

No. WD71264

IN THE
Missouri Court of Appeals
Western District

RYAN FERGUSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Boone County Circuit Court
Thirteenth Judicial Circuit
The Honorable Jodie Asel, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a Boone County Circuit Court judgment denying, after an evidentiary hearing, Mr. Ferguson's Rule 29.15 motion. In his motion, Mr. Ferguson sought to vacate convictions of murder in the second degree (felony), § 565.021.1.(2), RSMo 2000, and robbery in the first degree, § 569.020, RSMo 2000. Mr. Ferguson is serving a total of forty years in the Missouri Department of Corrections. This appeal does not involve any of the issues reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Western District. MO. CONST., Art. V, § 3; § 477.070, RSMo 2000.

STATEMENT OF FACTS

A jury found Mr. Ferguson guilty of murder in the second degree (felony murder), § 565.021.1(2), RSMo 2000, and robbery in the first degree, § 569.020, RSMo 2000. *State v. Ferguson*, 229 S.W.3d 612, 613 (Mo.App. W.D. 2007) (per curiam order). In a memorandum accompanying its order affirming Mr. Ferguson's convictions, this Court summarized the facts of Mr. Ferguson's crimes as follows:

On October 31, 2001, Chuck Erickson, a seventeen-year-old high school junior, attended a party at his friend's house in Columbia, Missouri. The police broke up the party and as Erickson was leaving the party, he ran into the appellant [Mr. Ferguson] who was just driving up to the house. The appellant, who was also a seventeen-year-old high school junior, told Erickson to get in his car, and the two drove off. They made plans to meet with the appellant's sister at By George's, a club in downtown Columbia, Missouri.

The appellant drove to By George's and parked on First Street. They waited for a few minutes for the appellant's sister, who was in college, and arrived, between 11:30 p.m. and midnight. Although underage, the appellant's sister had arranged for them to "borrow" other people's I.D.s so they could enter the club. Once in the club, the appellant bought a few mixed drinks for Erickson and himself. Around

1:00 a.m. the appellant and Erickson ran out of money so they left the club.

Once outside, they went to the appellant's vehicle. There, the appellant told Erickson that he did not want to go home and that they should find something else to do. The appellant suggested that they rob someone so they could get more beer money and stay out later. Erickson agreed. They exited the appellant's vehicle, and the appellant got a tire tool out of his trunk to use in the robbery. They then walked downtown to find someone to rob. They eventually walked to the Columbia Tribune Building where they saw the victim leaving the building.

The appellant and Erickson went down an alley and hid behind a dumpster. They observed as the victim reached his vehicle in the Tribune parking lot and opened his front door. As he was shuffling some papers, Erickson and the appellant ran up behind him as he was facing his vehicle, and Erickson hit him with the tire tool. Erickson repeatedly hit him with the tire tool. The victim eventually fell to the ground, where he laid motionless. Erickson dropped the tire tool near the victim. The appellant went over to the victim and took the victim's belt off and strangled him with it.

During the assault, a custodian at the Tribune Building, Shawna Ornt, had exited the building to smoke a cigarette. She observed what was happening and went back to the building to get a co-worker, Jerry Trump. While that was occurring, the appellant reached down and searched the victim's pockets and took his watch and car keys. Erickson grabbed the tire tool and the belt. Trump exited the building and saw the victim on the ground. He called out "I see you there. Who's out there." Erickson responded that the victim was hurt. Erickson and the appellant then left the scene. Trump went over to the victim's body and told Ornt to call 911.

After leaving the scene, the appellant and Erickson ran down Fourth Street toward Broadway. They eventually went to the Flat Branch Park, crossed a creek and arrived at the Phillips 66 on Providence. At the Phillips 66, they encountered a friend of theirs, Dallas Mallory, and Erickson told him that they had just beaten a man. The appellant and Erickson went back to the appellant's car. Once they arrived back at the car, the appellant grabbed a plastic bag out of his car and told Erickson to put the victim's belt and tire tool in the bag. The appellant put some other items in the plastic bag. The appellant told Erickson not to worry because he would take care of the stuff in

the bag. At some point, the appellant realized that he had some money in the glove box so they went back to the club. They stayed at the club for a few more minutes and each had a drink. After that, they left the club again, and the appellant drove Erickson home.

When the police arrived at the scene, they noticed bloody footprints around the victim's body. Detective Jeff Nichols of the Columbia Police Department used luminol to track the blood trail away from the scene. The trail started at the Tribune Building and continued south on Fourth Street to Broadway. A police dog was brought in and was able to track the blood trail to a campus facility at Fifth and Elm Streets.

The next morning, on November 1, 2001, Erickson woke up, but apparently did not remember the murder. That night, he called the appellant and asked for a ride to school the next day. The appellant agreed and the next day, on November 2, 2001, the appellant picked him up for school. While riding to school, Erickson read an article in the newspaper about the murder and told the appellant that he thought it was "messed up" because it happened only two blocks away from where they were that night. The appellant became irritated and asked "so what?" Erickson dropped the conversation. The appellant

and Erickson interacted less and less after the murder.

Eventually, the appellant and Erickson went to separate colleges. Erickson stayed near Columbia for college and the appellant moved to Kansas City to attend college. A few years later, in October of 2003, Erickson began to recall his involvement in the murder. At a New Year's Eve party in 2003, Erickson confronted the appellant about his recollection of the murder. The appellant told him that they did not murder the victim. The appellant threatened to kill Erickson if he went to the police with his story. Soon after, Erickson disclosed what he believed to be his involvement in the murder to his friends, Nick Gilpin and Art Figueroa. Gilpin contacted the Columbia Police Department. On March 10, 2004, the police contacted Erickson, and he went to the Columbia Police Department where he confessed to his involvement in the murder and robbery. He was eventually arrested and charged.

On March 10, 2004, the police drove to Kansas City, Missouri, where they arrested the appellant, who was later charged with the class A felony of murder in the first degree, in violation of § 565.020 and the class A felony of robbery in the first degree, in violation of § 569.020. Erickson pled guilty to first-degree robbery, in violation of § 569.020, second-degree murder in violation of § 565.021.1(2), and

armed criminal action, in violation of § 571.015. In exchange for a lesser sentence, Erickson agreed to testify against the appellant.

The appellant's case proceeded to a jury trial on October 14, 2005. At trial, Trump testified for the State. Over the appellant's objection that his in-court identification was unreliable, Trump identified the appellant as one of the persons he saw on the night of the murder. The State also called Erickson to the stand who testified that he and the appellant robbed and murdered the victim.

* * *

On October 18, 2005, the jury returned verdicts against the appellant finding him guilty of felony murder in the second degree, in violation of § 565.021.1(2); and for robbery in the first degree, in violation of § 569.020. The appellant filed a motion for a new trial, which the trial court overruled. On December 12, 2005, the trial court entered judgment against the appellant sentencing him to consecutive terms of thirty years on Count I and ten years on Count II, to be served in the Missouri Department of Corrections.

State v. Ferguson, memo. at 4-9.

This Court affirmed Mr. Ferguson's convictions and sentences on June 26, 2007. *State v. Ferguson*, 229 S.W.3d at 613. On August 23, 2007, this Court issued its

mandate.¹

On November 14, 2007, Mr. Ferguson filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 7). On March 3, 2008, appointed counsel filed an amended motion, alleging more than twenty claims of error (PCR L.F. 28). In relevant part, the amended motion alleged: (1) that the State had failed to disclose potentially exculpatory statements that Ronald Hudson made to the police; (2) that the State had failed to disclose exculpatory statements that Shawna Ornt made to the prosecutor; (3) that trial counsel was ineffective for failing to investigate and call Keith Fletcher, Eric Gathings, and John James to impeach Mr. Erickson's testimony; and (4) that trial counsel was ineffective for failing to call Christine Varner to impeach Mr. Trump's testimony (PCR L.F. 31, 36, 65, 67, 74).

On July 16, 2008, the motion court commenced a three-day evidentiary hearing on the claims alleged in Mr. Ferguson's amended motion (PCR Tr. 12). At the hearing, Mr. Ferguson presented the testimony of twenty-three witnesses, including one by deposition in lieu of live testimony (PCR Tr. 2-5, 7). Mr. Ferguson also presented numerous exhibits (PCR Tr. 7-9). The State presented three witnesses and fourteen exhibits (PCR Tr. 5, 9-10). (Specific details, as relevant to the claims raised on appeal, will be set forth in the Argument portion of this brief.)

¹ Respondent respectfully requests that the Court take judicial notice of its file in *State v. Ferguson*, No. WD66271.

On August 11, 2008, Mr. Ferguson filed a motion to re-open the evidence in his Rule 29.15 case “to allow movant to challenge the jury in his trial on the grounds that it was not selected in conformity with RSMo sections 494.400 to 494.505” (PCR L.F. 115). The motion alleged that counsel for Mr. Ferguson had recently—on July 28, 2008—become aware of information regarding jury selection procedures in Lincoln County (PCR L.F. 116-117). The motion included attached exhibits and an affidavit from counsel (PCR L.F. 121-154).

The State opposed Mr. Ferguson’s motion, pointing out that Mr. Ferguson’s Rule 29.15 motion had not challenged the manner of jury selection at his trial (PCR L.F. 155-156). The State observed that under the terms of Rule 29.15, any claim not included in the motion was waived (PCR L.F. 156).

On September 2, 2008, the motion court held a hearing on Mr. Ferguson’s motion to re-open the evidence (PCR L.F. 6, 158). The motion court declined to re-open the evidence and concluded that Mr. Ferguson’s motion “should be heard as a petition for writ of habeas corpus” (PCR L.F. 6, 158). The court, thus, transferred the motion to Cole County “as that venue would have jurisdiction over same as it appears movant is in the custody of the Jefferson City Correctional Center” (PCR L.F. 6, 158).²

² According to Missouri Case.net, Mr. Ferguson’s Cole County habeas petition (case no. 08AC-CC00721) was denied on January 9, 2009. On March 31, 2009, this Court

On June 12, 2009, the motion court denied Mr. Ferguson's Rule 29.15 motion and issued findings of fact and conclusions of law (PCR L.F. 260-299). (The relevant specifics of the motion court's findings of fact and conclusions of law will be set forth in the Argument portion of this brief.³) On July 17, 2009, Mr. Ferguson filed his notice of appeal (PCR L.F. 304-306).

On February 8, 2010, Mr. Ferguson filed a "Motion to Remand Based Upon Newly Discovered Evidence." Mr. Ferguson's motion alleged that Mr. Erickson had, on November 22, 2009, recanted certain aspects of his trial testimony and exculpated Mr. Ferguson. The motion included several attached exhibits, including a videotaped statement by Mr. Erickson.

On February 17, 2009, the State filed suggestions in opposition to remand, pointing out that Mr. Ferguson's new claim had not been included in his Rule 29.15 motion, and that under the terms of Rule 29.15, Mr. Ferguson's new claim could not

denied Mr. Ferguson's habeas petition in *In re Ryan Ferguson v. Dave Dormire*, No. WD70818. In light of Mr. Ferguson's habeas proceedings, the motion court delayed ruling on Mr. Ferguson's Rule 29.15 motion (PCR L.F. 6).

³ Approximately one third of Mr. Ferguson's Statement of Facts is dedicated to arguing that the motion court's findings and conclusions were erroneous (App.Br. 17-22). This is a violation of Rule 84.04(c), which states that the facts should be stated "without argument."

be raised in what was effectively a successive, untimely post-conviction motion. The State pointed out that the motion court could only consider claims that had been raised in the last timely filed amended motion, and, thus, that a remand to the motion court would be meaningless. The state observed that Missouri cases have consistently held that claims of newly discovered evidence are not cognizable in a post-conviction motion. The State also pointed out that, unlike cases on direct appeal, where a remand had been ordered before the criminal conviction was final, Mr. Ferguson's post-conviction motion involved a collateral attack upon a final conviction.

On March 2, 2010, the Court ruled that it would take Mr. Ferguson's motion to remand with the case.

ARGUMENT

I.

The motion court did not clearly err in denying Mr. Ferguson’s claim that his right to due process was violated by the State’s failure to disclose evidence of Ronald Hudson’s statements to the police.

In his first point, relying on the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), Mr. Ferguson asserts that the motion court erred in denying his claim that his right to due process was violated by the State’s failure to disclose potentially exculpatory information that Ronald Hudson gave to the police (App.Br. 27). Mr. Hudson gave his information to the police toward the end of 2002 (about a year after Mr. Heitholt was murdered) (*see* PCR Tr. 33-34, 62, 75). Specifically, Mr. Hudson told the police—in an attempt to obtain leniency in his pending criminal case—that Clarence Mabon had admitted to Mr. Hudson to being involved in the murder of Mr. Heitholt (*see* PCR Tr. 56-58, 62-64).

A. The standard of review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been

made." *Id.* "The movant has the burden of proving movant's claims for relief by a preponderance of the evidence." Rule 29.15(i).

B. The motion court's findings of fact and conclusions of law

In denying Mr. Ferguson's claim, the motion court issued extensive findings of fact and conclusions of law (PCR L.F. 265-270). And, after outlining the relevant testimony offered by various witnesses, the motion court concluded that the State had failed in its obligation under *Brady* to disclose information, but that the State's failure had not resulted in any prejudice to Mr. Ferguson; the motion court stated:

CLAIM 8(A)(1) Movant claims that the State failed to disclose evidence that an individual named Ronald Hudson, in November of 2002 (long before Movant and Erickson were arrested or even considered suspects), told officers that an individual by the name of Clarence Mabon, an African-American man, had told Hudson that he was involved in the murder of Kent Heitholt, the victim in this case.

* * *

This Court finds that first, there is no evidence that the prosecutor's office had any knowledge of the information given by Ronald Hudson to Brian Liebhart; the prosecutor's office was never told that Ronald Hudson had asserted that Clarence Mabon claimed responsibility for the crime. Second, Movant presented no evidence to

support his allegation that Ronald Hudson made any proffer for an exchange of a plea of guilty. Third, there was no evidence that these meetings were “proffers” as there was no prosecutor present and no agreement. Fourth, Movant presented no evidence that Hudson met with John Short and Robert Fleming to discuss information on the Heitholt murder. The evidence showed that the meeting with John Short and Fleming was unrelated to the Heitholt murder. Fifth, this Court finds that there was no intentional non-disclosure of this statement by Ronald Hudson. Sixth, although there was no intentional non-disclosure, the State was responsible to disclose this information. See Kyles v. Whitley, 514 U.S. 419, 421 (1995) (Prosecutor is responsible for disclosure regardless of any failure of police to bring such evidence to prosecutor’s attention).

Seventh, Movant has failed to establish that this evidence was material for his defense. This Court finds that although Charlie Rogers, Movant’s lead trial counsel, stated that he was unaware of this information, he also stated that he did not believe that this evidence would have changed the defense presented at trial. This Court finds that the police interviewed and investigated multiple “false” leads (which were disclosed to the defense). This Court finds that the defense

at trial was not that a specific other person did it but only that Movant and Erickson were not the perpetrators. This Court finds that the evidence presented by Movant in support of this claim would not have been admissible at trial. Ronald Hudson's testimony was hearsay and would not have been admissible. This Court finds Ronald Hudson's testimony not credible. The evidence at the hearing demonstrated that Hudson had multiple prior convictions, was a person who was grasping at straws to get a better deal from the State, and that his story did not make any sense. Mr. Hudson's attorney Rob Fleming testified that he had sent an e-mail to the prosecutor, Mark Morasch, stating that Hudson was grasping at straws and he did not believe his "information" was accurate. And, even assuming that Hudson's testimony that Mabon told him that he was involved was true, the statements made by Mabon made no sense. As explained at the evidentiary hearing, contrary to Mabon's alleged statements, police would not and could not place someone in Reality House merely to keep an eye on them. And, Clarence Mabon did not match any of the information that police had gathered from the crime scene. The sketch generated was accurate. The police had never considered Mabon a suspect. Moreover, Movant, the party with the burden in his case,

presented no additional evidence or testimony to show that Mabon was involved in the Heitholt murder that would have been **admissible** evidence at trial to support his defense or an alternative theory of innocence. Hudson's testimony was not admissible as it was hearsay; Movant presented no other evidence that Mabon was somehow involved in the murder. As the Court in Parker, supra explained, the statements by Ronald Hudson would not "have provided [Movant] with plausible and persuasive evidence to support his theory of innocence" nor would "it have enabled him to present a plausible, different theory of innocence." There was nothing plausible or persuasive about the evidence presented in support of this claim of non-disclosure. This claim is denied.

(PCR L.F. 265-270). The motion court did not clearly err.

C. Because Mr. Hudson's testimony did not contain admissible exculpatory or impeachment evidence, and because it did not lead to the discovery of other admissible exculpatory or impeachment evidence, Mr. Ferguson was not prejudiced by the State's failure to disclose Mr. Hudson's information

In *Brady v. Maryland*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or

bad faith of the prosecution.” 373 U.S. at 87. The Court has since held that “the duty to disclose such evidence is applicable even though there has been no request by the accused, . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence[.]” *Stickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted). “[E]vidence is material ‘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 *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

“Moreover, the rule encompasses evidence ‘known only to police investigators and not to the prosecutor.’ ” *Id.* at 280-281 (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). “In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.’ ” *Id.* (quoting *Kyles*, 514 U.S. at 437).

“There are three components of a true *Brady* violation: 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 State, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 281-282. That undisclosed information “might” have changed the outcome of a trial is not sufficient to show prejudice. *Id.* at 289. Rather, a movant must show “that ‘there is a reasonable probability’ that the result of the trial would have been different if the suppressed

[evidence] had been disclosed to the defense.” *Id.* In short, “the question is whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’ ” *Id.* (quoting *Kyles*, 514 U.S. at 435).

Here, the motion court correctly concluded that Mr. Hudson’s facially exculpatory statements to the police should have been disclosed to the defense team by the State. Indeed, although the prosecutor who tried Mr. Ferguson, Kevin Crane, did not personally know about Mr. Hudson’s statements (*see* PCR Tr. 753), Mr. Hudson’s statements were known to the police (*see* PCR Tr. 33-34, 64, 75), and the prosecutor had a duty under *Brady* to be aware of information in the hands of the police. But, that being said, the motion court also correctly concluded that Mr. Ferguson failed to prove any prejudice from the State’s failure to disclose the information.

At the evidentiary hearing, Mr. Hudson testified that in the Spring of 2002 (approximately four months after Mr. Heitholt was murdered), he talked to Clarence Mabon, and that Mr. Mabon said that he thought the police were trying to play tricks (PCR Tr. 56).⁴ When Mr. Hudson asked him what he meant, Mr. Mabon

⁴ At the beginning of the evidentiary hearing, the parties stipulated that hearsay would be freely admitted at the evidentiary hearing, even though it “would be hearsay if it was in front of a jury” (PCR Tr. 15-16). The parties expressly agreed

explained that he thought the police were publicizing a picture of a white suspect in connection with the Heitholt murder, when, in fact, the police knew that Mr. Mabon (who was African American) had committed the murder (PCR Tr. 56-57). Mr. Hudson testified that Mr. Mabon said that he (Mr. Mabon) was involved in the murder (PCR Tr. 57). Aside from Mr. Hudson's testimony about Mr. Mabon's out-of-court statements, Mr. Ferguson did not present any evidence that Mr. Mabon was involved in the murder of Mr. Heitholt.

Accordingly, because Mr. Hudson's testimony about Mr. Mabon's involvement in the murder consisted solely of hearsay that was not admissible at trial, it cannot be said that Mr. Hudson's testimony had any probability of putting "the whole case in such a different light as to undermine confidence in the verdict." Indeed, it stands to reason that if the testimony could not have been presented to the jury, it could not have affected the verdict in any fashion. As the United States Supreme Court has stated, when undisclosed information is not admissible at trial, it is "not 'evidence' at all." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (because polygraph results were not admissible at trial, the undisclosed results were "not 'evidence' at all;" thus, "Disclosure of the polygraph results . . . could have had no

that, in permitting such hearsay, the State was not agreeing to the truth or veracity of the out-of-court statements, but merely that they would be "admissible for this hearing" (PCR Tr. 15-16).

direct effect on the outcome of trial, because [the defendant] could have made no mention of them either during argument or while questioning witnesses.”). *See also Warren v. State*, 482 S.W.2d 497, 500 (Mo. 1972) (where the suppressed evidence had no probative force or was not competent evidence, there was no *Brady* violation).

In his brief, Mr. Ferguson does not argue that the motion court clearly erred in determining that Mr. Mabon’s out-of-court statements to Mr. Hudson would not have been admissible at trial. He does not, for instance, identify any exception to the hearsay rule that would have allowed him to present Mr. Mabon’s out-of-court statements to the jury (App.Br. 27-36).

Instead, Mr. Ferguson asserts that “There is no requirement that a defendant must present admissible evidence to demonstrate a valid *Brady* violation” (App.Br. 35). He argues that if the State had disclosed Mr. Hudson’s information, “disclosure would have resulted in a new line of investigation” (App.Br. 33). He asserts that “Given the opportunity, the defense would have been able to undertake this line of investigation in many ways” (App.Br. 35). He points out that counsel “would have been able to interview Hudson, Mabon’s ex-girlfriend Yolanda, as well as Hudson’s girlfriend Felicia” (App.Br. 35). He then points out that “These interviews may have led to other interviews,” and that “There may have been some physical evidence implicating Mabon that they could have uncovered” (App.Br. 35). He also points out that counsel could have “attempted to find Mabon . . . and investigate whether there

was any corroborating evidence to support his statements to Hudson” (App.Br. 35). And, after suggesting how an alternate theory involving Mr. Mabon could have been squared with some of the State’s evidence, Mr. Ferguson avers that “Had defense counsel received [Mr. Hudson’s information] it would have undisputedly changed their investigation and altered their theory” (App.Br. 35-36).

But Mr. Ferguson’s arguments are incorrect for several reasons. First, as stated above, if the information suppressed by the State is not admissible at trial (or if it does not lead to any admissible evidence), then no competent “evidence” has been suppressed by the State, and there is no possibility that the State’s failure to disclose the information affected the verdict. *Wood v. Bartholomew*, 516 U.S. at 6. Indeed, if no admissible evidence ever surfaces, then the evidentiary picture produced at trial and the manner in which the defense will present its case at trial necessarily remain unchanged.

Second, while Mr. Ferguson is correct in his observation that the suppression of information may foreclose certain avenues of investigation, a defendant must still ultimately show that admissible exculpatory or impeachment evidence would have been obtained but for the State’s failure to disclose. It is simply not sufficient to speculate about what might have been uncovered if the State had not suppressed certain information. *See Wood v. Bartholomew*, 516 U.S. at 6.

In *Wood v. Bartholomew*, the Ninth Circuit reversed a defendant’s conviction

based on the government's failure to disclose the results of a polygraph performed on one of the state's witnesses (a man named "Rodney"). 516 U.S. at 5. The Ninth Circuit acknowledged that the results would not have been admissible at trial, but the Ninth Circuit concluded that the results were nevertheless material under *Brady*. *Id.* In support of its holding, the Ninth Circuit reasoned that "[h]ad [respondent's] counsel known of the polygraph results, he would have had a stronger reason to pursue an investigation of Rodney's story"; that he "likely would have taken Rodney's deposition" and that in that deposition "might well have succeeded in obtaining an admission that he was lying about his participation in the crime" and "would likely have uncovered a variety of conflicting statements which could have been used quite effectively in cross-examination at trial." *Id.*

But the United States Supreme Court held that granting relief on the basis of such speculative possibilities was a "misapplication" of *Brady*. *Id.* at 2, 6. The Court observed that "Other than expressing a belief that in a deposition Rodney might have confessed to his involvement in the initial stages of the crime—a confession that itself would have been in no way inconsistent with respondent's guilt—the Court of Appeals did not specify what particular evidence it had in mind." *Id.* at 6. The Court, thus, concluded that the Ninth Circuit's "judgment is based on mere speculation, in violation of the standards we have established." *Id.*

Similarly, here, Mr. Ferguson merely speculates about what might have been

discovered in interviews with various people—named and unnamed—and he speculates that counsel may have discovered “some physical evidence implicating Mabon” (App.Br. 35). But, as the Court held in *Wood*, such speculation about possible evidence that might have turned up with additional investigation does not satisfy *Brady*'s requirement that there be a reasonable probability that the suppressed evidence would have affected the verdict.

In fact, the purpose of holding an evidentiary hearing in Mr. Ferguson's case was to give Mr. Ferguson an opportunity to present the exculpatory or impeachment evidence that he was previously foreclosed from presenting by the State's non-disclosure. Because Mr. Ferguson failed to present any such evidence (and only presented Mr. Mabon's inadmissible out-of-court statements), he failed to carry his burden of proving that he was prejudiced by the State's non-disclosure.

Finally, while Mr. Ferguson avers that his attorneys would have taken certain investigative steps (e.g., interviewing certain people), and that counsel would have “undisputedly” altered their defense theory (App.Br. 35-36), these are claims that Mr. Ferguson ultimately failed to prove. At the evidentiary hearing, counsel merely stated that they would have investigated Mr. Hudson's information if the State had disclosed it (PCR Tr. 346, 453, 515-516). None of Mr. Ferguson's attorneys outlined the steps they would have taken, and Mr. Ferguson's lead trial attorney testified that—aside from Mr. Hudson's statements—he was not aware of any other evidence

implicating Mr. Mabon (PCR Tr. 454). Thus, while it might be reasonably assumed that counsel would have interviewed people mentioned by Mr. Hudson, no competent evidence implicating Mr. Mabon was ever uncovered or presented at the evidentiary hearing. Accordingly, there is no basis to conclude that counsel would have altered the defense theory at trial. This point should be denied.

II.

The motion court did not clearly err in denying Mr. Ferguson's claim that his right to due process was violated by the State's failure to disclose exculpatory statements that Shawna Ornt allegedly made to the prosecutor.

In his second point, again relying on the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), Mr. Ferguson asserts that the motion court clearly erred in denying his claim that his right to due process was violated by the State's failure to disclose exculpatory statements that Shawna Ornt allegedly made to the prosecutor (App.Br. 37). According to Ms. Ornt, in a private meeting with the prosecutor (before trial and before her pre-trial deposition), the prosecutor tried to pressure her into identifying Mr. Ferguson and Mr. Erickson as the two young men she had seen in the parking lot where Mr. Heitholt was murdered (PCR Tr. 118-120). According to Ms. Ornt, she repeatedly told the prosecutor that the young men in the pictures (Mr. Ferguson and Mr. Erickson) were *not* the two young men she had seen (PCR Tr. 119-120, 123). Mr. Ferguson's defense attorneys never received any discovery about Ms. Ornt's alleged statements to the prosecutor (PCR Tr.248-249, 346-347, 401, 516).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000).

“Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.* “The movant has the burden of proving movant’s claims for relief by a preponderance of the evidence.” Rule 29.15(i).

B. The motion court’s findings of fact and conclusions of law

In denying Mr. Ferguson’s claim, the motion court found that Ms. Ornt’s testimony was not credible (i.e., that she had *not* told the prosecutor what she claimed to have told him), and that, accordingly, there was no *Brady* violation with regard to Ms. Ornt; the motion court stated:

CLAIM 8(A)(2) Movant claims that the State failed to disclose that Shawna Ornt told Kevin Crane that Ryan Ferguson and Chuck Erickson were not the men she saw the night that Kent Heitholt was murdered.

* * *

This Court finds Ms. Ornt’s testimony is not credible. Ms. Ornt’s testimony that she waited over two years to tell anyone that two “innocent” people went to prison for the rest of their lives and that she lied during her deposition to the one person who was assisting Movant, is incredulous. This Court finds Kevin Crane and Bill Haws’ testimony to be credible. This Court finds that no Brady violation

occurred because no statements were made by Ms. Ornt that Movant and Erickson were not involved. This Claim is denied.

(PCR L.F. 270-272). The motion court did not clearly err.

C. There was no *Brady* violation because Ms. Ornt did not make the statements she claimed to have made to the prosecutor

“There are three components of a true *Brady* violation: 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 State, either willfully or inadvertently; and prejudice must have ensued.” *Stickler v. Greene*, 527 U.S. 263, 281-282 (1999). The rule in *Brady*, of course, presupposes that the exculpatory or impeachment evidence actually exists.

Here, while Ms. Ornt testified at the evidentiary hearing that she had told the prosecutor that Mr. Ferguson and Mr. Erickson were not the two young men that she had seen in the parking lot, the motion court found her testimony to be incredible. In other words, the exculpatory evidence that the state allegedly failed to disclose simply did not exist.

“ ‘As the trier of fact, the trial court determines the credibility of witnesses and is free to believe or disbelieve all or part of the witnesses’ testimony.’ ” *Zink v. State*, 278 S.W.3d 170, 192 (Mo. banc 2009); see *Taylor v. State*, 262 S.W.3d 231, 242 n.5 (Mo. banc 2008) (deferring to motion court’s credibility finding that there was no

deal for leniency between the State's witness and the prosecutor). Indeed, as is well settled, " 'The motion court is not required to believe the testimony of a movant or any other witness at an evidentiary hearing even if [it is not contradicted], and an appellate court must defer to the motion court's determination of credibility.' " *Coleman v. State*, 256 S.W.3d 151, 155-156 (Mo.App. W.D. 2008).

The motion court was in the best position to gauge Ms. Ornt's credibility, and, as the motion court observed, there were also multiple objective reasons to doubt her belated post-conviction claim. For instance, at her pre-trial deposition, which was taken after she allegedly made her adamant statements to the prosecutor, Ms. Ornt offered the following testimony:

Q. Okay. Let me ask you this. If you were shown somebody today, could you say whether or not that's the person you saw?

A. No. Not for sure.

Q. Okay.

A. Then I probably could have, but -

Q. All right. Have you ever been shown what they call mug shots, police photographs of people?

A. Yes. After it happened.

Q. And were you able to pick anybody out as even resembling the person you saw?

A. No.

Q. Were you ever shown any lineups where there's people on a stage or something?

A. No. The only real person they showed us was that night it happened and they took us up to the college and some guy they picked up on the side of the road is the only person they showed us.

Q. And did that look like the person you saw?

A. No.

* * *

Q. So have you seen any pictures on television of people who have been arrested or charged in this case?

A. No. Well, I've seen them - I seen them two in the paper.

Q. Okay. Could you tell from those pictures in the paper whether those were - either of those was one of the people you may have seen?

A. I can't say for sure. I -

Q. Do you have - and I'm not saying you should be able to. Okay? But my question is, do you have a feeling as to whether that's right or wrong or you just don't know?

A. I just don't know. I don't want to - I don't know.

Q. Okay. That's -

A. It happened so long ago, it just – (State’s Ex. 1, pp. 20-22; *see* PCR Tr. 375-378, 459-462, 541). As is plainly evident, this testimony belies Ms. Ornt’s post-conviction claim that she had told the prosecutor that the pictures in the media (the pictures of Mr. Ferguson and Mr. Erickson) did not depict the two young men she had seen in the parking lot. If Ms. Ornt had, in fact, repeatedly stood up to the “intimidating” prosecutor and told him that she knew those pictures did not depict the two young men she saw, it stands to reason that she would have said the same thing at her deposition.⁵ Instead, as the record shows, she merely said that she could not be sure, and that she did not know.

That Ms. Ornt fabricated her post-conviction testimony about making exculpatory statements to the prosecutor before trial was further demonstrated by other evidence at the evidentiary hearing. For instance, Ms. Ornt admitted that, at some point after trial, she visited the www.freeryanferguson.com website and eventually struck up a relationship or dialogue with Bill Ferguson, the defendant Mr. Ferguson’s father (PCR Tr. 124-125). She testified that she struck up this

⁵ Ms. Ornt’s testimony that she did not know if she was permitted to “blurt out” what she knew (PCR Tr. 124) is not worthy of belief because she could have merely answered the questions posed to her—she could have simply answered that she had seen Mr. Ferguson’s and Mr. Erickson’s pictures and they were not the young men that she had seen in the parking lot.

dialogue with Bill Ferguson after people told her that Bill Ferguson wanted to “get in contact with [her] and stuff” (PCR Tr. 125). She admitted that she e-mailed back and forth with Bill Ferguson, that Bill Ferguson’s e-mails all contained a solicitation for monetary donations, that she talked to Bill Ferguson on the telephone more than once (she provided her number to him), and that she eventually made a videotaped statement with Bill Ferguson at the Columbia Tribune Building (something she would not agree to do for the prosecutor (PCR Tr. 712)) (PCR Tr. 126, 133, 135, 150). And, most tellingly, in one of her e-mails to Bill Ferguson, Ms. Ornt said, “I don’t know if I can get in trouble for talking to you all, but *I feel now I know that they have the wrong people*, and it hurts to see those young kids in prison” (PCR Tr. 148) (emphasis added). This e-mail was written on July 5, 2007—nearly two years after Mr. Ferguson’s trial (PCR Tr. 134)—and it appears to be the first recorded instance of Ms. Ornt indicating that she did not “feel” that Mr. Ferguson and Mr. Erickson were the young men she saw in the parking lot.

In his Statement of Facts, Mr. Ferguson attempts to suggest that the motion court made “factual errors” with regard to Ms. Ornt’s testimony (App.Br. 19). To the extent that these arguments in his Statement of Facts are intended to apply to the claim he raises in Point II, Mr. Ferguson’s arguments are not well taken. He first asserts that the motion court “insinuated an improper relationship existed between Ornt and Ferguson’s father” (App.Br. 19). But, in fact, the motion court never found

that there was any “improper relationship,” and any embellishment along those lines is Mr. Ferguson’s creation.

Mr. Ferguson also asserts that the motion court erred in finding that Bill Ferguson “solicited money to help with” Mr. Ferguson’s defense (App.Br. 19). He points out that the solicitation was a “general” solicitation that was included in every e-mail sent out by the Fergusons, and that Ms. Ornt “was adamant that Ferguson’s father never specifically asked her to donate money to Ferguson’s cause” (App.Br. 19). But whether the solicitation was “general” or “specific,” the fact remains that Bill Ferguson solicited a donation from Ms. Ornt with his e-mail. Thus, the motion court did not err factually.

Mr. Ferguson next takes issue with the motion court’s suggestion that Ms. Ornt’s “testimony was the product of ‘a relationship with Movant’s father’ ” (App.Br. 20). But what the motion court stated was factually correct. The motion court found that Ms. Ornt had not made her exculpatory “statement until she began a relationship with Movant’s father” (PCR L.F. 271). As discussed above, the first recorded instance of Ms. Ornt stating her belief that Mr. Ferguson and Mr. Erickson were not the men she saw was in Ms. Ornt’s e-mail to Bill Ferguson. And, as is readily apparent, this statement was not made until *after* she struck up a relationship with Bill Ferguson. (To the extent that Mr. Ferguson is taking issue with the motion court’s use of the word “relationship” (*see* App.Br. 20), the motion court

did not err because the two obviously had some sort of relationship, even if it was limited to the interactions described at the evidentiary hearing.)

Finally, Mr. Ferguson takes issue with the motion court's finding that "Ms. Ornt attempted to identify, at least initially, multiple people as the persons she saw that night (although later determining that they were not, in fact the perpetrators)" (App.Br. 20; *see* PCR L.F. 272). Mr. Ferguson argues that this finding is incorrect because Ms. Ornt said she only contacted the police about some people that had "spooked" her (App.Br. 20, citing Ms. Ornt's testimony at PCR Tr. 142-147). But the motion court did not credit Ms. Ornt's testimony, and other evidence showed that Ms. Ornt was initially concerned that the people who spooked or scared her might have been involved in the murder (*see* PCR Tr. 709-710, 722-723).

In addition to the foregoing evidence showing that Ms. Ornt fabricated her new statements, the motion court also heard testimony from the former prosecutor, Kevin Crane, and the prosecutor's investigator, William Haws. They both testified that in their pre-trial (and pre-deposition) meetings with Ms. Ornt that she merely stated that she would not be able to say whether Mr. Ferguson or Mr. Erickson was one of the men that she saw in the parking lot (PCR Tr. 706, 715, 745). They testified that they did not show Ms. Ornt pictures of Mr. Ferguson and Mr. Erickson, and that Ms. Ornt was consistent in saying that she could not make an identification (PCR Tr. 705-706, 716-717, 745-746). Moreover, they testified that Ms. Ornt told them

that she had seen Mr. Ferguson's picture and Mr. Erickson's picture in the media, and that she could not say whether they were the young men she had seen in the parking lot (PCR Tr. 715, 746). The motion court found this testimony to be credible (PCR L.F. 272); thus, there was direct evidence refuting Ms. Ornt's belated claim that she told the prosecutor that Mr. Ferguson and Mr. Erickson were not the young men she had seen in the parking lot.

Mr. Ferguson attempts to avoid the motion court's conclusion that there was no *Brady* violation by simply reiterating that Ms. Ornt's statements "satisfy the three prongs under *Strickler* in establishing a due process violation" (App.Br. 39). He then asserts that the motion court "failed to rule on the actual issue before it" (App.Br. 39). But Mr. Ferguson is incorrect. The motion court directly addressed the issue when it found that there was no *Brady* violation; for, if Ms. Ornt did not make the exculpatory statements that the post-conviction motion alleged she made, then there was nothing for the State to disclose. As stated above, *Brady* and its progeny only apply to evidence that actually exists. Here, the motion court found that Ms. Ornt was not telling the truth about her pre-trial meeting with the prosecutor—i.e., the motion court found that Ms. Ornt did not make the alleged exculpatory statements, and, thus, that there was nothing to disclose. This point should be denied.

III.

This Court should decline to review Mr. Ferguson's claim that the motion court plainly erred in adopting most of the State's proposed findings of fact and conclusions of law.

In his third point, Mr. Ferguson asserts that the motion court erred "in adopting verbatim the State's proposed findings of fact and conclusions of law" (App.Br. 41). He avers that the motion court "failed to use its own independent judgment in assessing the evidence presented and the applicable law" (App.Br. 41).

A. Because this claim was not preserved or raised in any fashion in the motion court, this Court should decline to review this claim

At the conclusion of the evidentiary hearing, the motion court raised the issue of proposed findings, and Mr. Ferguson's counsel requested sixty days in which to file proposed findings (PCR Tr. 773). The State requested an additional two weeks beyond Mr. Ferguson's submission date, and Mr. Ferguson's counsel stated that that was agreeable (PCR Tr. 773). The motion court, thus, ordered that Mr. Ferguson file proposed findings and conclusions by September 16, 2008, and that the State file its proposed findings and conclusions by September 30, 2008 (PCR Tr. 773). In addition, the motion court requested an electronic copy of the proposed findings so that the court could revise such a document in drafting its own findings (PCR Tr. 774). No objection was lodged to this procedure (PCR Tr. 773-774).

Thereafter, on September 15, 2008, Mr. Ferguson filed his proposed findings and conclusions (PCR L.F. 6). The State filed its proposed findings on September 29, 2008 (PCR L.F. 6).

On June 12, 2009, the motion court denied Mr. Ferguson's Rule 29.15 motion and issued findings of fact and conclusions of law (PCR L.F. 6). After the issuance of the motion court's findings, there is nothing in the docket entries to suggest that Mr. Ferguson objected to the motion court's reliance upon the State's proposed findings (*see* PCR L.F. 6).

Under Rule 78.07(c), "*In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review*" (emphasis added). Here, the record does not contain any motion to amend the motion court's judgment. Thus, by failing to object as required by Rule 78.07(c), Mr. Ferguson failed to give the motion court any opportunity to correct the alleged error. Accordingly, this Court should decline to review this unpreserved claim of error. *See Gill v. State*, 300 S.W.3d 225, 234 (Mo. banc 2009) (declining to review identical claim in a capital case—"Because the motion court was not given an opportunity to review this alleged error, the claim is not preserved for appellate review.").

B. The motion court did not plainly err in adopting most of the State's

proposed findings and conclusions

Even if this claim had been preserved, it would not warrant relief as there is no reason to conclude that the trial court did not exercise independent judgment in issuing its judgment. As the Missouri Supreme Court has recognized, “In the absence of independent evidence that the court failed to thoughtfully and carefully consider the claims, ‘there is no constitutional problem with the court adopting in whole or in part the findings of fact and conclusions of law drafted by one of the parties.’ ” *State v. Link*, 25 S.W.3d 136, 148 (Mo. banc 2000); *State v. Ferguson*, 20 S.W.3d 485, 510 (Mo. banc 2000).

Here, the motion court held a three-day evidentiary hearing and it considered proposed findings from both parties (*see* PCR Tr. 773-774; PCR L.F. 6). The motion court received Mr. Ferguson’s proposed findings on September 15, 2008, and it received the State’s proposed findings on September 29, 2008 (PCR L.F. 6). After a considerable amount of time (approximately nine months), the motion court issued its judgment (PCR L.F. 6). The motion court’s judgment largely adopted the State’s proposed findings, but it contained approximately thirty-six changes (ranging from changes to punctuation and syntax, the addition of facts, and the removal of a credibility finding) (*see* PCR L.F. 218-259, 260-299).⁶ For instance, with regard to Mr.

⁶ In his brief, Mr. Ferguson incorrectly asserts that “There are approximately nine differences between the two, none of which are substantive in nature” (App.Br. 43).

Hudson, the motion court added the fact that he offered to engage in a drug-buy for the State (*see* PCR L.F. 224, 266). With regard to another witness who testified at the evidentiary hearing (Dr. Richard Leo), the motion court deleted the State's proposed finding that the witness "was not credible" (*see* PCR L.F. 246, 287).

Given these circumstances, it is apparent that the motion court exercised independent judgment in issuing its findings and conclusions. The motion court did not simply rubber stamp the State's proposed findings. Rather, the motion court allowed considerable time for independent judgment, and, as evidenced by the motion court's additions and deletions to the State's findings, it is plain that the motion court's view of the evidence did not wholly mirror the State's view.

Mr. Ferguson asserts that some of the State's proposed findings and conclusions "were not accurate," and he suggests that the motion court's adoption of these inaccuracies evinces a lack of independent judgment (App.Br. 42-43). In support of his claim that there were inaccuracies in the State's proposed findings, Mr. Ferguson cites to pages 14 through 19 of his Statement of Facts (App.Br. 42). (This citation to pages 14 through 19 seems to be an incorrect citation as, in Mr. Ferguson's brief, the motion court's findings are discussed on pages 17 through 22 of the Statement of Facts (*see* App.Br. 17-22).) But Mr. Ferguson's reliance on a cross-reference to pages in his Statement of Facts should not be deemed a suitable substitute for developing an argument and supporting it with citations to facts in

the record. “ ‘When matters referenced as alleged error in a point relied on are not developed in the argument portion of a brief, they are deemed abandoned.’ ” *See Shaw v. Raymond*, 196 S.W.3d 655, 660 (Mo.App. S.D. 2006); *see also* Rule 84.04(c) (“The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument.”).

In any event, after reviewing the arguments included in Mr. Ferguson’s Statement of Facts, it appears that Mr. Ferguson has merely identified findings that he believes are erroneous. It does not appear that the motion court failed to exercise independent judgment. For instance, in his Statement of Facts, Mr. Ferguson takes issue with the motion court’s finding that “there is no evidence that the prosecutor’s office had any knowledge of the information given by Ronald Hudson to Brian Liebhart; the prosecutor’s office was never told that Ronald Hudson had asserted that Clarence Mabon claimed responsibility for the crime” (*see* App.Br. 17; PCR L.F. 268). Mr. Ferguson then asserts that the court’s findings are “wholly inconsistent with the evidence” because “Robert Fleming, Hudson’s public defender, *sent emails to the Boone County prosecutor’s office* referencing the fact that Hudson had information regarding the Heitholt homicide” (App.Br. 18).

But, in fact, the motion court was not clearly erroneous in its finding, as Mr. Fleming’s e-mails did *not* divulge what specific information Mr. Hudson had given to Detective Liebhart. The first e-mail merely said that Mr. Hudson “may have some

information about the perps in the Heithold (sp?) murder,” and the second e-mail merely said that Mr. Hudson “gave the info he had” to Detective Liebhart (Mov. Ex. B-2). The motion court was perfectly aware that these e-mails had been sent to two assistant prosecutors at the prosecutor’s office (*see* PCR L.F. 265-266), and its findings merely reflect that Mr. Hudson’s specific information was not given directly to the prosecutor’s office. Instead, as the motion court ultimately found and concluded, Mr. Hudson’s specific information was given to the police, and the prosecutor, thus, had an obligation to discover that information and turn it over to the defense (PCR L.F. 268-269). In short, even though the motion court agreed with the State’s view of this evidence, there is no reason to believe that this finding was not preceded by independent consideration of the evidence.

Other alleged inaccuracies include whether Mr. Hudson’s conversations with the police were “proffers” (the motion court accepted the prosecutor’s definition of what constituted a proffer), whether defense counsel Charlie Rogers said that he “did not believe that [Mr. Hudson’s information] would have changed the defense presented at trial” (in fact Mr. Rogers simply never said that Mr. Hudson’s information would have changed the presentation of the defense⁷), whether the

⁷ Mr. Ferguson argues that Mr. Rogers testified that Mr. Hudson’s information would have “altered the defense offered at trial” (App.Br. 19). But, in fact, Mr. Rogers never offered such testimony. He only testified that he would have

motion court should have disbelieved Ms. Ornt's testimony (the reasons for the motion court's disbelief are set forth in Point II, above), and whether the motion court accurately summarized the testimony of the inmates who were housed with Mr. Erickson and the testimony of Christine Varner (these witnesses are discussed in Point IV, below) (*see* App.Br. 19-22). But, for the reasons discussed in Points I, II, and IV, the motion court's factual findings were not clearly erroneous.

In sum, in the absence of any "independent evidence that the court failed to thoughtfully and carefully consider the claims" in Mr. Ferguson's motion, there is no basis to conclude that the motion court plainly erred in adopting most of the State's proposed findings and conclusions. Indeed, in light of the motion court's additions to, and deletions from, the State's proposed findings it is evident that the motion court did not simply "rubber stamp" the State's proposed judgment. This point should be denied.

investigated the information (PCR Tr. 401, 453, 494). But he admitted that, aside from the hearsay offered by Mr. Hudson, there was no evidence implicating Mr. Mabon (PCR Tr. 454). Thus, as discussed above in Point I, there was no evidence that could have been used to alter the defense presented at trial.

IV.

The motion court did not clearly err in denying several of Mr. Ferguson’s various claims asserting that counsel was ineffective for failing to impeach the trial testimony of Mr. Erickson and Mr. Trump.

In his fourth point, Mr. Ferguson combines four claims from his amended motion, namely, claims 8(E)(1), 8(E)(2), 8(E)(3), and 8(G) (App.Br. 44; *see* PCR L.F. 65, 67, 74). In claims 8(E)(1), 8(E)(2), and 8(E)(3), Mr. Ferguson alleged that counsel was ineffective for failing to call three of Mr. Erickson’s jail cellmates (Keith Fletcher, Eric Gathings, and John James) to impeach Mr. Erickson’s trial testimony. (Mr. Erickson was Mr. Ferguson’s co-actor in committing the murder, and Mr. Erickson testified against Mr. Ferguson as part of a plea agreement (Tr. 614-615).⁸)

In claim 8(G), Mr. Ferguson alleged that counsel was ineffective for failing to call Christine Varner to impeach Mr. Trump’s trial testimony. (Mr. Trump had identified Mr. Ferguson and Mr. Erickson as the two young men he saw in the parking lot on the night of the murder (Tr. 1022, 1032, 1027, 1029).)

A. The standard of review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion

⁸ Mr. Erickson pled guilty to murder in the second degree, robbery in the first degree, and armed criminal action (Tr. 618).

court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.* “The movant has the burden of proving movant’s claims for relief by a preponderance of the evidence.” Rule 29.15(i).

B. Counsel was not ineffective for failing to investigate and call Keith Fletcher, Eric Gathings, and John James to impeach Mr. Erickson; and counsel was not ineffective for failing to investigate and call Christine Varner to impeach Mr. Trump

To prevail on a claim of ineffective assistance of trial counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

To prove ineffective assistance for failure to call a witness, the movant must demonstrate 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 v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007). “The failure to develop or introduce cumulative evidence does not constitute ineffective assistance of counsel.” *Forrest v. State*, 290 S.W.3d 704, 709 (Mo. banc 2009).

1. The Boone County Jail inmate witnesses

In denying Mr. Ferguson’s related claims that counsel was ineffective for failing to impeach Mr. Erickson’s testimony with testimony from Keith Fletcher, Eric Gathings, and John James (the inmate witnesses), the motion court concluded both that Mr. Ferguson had failed to overcome the presumption that counsel’s choices were made according to a reasonable trial strategy and that Mr. Ferguson had failed to prove prejudice (PCR L.F. 280-284). More specifically, after outlining the nature of the inmate witnesses’ testimony, the motion court stated, in part:

Claim 8(E)(1) Movant claims that his trial counsel was ineffective for failing to call Keith Fletcher, who was housed with Erickson at the Boone County Jail prior to trial, to testify at trial.

* * *

Although Movant asked one of the trial attorneys, Ms. Benson, who acted as local counsel, whether there was strategy for not interviewing Mr. Fletcher, Movant failed to present any evidence from Charlie Rogers, Movant’s lead attorney and the attorney who made the ultimate trial strategy decisions, about whether there was a trial

strategy for not contacting persons who were housed with Church Erickson. Movant has the burden of proving his case by a preponderance of the evidence and without any evidence as to whether trial counsel had a strategy, Movant cannot establish that counsel's actions were not reasonable.

(PCR L.F. 280-281). The motion court reiterated this finding as to claims 8(E)(2) and 8(E)(3) (PCR L.F. 283, 284).

With regard to the prejudice prong, the motion court stated:

Fletcher's testimony, as shown at the evidentiary hearing, would have been extremely minor and equivocal. The state at trial would have been able to impeach him with all of his prior convictions, and his testimony would not have provided a viable defense. Fletcher's testimony would have offered nothing to demonstrate that Erickson and [Mr. Ferguson] were not involved in Heitholt's murder.

* * *

... Gathings testimony would not have provided a viable defense and there is no reasonable probability that his testimony that Erickson said he had a dream, which had already been presented at trial, would have changed the verdict.

* * *

. . . James's testimony would not have provided a viable defense and considering the minimal nature of his testimony, there is no reasonable probability that the verdict would have been different.

(PCR L.F. 282-284). The motion court did not clearly err.

With regard to the first prong of the *Strickland* test, the motion court found that Mr. Ferguson had failed to present sufficient evidence to overcome the strong presumption that Charlie Rogers, Mr. Ferguson's lead attorney, "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (see PCR L.F. 281-284). At the evidentiary hearing, when asked about the three inmates, and the information in his file about the inmates, Mr. Rogers testified merely that he did not "recall ever seeing" the information (PCR Tr. 426-427). He was not asked whether he would have wanted the inmates to testify, and he was not asked whether he would have had any reasonable strategy for deciding not to call them (PCR Tr. 424-428).

Evidence of a mere inability to recall information or strategic reasoning does not "overcome the strong presumption that counsel had a strategic reason" for his decisions. *Bullock v. State*, 238 S.W.3d 710, 715 (Mo.App. S.D. 2007). A movant "has the burden to overcome the presumption that any omissions by counsel were sound trial strategy." *Id.* (citing *State v. Tokar*, 918 S.W.2d 753, 766 (Mo. banc 1996)). In *State v. Tokar*, for example, the defendant asserted that counsel was ineffective for failing

to object to a portion of the prosecutor's closing argument. *Id.* But at the evidentiary hearing, the defendant "introduced no evidence regarding trial counsel's failure to object to this argument, despite questioning them regarding other issues at the post-conviction relief hearing." *Id.* Thus, the Court concluded that the defendant had failed to overcome the presumption and prove that counsel's performance fell below an objective standard of reasonableness. *Id.* Here, similarly, counsel failed to inquire about counsel's strategic reasoning and instead was satisfied to elicit merely that counsel did not recall seeing the information about the inmates.

Mr. Ferguson points out that one of his attorneys, Kathryn Benson, "conceded there was no strategic or tactical decision for not interviewing" the inmate witnesses, and he points out that she testified that they "wanted them interviewed, [but that they] didn't get it done" (App.Br. 48). But, as the motion court found, Mr. Rogers was the lead defense attorney, and he was ultimately responsible for "trial strategy decisions" (PCR L.F. 281). Thus, it was incumbent upon Mr. Ferguson to overcome the strong presumption that Mr. Rogers rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

In any event, even if Mr. Ferguson is deemed to have carried his burden in proving that counsel's performance was deficient, he failed to prove prejudice. To prove prejudice, Mr. Ferguson was required to prove that there is a reasonable probability that the inmate witnesses' testimony would have caused the jury to have

a reasonable doubt as to Mr. Ferguson's guilt.

At the evidentiary hearing, the first inmate witness, Keith Fletcher, offered the following testimony that could have been used to impeach Mr. Erickson: (1) that Mr. Erickson said that he "did not believe that he did it;" (2) that he said he confessed to the police because "he was tired of sitting at the police station and he wanted to go home;" (3) that he said that the police promised him he could go home after giving a statement; (4) that he said he "didn't do this;" and (5) that he said he wanted to take the plea to "get it over with" (PCR Tr. 84-86).

The second inmate witness, Eric Gathings, offered the following: (1) that Mr. Erickson said that he "had a dream that him and [Mr. Ferguson] did it;" (2) that he said that he "thought he had a dream;" and (3) that he did not say "whether he knew if he actually committed that murder or not" (PCR Tr. 77-78, 80).

The third inmate witness, John James, offered the following: (1) that Mr. Erickson said that "he didn't know if he had done it;" (2) that he said that "it was all a dream;" (3) that he said that he "wasn't sure if [he and Mr. Ferguson] did it; he didn't know;" (4) that he said that "it may have been him and one other person;"⁹

⁹ Mr. Ferguson seems to rely on this bit of testimony as evidence that Mr. Erickson may have been referring to someone other than Mr. Ferguson as his co-actor (App.Br. 52). But Mr. Erickson's reference to "one other person" could have merely been a reference to Mr. Ferguson. There is no clear evidence that Mr. Erickson was

(5) that he was “unaware of . . . what he did;” (6) that he said that he was “high” when he confessed to the police; (7) that he said that he “thinks he did it, but he didn’t know;” (8) that he talked about how he “dreamed about the murder;” (9) that he repeatedly said, “I don’t know. I think I did;” and (10) that he “never gave a hundred percent answer if [he or Mr. Ferguson] had done it” (PCR Tr. 94-95, 97-98).

As is evident, while there are some statements suggestive of a recantation or partial recantation, the sum of Mr. Erickson’s various statements reveal merely that Mr. Erickson equivocated about his involvement in the murder, that Mr. Erickson talked about the murder as if it were a “dream,” and that Mr. Erickson did not know exactly what he had done. But as the motion court found, such testimony was not particularly useful in presenting a viable defense, because the trial was replete with such testimony already.

With regard to prejudice, Mr. Ferguson asserts that “As a result of defense counsel’s failure to investigate and call each of these witnesses the State’s evidence went to the jury without significant challenge” (App.Br. 45). But this assertion is flatly refuted by the record. Indeed, at trial, in challenging Mr. Erickson’s testimony, defense counsel employed numerous methods and presented a substantial quantum of impeachment evidence.

referring to some other unknown person, and the motion court was not required to force such an inference from Mr. James’s unclear testimony.

For instance, on cross-examination—which consisted of more than 240 pages (Tr. 627-859, 883-893, 894-895)—defense counsel began by asking Mr. Erickson about his initial statements to Art Figueroa and Nick Gilpin (Tr. 627-628). Mr. Erickson told them that he did not know if his impressions about the murder were “memories or dreams” (Tr. 627-628). Counsel then turned to inquiring about Mr. Erickson’s statements to the police and others, including a nurse at the jail. And, in cross-examining Mr. Erickson about his various statements, counsel elicited the following:

(1) that Mr. Erickson had said (with regard to whether he and Mr. Ferguson killed Mr. Heitholt) “I don’t even remember” (Tr. 634);

(2) that he said he might be “confusing [memories] with dreams” (Tr. 635);

(3) that he had made inconsistent and incorrect statements to the police (Tr. 638-639, 644-647, 650, 666-667, 670-671, 729, 765);

(4) that he could not recall certain facts, and that he simply “presumed” or tried to guess some of the facts (Tr. 643, 667-668, 682, 686, 691, 727-728);

(5) that he had asked for facts and details from the police, and that the police provided facts to him (Tr. 646, 667-669, 681, 729);

(6) that he had, in one of his taped interviews, said that he

“might have flipped out and thought [he] did something [he] didn’t really do” (Tr. 657);

(7) that he had, in one of his taped interviews, said that he was “unsure about whether or not [he was] involved in the murder” (Tr. 657-658);

(8) that he had, in one of his taped interviews, said, “I mean, I might not even know what I’m talking about now” (Tr. 658);

(9) that he had, in another taped interview, said that he was “not sure that [he] had been involved in the death of Mr. Heitholt” (Tr. 704);

(10) that he had, in his interview with Detective Nichols, said, “I don’t know. I mean, I don’t even – it’s just so foggy. Like, I could just be sitting her and fabricating all of it and not know. Like, I don’t know. I don’t” (Tr. 707);

(11) that he said, “I’m just kind of presuming what happened. I’m making presumptions based on what I read in the newspaper” (Tr. 710);

(12) that he told Detective Nichols, “Look, I’m not sure we did this” (Tr. 721);

(13) that he had told a nurse in jail that he was “not sure” he had committed the murder (Tr. 768-769);

(14) that his parents attempted to persuade him to testify against Mr. Ferguson, and that his father told him that if he did not cooperate, he would “be looking at a substantially greater period of time to serve” (Tr. 777, 787);

(15) that he was expecting fifteen-year sentences, and hoping to serve less than that, under the terms of his plea agreement (Tr. 793-796);

(16) that he had said in a deposition that he had told Mr. Figueroa that he was not sure “these were accurate memories,” and that “they could be something [he] dreamed about or something that [he] dreamed up” (Tr. 820); and

(17) that after the murder, for an extended period of time, he had no “conscious belief that [he] had been involved in the death of Kent Heitholt” (Tr. 847-848).

In short, because there was extensive evidence that Mr. Erickson made equivocal, inconsistent and incorrect statements to some police officers, a nurse at the jail and two of his friends, it cannot be said that Mr. Ferguson was prejudiced by counsel’s failure to present a few additional statements that were made to some jail inmates.

Moreover, counsel’s efforts included more than simply cross-examining Mr. Erickson and presenting evidence of his prior statements. Counsel also presented

the testimony of three witnesses who directly contradicted Mr. Erickson's account about the bar remaining open after 1:30 a.m. (Tr. 1487, 1715, 1730). Additionally, counsel presented the expert testimony of Dr. Elizabeth Loftus, who testified extensively about the influences (including interrogation techniques) that could have influenced false memories in Mr. Erickson, and who disputed Mr. Erickson's claim that he suppressed his memory (*see* Tr. 1950-1995). Among many other things, she testified that she had "not seen any credible support for the idea that somebody, after some horrific event, a day later they don't remember; two days later they don't remember; one year later, when presented with strong retrieval cues, they don't remember; two years later, with more retrieval cues, they don't remember; and then suddenly they remember" (Tr. 1974). For such a phenomenon, she said "There is no credible scientific support for that, as - as the way memory works" (Tr. 1974).

In sum, the record flatly refutes Mr. Ferguson's claim that counsel allowed Mr. Erickson's testimony to go "to the jury without significant challenge" (App.Br. 45). Counsel exhaustively impeached Mr. Erickson, and, as a result, the jail inmates' testimony about Mr. Erickson's statements would have been cumulative to the many other statements that Mr. Erickson made to the police, a jail nurse, and his friends. There was no prejudice from counsel's failure to investigate and call the inmates. *See generally Forrest v. State*, 290 S.W.3d at 710-711 (counsel was not ineffective for failing to present additional mitigating evidence from the defendant's

friend, neighbor and employer, because the same information had already been presented through the testimony of the defendant's brother, his former girlfriend's children, and other friends); *Storey v. State*, 175 S.W.3d 116, 137-139 (Mo. banc 2005) (counsel was not ineffective for failing to present numerous other witnesses because their testimony would have been cumulative); *State v. Smith*, 949 S.W.2d 947, 952 (Mo.App. W.D. 1997) (counsel was not ineffective for failing to call a witness who would have testified about the defendant's whereabouts, because other witnesses had already offered the same testimony at trial); *see also Strickland v. Washington*, 466 U.S. at 695-696 ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect."). *Cf. Black v. State*, 151 S.W.3d 49 (Mo. banc 2004) (a failure to impeach resulted in a finding of ineffective assistance of counsel).

2. Christine Varner

In denying Mr. Ferguson's claim that counsel was ineffective for failing to impeach Mr. Trump's testimony with testimony from Christine Varner, the motion court concluded that Ms. Varner was not a witness that counsel could have been expected to discover, and that Ms. Varner's testimony would not have provided a viable defense; the motion court stated:

Claim 8(G) Movant claims that his counsel failed to adequately impeach and investigate Jerry Trump. Specifically, Movant claims that

counsel failed to investigate Christine Varner Varner testified at the evidentiary hearing that shortly after the murder Jerry Trump came into the office and told her that he had seen people by the car and that he was frightened but that he did not recognize the people because of the lights in the parking lot. Varner admitted that she knew Trump only from the times that he would come into Job Center and that Trump's statements about not being able to recognize or identify the suspects was shortly after the murder. Varner also testified that she was the one to contact the public defender's office long after Ferguson's trial and that she was not contacted prior to trial.

* * *

This Court finds that Movant has failed to establish that his counsel's actions were unreasonable. Specifically, Movant has failed to demonstrate that counsel's investigation was inadequate. Movant does not explain or present evidence demonstrating how counsel could have known that Trump had made that statement to a random person that worked at Job Center.

* * *

Here, Movant has failed to demonstrate that Varner could have been located or that counsel should have known about Varner or her

potential testimony.

In any event, Movant was not prejudiced. Varners' testimony was that Trump could not identify the men in the parking lot **shortly** after the murder. Trump did not see Movant or Erickson's photographs as they were not suspects until 2004. The fact that he could not make an identification at the time of the murder (with no suspects) does not impeach his testimony that upon seeing their photographs he recognized Movant and Ferguson [sic] as the persons in the parking lot that night. Moreover, Varner's testimony does not provide a viable defense.

(PCR L.F. 285-287). The motion court did not clearly err.

As is readily apparent from the testimony offered at the evidentiary hearing, Ms. Varner was only tangentially related to Mr. Trump. She worked for a company that had dealings with the company that Mr. Trump worked for (Tr. 170-172). She was not Mr. Trump's supervisor, and she only knew Mr. Trump because he was one of the various people that came in and out of her office building (Tr. 178). In short, Ms. Varner was simply one of the multitudinous "random" people with whom Mr. Trump could have had a conversation about the murder. There was no reason to single her out from among all of Mr. Trumps family members, friends, and casual acquaintances.

And, consistent with the attenuated relationship she had with Mr. Trump, there was no evidence that any of Mr. Ferguson's trial attorneys had any idea that Mr. Trump had ever had a conversation with her about his ability to identify the two people he saw in the parking lot on the night of the murder (PCR Tr. 364-365, 386, 434, 482-483, 533-534). In fact, Ms. Varner was not even discovered by Mr. Ferguson's post-conviction counsel; rather, Ms. Varner contacted the public defender's office of her own accord after watching the television program "48 Hours" (PCR Tr. 174-176).

Given these facts, the motion court did not clearly err in concluding that Mr. Ferguson failed to prove that counsels' performance fell below an objective standard of reasonableness. As stated above, to prove ineffective assistance for failure to call a witness, the movant must demonstrate, among other things, first that "trial counsel knew or should have known of the existence of the witness," and second that "the witness could be located through reasonable investigation." *Glass v. State*, 227 S.W.3d at 468. Mr. Ferguson failed to prove either of these threshold requirements.¹⁰

¹⁰ In an apparent attempt to prove that a simple question would have turned up Ms. Varner, Mr. Ferguson points out in his brief that Mr. Rogers failed to ask Mr. Trump in his deposition "whether he had discussed what he had seen that night with any other individuals" (App.Br. 55). But while counsel could have asked, there was no evidence at the evidentiary hearing to suggest that Mr. Trump would have recalled

Finally, even if Ms. Varner should have been located, Mr. Ferguson was not prejudiced by the absence of her testimony. At the evidentiary hearing, she testified that Mr. Trump told her, shortly after the murder, that he “couldn’t recognize [the two men] at all because of the lights” (Tr. 173). Or, in other words, he told her, “because of the lighting, he couldn’t clearly see who was there” (Tr. 180).

But Mr. Trump’s initial inability to recognize or identify anyone was a fact already known to the jury. At trial, Mr. Trump testified that he told the police he was not certain he could identify the two men (Tr. 1057). It was only later, when confronted with actual pictures of Mr. Ferguson and Mr. Erickson, that Mr. Trump recognized their faces (Tr. 1022). The fact that Mr. Trump could not clearly see the two young men, and that he, thus, initially believed that he could not recognize them, has little or no value as impeachment evidence. Mr. Trump did not tell Ms. Varner that he did not see the young men’s faces (a fact that *would* preclude later recognition); rather, he merely said that he couldn’t clearly see them.

In sum, the fact is that the ability to recognize a face when confronted with a picture is different from the ability to describe or identify a person after briefly viewing that person in imperfectly lit conditions. Mr. Trump may have initially

his conversation with Ms. Varner and disclosed it to counsel. It cannot be assumed that Mr. Trump would have remembered every random conversation he had with casual acquaintances.

believed that he could not identify the two young men (as he said to Ms. Varner), but his initial belief was ultimately unrelated to his subsequent ability to recognize the perpetrators' faces when he was confronted with their pictures. This point should be denied.

V.

This Court should deny Mr. Ferguson's motion to remand based on newly discovered evidence.

A final issue in this case concerns Mr. Ferguson's motion to remand in light of Mr. Erickson's newly available statement, wherein Mr. Erickson recants aspects of his trial testimony. For the reasons set forth in respondent's suggestions in opposition to Mr. Ferguson's motion to remand, respondent respectfully suggests that the motion should be denied.

In particular, respondent reiterates that because Mr. Ferguson's criminal conviction is final, the rule originally established in *State v. Mooney*, 670 S.W.2d 510 (Mo.App. E.D. 1984), does not apply. The Court has held that where a defendant's "direct appeal is final," *Mooney* does not apply. *Clemmons v. State*, 795 S.W.2d 414, 418 n.4 (Mo.App. E.D. 1990); *State v. Warden*, 753 S.W.3d 63, 65 n.3 (Mo.App. E.D. 1988) ("These cases [including *Mooney*] do not apply in the present case because defendant's motion was filed after his direct appeal was final.").

As set forth in respondent's previously-filed suggestions, claims of newly discovered evidence are not cognizable in a post-conviction motion, and the motion court cannot consider claims that were not included in the post-conviction motion. Thus, here, a remand on this new claim would accomplish nothing. But, that being said, a hearing on Mr. Ferguson's motion is necessary to determine whether Mr.

Erickson's newly available statement is voluntary, reliable and admissible. Indeed, given the circumstances and timing of Mr. Erickson's new statement, there are substantial issues surrounding its voluntariness, its reliability and its usefulness in obtaining a new trial—issues that must be investigated and subjected to the crucible of an adversarial proceeding. Accordingly, respondent respectfully suggests that Mr. Ferguson's motion to remand to the motion court should be denied, and that Mr. Ferguson be directed to file his motion in an appropriate forum.

CONCLUSION

The denial of appellant's Rule 29.15 motion should be affirmed, and Mr. Ferguson's motion to remand should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) and Western District Rule XLI and contains 13,636 words, excluding the cover, the table of contents, the table of authorities, this certification, the signature block, and the appendix, as determined by Microsoft Word software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of June, 2010, to:

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APPENDIX

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Excerpts from the motion court's findings and conclusionsA1-A20