* when he stated that he could be fair and impartial. Mr. Shockley claims Juror 58's experiences and beliefs, as illuminated in his writing, had likely been influential upon the other jurors.

While these types of allegations most often are made when asserting intentional nondisclosure by a juror during *voir dire,* Mr. Shockley has neither cited cases setting out the standard for granting a new trial for intentional non-disclosure nor attempted to show how these cases would apply to Juror 58. This may be because intentional nondisclosure in *voir dire* occurs only if the venireperson falsely answers a "question asked of the prospective juror." *Williams By and Through Wilford v. Barnes Hosp.,* 736 S.W.2d 33, 36 (Mo. banc 1987). Here, neither counsel asked Juror 58

any questions about his novel during *voir dire,* even after he volunteered that he was a published author and said he did so because "I thought that series of questions to ask about that should come out front as well." Juror 58 cannot have lied in response to a question not asked. *See State v. Brown,* 939 S.W.2d 882, 884 (Mo. banc 1997).

Instead, Mr. Shockley claims a violation of section 547.020 in the argument section of his brief (although he does not mention it in his point relied on). That statute addresses the trial court's right to grant new trials generally. It states:

The court may grant a new trial for the following causes, or any of them:

> (1) When the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony, or for newly discovered evidence;
>
> (2) When the jury has been separated without leave of the court, after retiring to deliberate upon their verdict, or has been guilty of any misconduct tending to prevent a fair and due consideration of the case;
>
> (3) When the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors;
>
> (4) When the court has misdirected the jury in a material matter of law;

(5) When the verdict is contrary to the law or evidence.

Here, although he cites to no cases applying these provisions to a situation such as this, Mr. Shockley argues that subdivisions (1) and (2) apply. He argues that this Court should assume from the nature of the novel that Juror 58 talked about his novel to the other jurors and that this means they received "evidence, papers or documents, not authorized by the court" in violation of section 547.020.1. He then argues that this Court should hold as a matter of law that this information must have influenced their verdict and so must have "prevented fair and due consideration of the case" under section 547.020.2.

Alternatively, Mr. Shockley argues, the trial court erred in not granting his motion to inquire of Juror 58 during deliberations about the contents of his book and his beliefs, or at least that the trial court committed reversible error in not at some point *sua sponte* calling a hearing and "conducting its own inquiry into whether extraneous information or prejudicial material was made a part of the deliberative process." He argues that the lack of a hearing, at which possible improper influences could have been discovered, precludes meaningful appellate review.

Mr. Shockley's argument is without merit. There is nothing in the record to support Mr. Shockley's assumption that Juror 58 shared his novel and its story with the other jurors; the only evidence is that Juror 58 showed the book to a bailiff. While the nature of the novel's subject matter caused the court concern,

the court determined that nothing in the record demonstrated that Juror 58 lied when he said he could be fair and impartial or that he was willing but reluctant to impose the death penalty. Mr. Shockley's argument to the contrary is premised on a degree of factual congruity between the novel and the facts of the trial that does not exist.[12] Further, the defense's argument that Juror 58's assurance of his impartiality was false is premised on the assumption that Juror 58 shared the views expressed by the protagonist in his novel and tried to hide that fact from the court and counsel so that he could be seated on the jury. This is inconsistent with the fact that it was Juror 58 himself who brought his novel, and his son's police work, to the attention of the court and counsel so they could include these issues in their remaining line of questions.

It is of course possible to speculate that had a hearing been held, Juror 58 might have revealed that he shared his novel's themes or viewpoints with the other jurors or that he lied in *voir dire* or that he was unable to be neutral and impartial. But it is also possible to speculate that he would have reaffirmed what he said in *voir dire*—that he had a son who was a police officer and that he was a published author,

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[12] Here, unlike in the novel, the alleged perpetrator of a hit and run accident did not avoid punishment or receive only probation. Mr. Shockley was arrested for and was being tried for the premeditated murder of a police investigator. The issue for the jury was not whether to punish him for the hit and run accident but whether to find him guilty and impose a sentence of life imprisonment without parole or a death sentence.

but that he could be fair and impartial. What is certain is that there is no merit to the defense's argument that the trial court bore any degree of responsibility for the lack of a factual record. After trial, the judge sent counsel a letter in which he said in relevant part:

> I want to determine whether the state or the defendant will be requesting (or subpoenaing) any juror in this case to testify about any issue raised at trial or in pending motions.... Also, for your information, regarding the "book" referred to at trial, I have been advised that the same juror gave a copy of his book during the week of trial to the court bailiff.

Not only did neither counsel take the judge up on this offered opportunity to question Juror 58 about whether he had discussed his novel with other jurors, defense counsel specifically waived any right to such a hearing. He stated on the record at the motion for new trial hearing:

> we received [a] letter from the Court about whether or not we were going to call any jurors or anything like that. I just wanted to—...—supplement the record. We responded to the Court's letter that we did not intend to call any additional witnesses, whether it was Juror 58 or anyone else.

The issue, therefore, does not arise whether the trial court *sua sponte* should have set a hearing at which it could question jurors about the influence of Juror 58, for the court did hold a hearing on the

motion for new trial and offered to allow jurors to be questioned or subpoenaed for that hearing. Not only did defense counsel not accept this opportunity, he affirmatively declined to call any witnesses. Mr. Shockley cannot now claim that the trial court committed plain error in failing to hold such a hearing and itself subpoena jurors as witnesses over defense counsel's statement that he did not want such witnesses. "It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Mayes,* 63 S.W.3d 615, 632 n. 6 (Mo. banc 2001). While plain error review is discretionary, an appellate court should not use it to impose a *sua sponte* duty upon a trial court to correct mistakes of a defendant's own making. *See State v. Bolden,* 371 S.W.3d 802, 806 (Mo. banc 2012). No basis for reversal is shown in regard to Juror 58.

E. The Death Sentence is not Disproportionate to the Penalty Imposed in Similar Cases

Whenever the death penalty is imposed, section 565.035.3, requires this Court to conduct a proportionality review and determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

Id.

Mr. Shockley does not claim under section 565.035.3(1) that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and this Court's independent review finds no reason to believe the verdict was based on any such factor.

Neither does Mr. Shockley claim under section 565.035.3(2) that the evidence does not support the jury's finding beyond a reasonable doubt of at least one statutory aggravating circumstance, and this Court determines after an independent review that the evidence supported the jury's finding of at least one statutory aggravator beyond a reasonable doubt. *See State v. Clay,* 975 S.W.2d 121, 145 (Mo. banc 1998) ("The jury need find only one statutory aggravating circumstance in order to recommend imposition of the death penalty").[13]

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[13] The three statutory aggravators the jury found supported by the evidence were that: (1) the defendant killed a peace officer because of the exercise of his official duty; (2) the victim was murdered for the purpose of preventing a lawful arrest of the defendant, and (3) the victim was a potential witness in the pending investigation of defendant for leaving the scene of a motor vehicle accident and was killed as a result of his status as a potential witness.

Mr. Shockley argues, however, that this Court should find under section 565.035.3(3) that "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the strength of the evidence" because it is based solely on circumstantial evidence which, he claims, is of limited strength. In reviewing penalties imposed in similar cases, this Court must consider "all factually similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life imprisonment without the possibility of probation or parole." *State v. McFadden,* 391 S.W.3d 408, 428 (Mo. banc 2013).

In support of his argument, Mr. Shockley cites *State v. Chaney,* 967 S.W.2d 47 (Mo. banc 1998), in which this Court found a death sentence disproportionate to the strength of evidence that was very weak and circumstantial. In so doing, *Chaney* did not state that a death sentence cannot be based on circumstantial evidence. Rather, it based its holding on the weakness of the particular facts, stating:

> In this case there is no eyewitness, confession, admission, document, fingerprint

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It is uncontested that as a highway patrolman, Sergeant Graham was a peace officer. The State presented substantial evidence that Sergeant Graham was investigating Mr. Shockley's involvement in another crime at the time of the murder, that Mr. Shockley was concerned that the investigation would lead to his arrest, and that Sergeant Graham had uncovered evidence of Mr. Shockley's involvement in the fatal truck accident involving Mr. Bayless and was a potential witness in that action.

> or blood evidence directly pointing to the defendant. Neither is there evidence of defendant's involvement in any similar or related crimes from which one might infer his involvement here. While sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, the evidence here is not as strong as evidence in similar cases imposing the death penalty noted above. After comparing the evidence in this and similar death penalty cases, we conclude that this case falls within a narrow band where the evidence is sufficient to support a conviction, but not of the compelling nature usually found in cases where the sentence is death.

Chaney, 967 S.W.2d at 60. This Court has upheld the death sentence in cases hinging upon circumstantial evidence where the circumstantial evidence was strong. *State v. Jones,* 749 S.W.2d 356 (Mo. banc 1988); *see also State v. Hutchison,* 957 S.W.2d 757 (Mo. banc 1997).

Here, the circumstantial evidence was strong. Knowing that Sergeant Graham was investigating his involvement in the accident that killed Mr. Bayless, for several months Mr. Shockley concocted a series of lies to conceal the fact that it was he who drove the truck into the ditch. He also encouraged others to lie for him about his participation in the accident, including putting his finger over his grandmother's mouth when she said she would not lie for him. Once Mr. Shockley learned that Sergeant Graham had verified his involvement, he obtained Sergeant

Graham's home address. The day of Sergeant Graham's murder, Mr. Shockley borrowed his grandmother's car, and witnesses testified to seeing the car near Sergeant Graham's house during the estimated time of the murder. Mr. Shockley returned the car to his grandmother within thirty minutes of the shooting. The bullet that penetrated Sergeant Graham's Kevlar vest belonged to the .22 to .24 caliber class of ammunition. Although never found in his possession, Mr. Shockley was known to own a .243 rifle, and investigators discovered a single empty slot in Mr. Shockley's gun cabinet. On the night of the murder, Mrs. Shockley took a box of .243 ammunition to Mr. Shockley's uncle and stated that "Lance said you'd know what to do with them." After learning that Mr. Shockley previously had fired his .243 rifle on his uncle's property, investigators searched the grounds and discovered a .243 shell casing. The investigators also recovered several .243 shell casings on Mr. Shockley's field as well as several bullet fragments. Three highway patrol ballistics experts compared the fragments found on Mr. Shockley's property to the slug pulled from Sergeant Graham's body. All concluded that, in their expert scientific opinion, the three bullet fragments recovered from Mr. Shockley's field were fired from the same firearm as the one used to shoot the bullet into Sergeant Graham. In addition to the .243 rifle, Mr. Shockley owned numerous other guns, including three shotguns. A ballistics expert testified that a shotgun wadding discovered on Mr. Shockley's property was consistent with the wadding found near Sergeant Graham's body. The evidence

was sufficient to support the imposition of a death sentence considering the strength of the evidence.

Mr. Shockley nonetheless argues that the fact the conviction is based on circumstantial evidence combined with the fact that the jury could not agree on punishment requires a finding of lack of proportionality. If accepted, this argument would mean that no circumstantial evidence case could be sent to the judge to decide where the jury deadlocked on punishment. That would negate the legislature's intent that the trial court be permitted to determine whether to impose a death sentence where the jury finds the facts necessary to impose the death penalty but is unable to agree on punishment. Mr. Shockley cites no authority that Missouri's statutory procedure violates the state or federal constitutions, and this Court has upheld a death sentence where the trial court imposed the death sentence after the jury deadlocked on punishment. *State v. McLaughlin,* 265 S.W.3d 257 (Mo. banc 2008).

This Court's independent review also shows that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. This Court has upheld death sentences when a police officer was killed. *See State v. Johnson,* 284 S.W.3d 561 (Mo. banc 2009); *State v. Tisius,* 92 S.W.3d 751 (Mo. banc 2002); *State v. Clayton,* 995 S.W.2d 468 (Mo. banc 1999); *State v. Johnson,* 968 S.W.2d 123 (Mo. banc 1998). This Court also has upheld death sentences when the murder was committed for the purpose of preventing lawful arrest. *See State v.*

Smith, 944 S.W.2d 901 (Mo. banc 1997); *State v. Richardson,* 923 S.W.2d 301 (Mo. banc 1996); *State v. Gray,* 887 S.W.2d 369 (Mo. banc 1994); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988). Finally, this Court has upheld death sentences when the victim was a potential witness in a pending investigation. *See State v. Parker,* 886 S.W.2d 908 (Mo. banc 1994); *State v. Boliek,* 706 S.W.2d 847 (Mo. banc 1986).

Mr. Shockley argues that there are factually similar cases in which a life sentence was imposed rather than a sentence of death, but fails to cite to any such cases. This Court is unaware of a case in which a sentence of life imprisonment was imposed where the evidence showed that the defendant deliberately killed a peace officer due to the fear that the officer would arrest him after the officer discovered evidence in the exercise of his official duties that implicated the defendant in a prior crime and in order to prevent the officer from being a witness against him. Considering the penalty imposed in other cases, the death sentence is not disproportionate to the crime, the evidence or the defendant.

IV. CONCLUSION

For the reasons set forth above, this Court finds no reversible error and concludes that the sentence imposed is not disproportionate to the crime, the strength of the evidence or the defendant. The judgment of the trial court is affirmed.

All concur.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 24-1024

Lance Shockley

Appellant

v.

Travis Crews

Appellee

Appeal from the U.S. District Court for the Eastern District of Missouri – St. Louis (4:19-cv-02520-SRC)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Kelly would grant the petition for panel rehearing.

Judge Kelly and Judge Erickson would grant the petition for rehearing en banc.

June 07, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Maureen W. Gornik