

**IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI**

NO. 1516-CV05073

In re RICKY L. KIDD,

Petitioner,

v.

**KEN CONLEE, Director,
Jackson Co. Detention Center,**

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CHRIS KOSTER
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1307
(573) 751-2096 Fax
mike.spillane@ago.mo.gov
Attorneys for Respondent

TABLE OF CONTENTS

Table Of Authorities	iv
Summary of Argument	1
Statement of Exhibits	2
I. Ricky Kidd is not actually innocent.	3
II. Kidd may not use habeas corpus to bring claims that Missouri courts reviewed in the ordinary course of review and found to be without legal merit.	6
III. Kidd may not use habeas corpus to bring claims that he could have brought in the ordinary course of review but that he defaulted unless he shows that cause and actual prejudice excuse his defaults.....	7
IV. None of Kidd’s current claims entitle him to relief in habeas corpus.....	9
A. The post-conviction review court found Kidd’s claim that counsel was ineffective in dealing with the testimony of Kayla Bryant and Richard Harris is without merit. Kidd waived the claim when he did not pursue it in the appeal of the denial of the post-conviction relief motion.....	9
B. The post-conviction review court rejected on the merits a variation of the claim that counsel was ineffective for not trying to blame the crime on the Goodspeeds and Marcus Merrill. And Kidd waived the claim when he did not pursue it in the appeal of the denial of the post-conviction relief motion. Further, the claim is without legal merit.	11

C. Trial counsel made a proper objection when counsel for Kidd’s accomplice allegedly misstated the evidence in closing argument. Kidd did not pursue the claim that counsel acted ineffectively, and that bars the claim from further review..... 13

D. The prosecutor did nothing wrong when he did not intervene in the argument between counsel for the two defendants about a particular piece of evidence, when the court overruled an objection to the characterization by counsel for one defendant, and told the jury to recall the evidence presented. Kidd defaulted the claim of prosecutorial misconduct when he did not pursue the claim in his direct appeal..... 16

E. Counsel did not act ineffectively in not further investigating Kidd’s alibi defense. The federal district court found after an evidentiary hearing, at which Kidd presented additional evidence about the alibi, that Kidd’s evidence did not provide an alibi for the time of the crime. The claim is also barred as Kidd did not pursue it in the ordinary course of review. 18

F.Kidd’s claim that counsel had an irreconcilable conflict is without merit and procedurally barred. Insofar as the claim is based on Kidd’s alleged alibi, the federal court pointed out after a hearing that Kidd did not have a true alibi. 20

G. The claim that trial counsel was ineffective in arguing for severance of

the trials of Kidd and his co-defendant is without merit and is barred from review. The Court of Appeals found Kidd failed to show prejudice from the joint trial. The relevant statute requires the person entitled to jury sentencing to show prejudice from a joint trial with someone who is not entitled to jury sentencing..... 22

H. Kidd’s claims of ineffective assistance of direct appeal counsel are without merit. To the extent Kidd raises cognizable claims, the claims are barred by Kidd’s failure to properly present the claims in the ordinary course of review, or are precluded to the extent the Missouri courts already rejected variations of the claims in the ordinary course of review..... 23

Conclusion 30

TABLE OF AUTHORITIES

Cases

<i>Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. 2003)	4
<i>Anderson v. Goeke</i> , 44 F.3d 675 (8th Cir. 1995)	17
<i>Arnold v. Dormire</i> , 675 F.3d 1082 (8th Cir. 2012)	9, 10
<i>Clay v. Dormire</i> , 37 S.W.3d 214 (Mo. 2000)	4
<i>Dansby v. Hobbs</i> , 766 F.3d 809 (8th Cir. 2014).....	8, 18, 26, 28
<i>Edwards v. Carpenter</i> , 529 U.S. 446 (2000)	8, 18, 27
<i>Ewing v. Denney</i> , 360 S.W.3d 325 (Mo. App. W.D. 2012).....	9
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978)	20, 21
<i>Kidd v. McCondichie</i> , 03-0079-CV-W-SOW (W.D. Mo. Dec. 8 2009)	3
<i>Kidd v. Norman</i> , 133 S.Ct. 137 (Oct. 1, 2012).....	3
<i>Kidd v. Norman</i> , 651 F.3d 947 (8th Cir. 2011).....	3, 24
<i>Kidd v. State</i> , CV99-26224 (Jackson County, October 4, 2000)	2
<i>Kidd</i> , 990 S.W.2d 182-85	27, 30
<i>Linder v. State</i> , 404 S.W.3d 926 (Mo. App. W.D. 2013)	9
<i>Martin v. State</i> , 386 S.W.3d 179 (Mo. App. E.D. 2012)	9, 26
<i>Martinez v. Ryan</i> , 132 S. Ct. 1309 (2012)	8, 9, 18, 26
<i>McKim v. Cassidy</i> , 457 S.W.3d 831 (Mo. App. W.D. 2015).....	4
<i>Mickens v. Taylor</i> , 535 U.S. 162 (2003)	21

Murray v. Carrier, 477 U.S. 478 (1986)..... 7

State ex rel Nixon v. Jaynes, 63 S.W.3d, 210 (Mo. 2001) 7, 9

State ex rel Strong v. Griffith, 462 S.W. 3d 732 (Mo. 2015)..... 6, 15, 25, 29

State v. Kidd, 75 S.W.3d 804 (Mo. App. W.D. 2002) 3, 24, 29

State v. Kidd, 990 S.W.2d 175 (Mo. App. W.D. 1999)passim

State v. Nash, 339 S.W.3d 512 (Mo. 2011)..... 12, 13

State v. Owsley, 959 S.W.2d 89 (Mo. 1997)..... 26

State v. Simmons, 944 S.W.2d 165 (Mo. 1997)..... 15

Strickland v. Washington, 466 U.S. 668 (1984) 14, 16, 21

Statutes

Missouri Revised Statute 545.880.2(1)..... 23, 30

Rules

Missouri Supreme Court Rule 29.15 8

**IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI**

In re RICKY L. KIDD,)	
)	
Petitioner,)	
)	
v.)	No. 1516-CV05073
)	
KEN CONLEE, Director,)	
Jackson Co. Detention Center,)	
)	
Respondent.)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Summary of Argument

The Circuit Court of Jackson County, Missouri, sentenced Ricky L. Kidd to two consecutive terms of life without parole for two first-degree murders. This Court also sentenced Kidd to two consecutive terms of life for two counts of armed criminal action. Kidd serves his sentence in the Crossroads Correctional Center in DeKalb County, Missouri, where the Warden, Ronda Pash, is his custodian.

Kidd alleges he is actually innocent of the murders based on statements by his co-defendant, who is now beyond penal jeopardy, and additions to the alibi defense he presented at trial. Kidd meets neither the standard for a gateway claim of actual innocence permitting review defaulted claims, nor the higher standard for a free-standing claim of actual innocence that would entitle him to

discharge from confinement. The eyewitness testimony of Kidd's guilt remains intact, and Kidd, when given the opportunity in a federal habeas hearing, presented testimony from his co-defendant that the federal court found incredible, and evidence that the federal court found did not establish a true alibi. Additionally, the federal court noted the eyewitness testimony of guilt has always remained consistent on key points.

Kidd's current claims of trial error, ineffective assistance of trial counsel, and ineffective assistance of direct appeal counsel are procedurally barred from habeas review, and he cannot establish cause and actual prejudice to excuse his default of the claims. The claims are also all without legal merit. To the extent the claims are the same as claims that the Missouri courts have already rejected in the ordinary course of review, Kidd may not litigate the claims again through habeas corpus.

Statement of Exhibits

Respondents' Exhibit 1 is the opinion affirming the judgment of conviction and sentence in Kidd's direct appeal, *State v. Kidd*, 990 S.W.2d 175 (Mo. App. W.D. 1999).

Respondents' Exhibit 2 is the judgment of the Circuit Court of Jackson County denying the Rule 29.15 post-conviction relief motion in *Kidd v. State*, CV99-26224 (Jackson County, October 4, 2000).

Respondents' Exhibit 3 is the opinion affirming the denial of Kidd's post-conviction relief motion in *State v. Kidd*, 75 S.W.3d 804 (Mo. App. W.D. 2002).

Respondents' Exhibit 4 is the order denying Kidd's federal habeas corpus petition in *Kidd v. McCondichie*, 03-0079-CV-W-SOW (W.D. Mo. Dec. 8 2009).

Respondents' Exhibit 5 is the opinion of the United States Court of Appeals for the Eighth Circuit affirming the denial of the petition for habeas corpus in *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011).

Respondents' Exhibit 6 is the order denying Kidd's petition for certiorari in *Kidd v. Norman*, 133 S.Ct. 137 (Oct. 1, 2012).

Respondents' Exhibit 7 is volume 1 of the federal habeas hearing transcript.

Respondents' Exhibit 8 is volume 2 of the federal habeas hearing transcript.

Respondents' Exhibit 9 is volume 3 of the federal habeas hearing transcript.

I. Ricky Kidd is not actually innocent.

In order to prove a claim of actual innocence, entitling a petitioner to review of defaulted claims, a petitioner must prove it is more likely than not that no reasonable juror would convict in light of newly discovered evidence of innocence. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000).

“New” evidence in this sense means evidence that was unknown or unavailable at the time of trial. *See McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. App. W.D. 2015). When a petitioner does not meet the standard for gateway actual innocence entitling him to review of defaulted claims, he necessarily also does not meet the higher standard for showing a claim of freestanding actual innocence that entitles him to discharge from confinement. *Id.* at 847.

In order to prove a claim of actual innocence entitling a petitioner to discharge, the habeas petitioner must undermine confidence in the verdict by clear and convincing evidence. *Amrine v. Roper*, 102 S.W.3d 541, 543-50 (Mo. 2003). “Evidence is clear and convincing when it instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder’s mind is left with the abiding conviction that the evidence is true.” *Id.* at 548 (internal quotation marks omitted).

Kidd alleges that his co-defendant Marcus Merrill now says Kidd did not participate in the murders, and that Eugene Williams heard Merrill and two other men, the Goodspeeds, discussed committing a robbery in his

presence. Kidd alleges this supports a claim of actual innocence of the murders.

Following an evidentiary hearing, the United States District Court found the testimony that Merrill was involved but that Kidd was not involved in the murders, was incredible, and that a reasonable, properly instructed jury, would also find the testimony lacked credibility (Resp. Ex. 5 at 8). The court found that Richard Harris, the eyewitness who identified Kidd as the shooter, has never wavered from his position that Kidd was one of the murderers, he has never recanted his testimony that Kidd was the shooter, and he would still identify Kidd as the shooter if a new trial was held, despite Merrill's testimony (Resp. Ex. 5 at 8-9).

The federal court after an evidentiary found that Kidd still had not established an alibi for February 6, the day of the murder, finding that Kidd could have filed his application for a concealed carry permit on February 5 (Resp. Ex. 5 at 10). The court also found that even if Kidd did file the application on February 6, he could have done so either before or after the 11:30 a.m. murder (Resp. Ex. 5 at 10).

In light of the fact that Richard Harris has not wavered on the core of his testimony that Kidd is guilty, that the victim's daughter identified Kidd, and that Kidd does not really have an alibi that excludes him from committing the murder, it cannot be said that no reasonable juror would vote to convict in light of new evidence, as is required to establish a gateway innocence claim in Missouri. Therefore, Kidd does not meet the burden for showing either a gateway, or free-standing claim of actual innocence.

II. Kidd may not use habeas corpus to bring claims that Missouri courts reviewed in the ordinary course of review and found to be without legal merit.

“[H]abeas review does not provide duplicative and unending challenges to the finality of a judgment so it is not appropriate to review claims already raised on direct appeal or during post-conviction proceedings.” *State ex rel. Strong v. Griffith*, 462 S.W. 3d 732, 734 (Mo. 2015) (internal quotation marks omitted). Insofar as Kidd has already received a merits ruling on particular claims in the ordinary course of review, he may not litigate those claims again through habeas corpus. *Id.*

III. Kidd may not use habeas corpus to bring claims that he could have brought in the ordinary course of review but that he defaulted unless he shows that cause and actual prejudice excuse his defaults.

Kidd has not shown gateway actual innocence by establishing that no reasonable juror would convict in light of his new evidence. He also does not meet his burden of showing cause and prejudice to excuse his defaults. Cause and prejudice are conjunctive criteria, thus, a petitioner must satisfy both criteria to obtain relief. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Cause occurs when “some objective factor external to the defense impeded counsel’s [or the petitioner’s] efforts to comply with the State’s procedural rule.” *State ex rel Nixon v. Jaynes*, 63 S.W.3d, 210, 215 (Mo. 2001) (adopting federal cause and prejudice review, as it then existed, into Missouri law) *quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish the “prejudice” necessary to overcome procedural default, a petitioner seeking to vacate, set aside, or correct a conviction or sentence in federal habeas bears the burden of showing, not merely that errors at his trial created possibility of prejudice, but that they “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Id.* at 215-16.

Kidd cannot assert ineffective assistance of direct appeal counsel as cause to excuse the default of his current trial error claims because claims of ineffective assistance of direct appeal counsel must be raised in a Rule 29.15 motion and in the appeal of the denial of that motion, and he did not do that. See Missouri Supreme Court Rule 29.15; *Edwards v. Carpenter*, 529 U.S. 446 (2000) (claim of ineffective assistance of direct appeal counsel asserted as cause to excuse a default can itself be defaulted when the habeas petitioner did not exhaust an independent Sixth Amendment claim challenging the effectiveness of direct appeal counsel). Any claims that direct appeal counsel was ineffective, whether now raised as cause to excuse the default of Kidd's current trial error claims or as independent Sixth Amendment claims are therefore defaulted by the failure to raise these claims in the Rule 29.15 motion and in the appeal of the denial of that motion.

The United States Supreme Court has recognized that in *federal* habeas corpus review ineffective assistance of post-conviction counsel may be cause to excuse a defaulted underlying claim of ineffective assistance of *trial* counsel *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). But *Martinez* applies only to *federal* habeas review. *Martinez* applies in federal habeas corpus actions only where the underlying claim is ineffective assistance of trial counsel, as opposed to direct appeal counsel. *Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014). And

Martinez applies only where the alleged cause is alleged ineffectiveness at the first post-conviction level where the effectiveness of trial counsel may be challenged. See *Arnold v. Dormire*, 675 F.3d 1082, 1097 (8th Cir. 2012) (ineffective assistance of post-conviction *appellate* counsel cannot be cause to excuse a default). *Martinez* was decided after Missouri courts adopted *then existing* federal cause and prejudice analysis in *Jaynes* in 2001. Missouri appellate courts have not applied *Martinez* to Missouri habeas cases, where ineffective assistance of post-conviction counsel is categorically unreviewable. See *Ewing v. Denney*, 360 S.W.3d 325, 331 n.11 (Mo. App. W.D. 2012) (ineffective assistance of post-conviction counsel is not cause that excuses a default and the only relief available is in cases of total abandonment that justifies reopening the post-conviction motion); see also *Linder v. State*, 404 S.W.3d 926, 929n.5 (Mo. App. W.D. 2013); *Martin v. State*, 386 S.W.3d 179, 185-86 (Mo. App. E.D. 2012) (*Martinez* speaks only to *federal* habeas corpus procedure).

IV. None of Kidd's current claims entitle him to relief in habeas corpus.

- A. The post-conviction review court found Kidd's claim that counsel was ineffective in dealing with the testimony of Kayla Bryant and Richard Harris is without merit. Kidd**

waived the claim when he did not pursue it in the appeal of the denial of the post-conviction relief motion.

In his first claim Kidd alleges trial counsel was ineffective in dealing with the eyewitness identifications of Kidd by Kayla Bryant and Richard Harris (Habeas Petition 26-54). Kidd presented these claims as claims I and II in his pro se motion for post-conviction relief (Resp. Ex. 2 at 60). The post-conviction review court rejected these claims as without legal merit (Resp. Ex. 2 at 62-63). Kidd did not raise these claims in the appeal of the denial of the post-conviction relief motion, defaulting the claims (Resp. Ex. 3). Alleged ineffective assistance of post-conviction *appellate* counsel cannot be cause that excuses a procedural default. *Arnold*, 675 F.3d at 1097. The Rule 29.15 court rejected the claims on the merits. Kidd then defaulted the claims in the ordinary course of state collateral review when he did not appeal the denial of the claims.

The United States District Court held an evidentiary hearing on Kidd's federal habeas petition, which claimed that counsel was ineffective for failing to properly present the case and present critical evidence (Resp. Ex. 4). The court found that Harris, the eyewitness who identified Kidd as the shooter, has consistently maintained that he went to Michael Holland's house on the day of the murders and that he returned home on a route that took him directly by the victim, George Bryant's house (Resp. Ex. 4 at 8). The court found that Harris

has never recanted his testimony that Kidd was the shooter, and that he would still testify that Kidd was the shooter if a new trial were held (Rep. Ex. 4 at 8-9). The court found that it was not enough for Kidd to blame trial counsel, or question the credibility of Harris, or challenge the reliability of Kayla Bryant's identification, and that the only evidence presented that was unavailable at trial was the testimony of Merrill who the court found was not a reliable witness (Resp. Ex. 4 at 9) This supports the finding of the Rule 29.15 court that the claims are without merit. Kidd cannot excuse his default of his claim that trial counsel should have dealt with the identifications by Richard Harris and Kayla Bryant differently because he defaulted the claim, in the appeal of the denial of post-conviction relief. And the claim is without merit, as the Rule 29.15 court found.

B. The post-conviction review court rejected on the merits a variation of the claim that counsel was ineffective for not trying to blame the crime on the Goodspeeds and Marcus Merrill. And Kidd waived the claim when he did not pursue it in the appeal of the denial of the post-conviction relief motion. Further, the claim is without legal merit.

Kidd alleges trial counsel was ineffective for not blaming the murder on Marcus Merrill, the co-defendant, Gary Goodspeed Jr., and Gary Goodspeed Sr.

(Habeas Petition at 54-62). This is a variation of the claim that Kidd raised in his post-conviction relief motion that counsel should have called the Goodspeeds at trial in order to offer them as alternate suspects (Rep. Ex. 2 at 60). The Rule 29.15 court found the claim was without merit, noting that the Goodspeeds were not obligated come to Kidd's trial and take the blame for the crime (Resp. Ex. 3 at 64). Kidd did not raise the claim in the appeal of the denial of the post-conviction relief motion defaulting the claim (Resp. Ex.4). Like Kidd's first claim in the current habeas petition, Kidd lost a variation of the claim in the Rule 29.15, litigation then defaulted the claim in the Rule 29.15 appeal.

At trial, Kidd presented a defense of alibi while the co-defendant Merrill presented a defense of mistaken identity. *State v. Kidd*, 990 S.W.2d 175, 182 (Mo. App. W.D. 1999). In Missouri, a defendant cannot present evidence attempting to blame a crime on a third party unless there is evidence directly linking the third person with the *corpus delicti* of the crime and that evidence clearly points to the third person rather than the defendant as the perpetrator of the crime. *State v. Nash*, 339 S.W.3d 512-15 (Mo. 2011). In *Nash*, the Missouri Supreme Court held that evidence of third party guilt was properly excluded where the third party's fingerprints, but not the defendant's fingerprints, were on the victim's car at the murder scene, and the third party allegedly lied about knowing the victim. *Id.* at 514-15. Here where there was no direct evidence

linking the Goodspeeds to the *corpus delicti* of the murders and no evidence pointing to them rather than Kidd as the killers at the time of trial, counsel could not, under Missouri law, have presented the theory that they had the motive and opportunity to commit the murder and therefore were viable alternate suspects. Years later, in federal habeas corpus proceedings, Merrill recounted a version of events that sought to exonerate Kidd and blame the Goodspeeds as Merrill's accomplices (Resp. Ex. 4 at 2-4). But such a theory was not admissible at trial when Merrill was claiming that he was the victim of mistaken identity and did not participate in the crime. And trial counsel could not have presented that theory. Further, the United States District Court found that Merrill's testimony trying to blame the Goodspeeds was incredible, and that a jury would also find it incredible (Resp. Ex. 4 at 7-8). The claim that counsel was ineffective for not presenting a defense that blamed the murder on the Goodspeeds is without merit as well as procedurally barred.

C. Trial counsel made a proper objection when counsel for Kidd's accomplice allegedly misstated the evidence in closing argument. Kidd did not pursue the claim that counsel acted ineffectively, and that bars the claim from further review.

Kidd alleges that counsel for Kidd's co-defendant misstated the evidence in closing argument by erroneously stating that Kidd's fingerprint was found on a box in the car used in the murder when it was really found in a different vehicle (Habeas Petition 62-63). Kidd alleges that his trial counsel unsuccessfully objected and unsuccessfully asked the trial court to direct the jury to disregard the argument (Habeas Petition at 63). Kidd alleges his counsel was ineffective because if counsel had made the facts unmistakably clear during the trial he could have better countered the argument that he alleges misstated the facts (Habeas Petition 64-65).

The claim of ineffective assistance of trial counsel is procedurally barred from review because Kidd did not raise it in his post-conviction relief motion. The claim is also without legal merit under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). In order show an entitlement to relief under *Strickland* a petitioner must show that counsel acted outside the wide range of professional competence and that the act or omission created a reasonable probability the outcome of the proceeding was changed as a result. Counsel did object to the alleged misstatement of the evidence in the co-defendants argument, but the court gave an instruction stating the jury would recall the evidence. That is all counsel could do at the time. Counsel was not required to present his case with the thought that the co-defendant might misstate the

evidence during closing argument, which is what Kidd really alleges. Further, juries are instructed that that argument by counsel is not evidence. *See State v. Simmons*, 944 S.W.2d 165, 188-89 (Mo. 1997) (rejecting ineffective assistance of counsel claim based on closing argument as there was no reasonable probability the outcome of the case was changed in light of the instruction given to juries in Missouri that argument is not evidence).

And as the Missouri Court of Appeals held in rejecting a claim on direct appeal that Kidd was prejudiced by a joint trial because of the co-defendant's closing argument, juries are presumed to follow the court's instructions, and the instruction that argument is not evidence was sufficient to cure any prejudice. *State v. Kidd*, 990 S.W.2d 175, 182-85 (Mo. App. W.D. 1999). Kidd's claim that counsel was ineffective is procedurally barred from review and without merit. In addition, the claim is a variation of a theme already rejected on direct appeal, that co-defendant's closing argument allegedly created a reasonable probability the outcome of the case was changed. The Court of Appeals' decision on that issue is already the law of the case. *See Strong*, 462 S.W.3d at 734 (habeas corpus may not be used to re-litigate a claim already rejected on the merits during the ordinary course of review).

The claim that counsel was ineffective in dealing with the co-defendant's closing argument is procedurally barred and without merit. Further, the

Missouri Court of Appeals has already determined that the argument did not create a reasonable probability the outcome of the proceeding was changed in light of the instruction given to the jury that argument is not evidence. That holding defeats a claim that *Strickland* prejudice resulted.

D. The prosecutor did nothing wrong when he did not intervene in the argument between counsel for the two defendants about a particular piece of evidence, when the court overruled an objection to the characterization by counsel for one defendant, and told the jury to recall the evidence presented. Kidd defaulted the claim of prosecutorial misconduct when he did not pursue the claim in his direct appeal.

Kidd next argues that the prosecutor committed a constitutional violation by not intervening on behalf of Kidd when the judge overruled Kidd's objection to the co-defendant's closing argument (Habeas Petition 65-67). Kidd also alleges that the prosecutor is responsible for the co-defendant's closing argument because if the prosecutor had presented fingerprint testimony that was clearer in the first place, the co-defendant would not have made an argument that misconstrued the testimony. This claim is a variation of the improper joint trial claim Kidd lost on the merits in the court of appeals, as is the previous

ineffective assistance of counsel claim. The claim briefed on direct appeal presented the issue as trial error caused by prejudice from closing argument that would not have occurred had the case been tried separately. The claim raised earlier in this suit presented the issue as ineffective assistance of counsel. And the current claim presents the issue as prosecutorial misconduct. But in each case prejudice is measured by the creation of a reasonable probability the outcome of the proceeding was changed. *See Anderson v. Goeke*, 44 F.3d 675, 678 n.2 (8th Cir. 1995) (the test for prejudice from prosecutorial misconduct and for trial error resulting in a due process violation is the same, so how the claim was characterized did not matter to the result that the claim was without merit). The Missouri Court of Appeals already found the co-defendant's closing argument did not create a reasonable probability the outcome of the proceeding was changed when it rejected the claim that it was error to conduct a joint trial. *Kidd*, 990 S.W.2d 182-85. That dictates the result of this claim.

But the current claim is also procedurally barred because Kidd did not raise the claim in his direct appeal. Any claim that direct appeal counsel was ineffective and therefore provided cause to excuse the default is itself defaulted, because Kidd did not challenge the effectiveness of direct appeal counsel on this point in the Rule 29.15 litigation. *See Edwards v. Carpenter*, 529 U.S. 446 (2000) (claims that that counsel's ineffectiveness presents cause to excuse a default are

themselves defaulted when not presented as independent Sixth Amendment claims in the ordinary course of review). *Martinez v. Ryan* cause analysis would not apply to this fact pattern even in federal court because the underlying defaulted claim is one of ineffective assistance of direct appeal counsel as opposed to ineffective assistance of trial counsel, *Dansby v. Hobbs*, 766 F.3d at 833. (*Martinez* only applies when the underlying claim of error is ineffective assistance of trial counsel, as opposed to ineffective assistance of direct appeal counsel). Further, the prosecutor did nothing improper by not becoming embroiled in a dispute between the co-defendants on the meaning of testimony that the trial court instructed the jury to resolve by recalling the evidence. But it is not necessary to reach that level of analysis, as the claim is defaulted and no prejudice resulted.

E. Counsel did not act ineffectively in not further investigating Kidd's alibi defense. The federal district court found after an evidentiary hearing, at which Kidd presented additional evidence about the alibi, that Kidd's evidence did not provide an alibi for the time of the crime. The claim is also barred as Kidd did not pursue it in the ordinary course of review.

Kidd alleges that trial counsel was ineffective for not better investigating and better supporting Kidd's alibi defense (Habeas Petition at 67-75). The claim is procedurally barred because Kidd did not raise the claim in his Rule 29.15 litigation during the ordinary course of review.

Years after trial, Kidd alleged to the federal habeas court that trial counsel was ineffective for not better investigating and presenting an alibi defense (Resp. Ex. 4 at 5-6, 9-10). The federal court held a three-day hearing in June and July 2009 (Resp. Ex. 4 at 1). The same counsel who represented Kidd in that proceeding now represents Kidd before this Court.

The district court found that Kidd did not establish videotaped footage existed from 1996, that could have been used by trial counsel to establish an alibi, that he presented no evidence that footage existed or what areas it would have covered, or what the likelihood was that surveillance would have captured Kidd on video if he visited his sister at work on the day of the murder (Resp. Ex. 4 at 9).

The federal district court also found that the evidence Kidd presented did not definitely establish that Kidd had applied for a gun permit on February 6, the day of the murder, as opposed to February 5, and that even if Kidd could establish the date of the gun permit application as February 6, that would not

show that he could not have applied for the permit, either before or after committing the murders around 11:30 a.m. (Resp. Ex. 4 at 10).

It implausible to allege that trial counsel was ineffective for not presenting a more convincing alibi at trial or that Kidd was prejudiced, when Kidd's current counsel, with years to investigate and prepare his claim, could not present a convincing alibi to the federal court when given the opportunity. The current claim is procedurally barred from review and without merit.

F. Kidd's claim that counsel had an irreconcilable conflict is without merit and procedurally barred. Insofar as the claim is based on Kidd's alleged alibi, the federal court pointed out after a hearing that Kidd did not have a true alibi.

Kidd alleges he had an irreconcilable conflict with counsel because he alleges he did not get along with counsel. He alleges the public defenders are overworked and have insufficient resources. And he alleges counsel did not in his view do an adequate investigation (Habeas Petition at 76-84). Kidd relies on *Holloway v. Arkansas*, 435 U.S. 475 (1978), which he alleges supports the idea that prejudice is presumed from the conflict he alleges (Habeas Petition at 82-84).

The ineffective assistance of counsel claim is procedurally barred from habeas corpus review because Kidd did not present it in his Rule 29.15 motion

and the appeal of the denial of that motion. Insofar as Kidd may be alleging the trial court erred by denying his motion to replace counsel, that claim of error is barred because Kidd did not raise the claim in his direct appeal.

Kidd's legal analysis is also mistaken. In *Mickens v. Taylor*, 535 U.S. 162 (2003) the United States Supreme Court rejected the idea that the *Holloway* presumption of prejudice applies outside the context of the same attorney representing multiple defendants with opposing interests. In fact the Court held that except where counsel indicates to the court his representation of multiple defendants creates a conflict, prejudice is not presumed and an adverse impact on representation must be shown to prove ineffectiveness. *Id.* at 166-74. The Court also noted that, although the parties in *Mickens* and some lower courts apparently assumed to the contrary, outside the context of multiple representation the United States Supreme Court had never itself varied from the requirement in *Strickland*, that to prove counsel was ineffective, a defendant must show a probable effect upon the outcome of trial. *Id.* at 174-76.

Kidd's claim of ineffectiveness is procedurally barred and without merit. In light of the fact that Kidd, represented by current counsel, failed to present a convincing alibi defense to the federal habeas court, despite an evidentiary hearing, it is implausible to allege that trial counsel was ineffective in her presentation of an alibi defense, or that Kidd was prejudiced. The trial court did

not err in declining to replace counsel because Kidd was a difficult client, who was not satisfied with the public defender system or with his particular public defender. But it is not necessary to reach that level of analysis because the claim is procedurally barred.

G. The claim that trial counsel was ineffective in arguing for severance of the trials of Kidd and his co-defendant is without merit and is barred from review. The Court of Appeals found Kidd failed to show prejudice from the joint trial. The relevant statute requires the person entitled to jury sentencing to show prejudice from a joint trial with someone who is not entitled to jury sentencing.

Kidd alleges trial counsel was ineffective because the fact that Kidd was not a prior offender allegedly “entitled him to automatic severance of his trial from co-defendant Merrill,” but counsel did not prove Kidd was not a prior offender, and make that argument (Habeas Petition at 85). The claim is without merit, and is defaulted.

Missouri Revised Statute 545.880.2(1) requires a judge to sever the trial of co-defendant entitled to jury sentencing from the trial of a co-defendant not entitled to jury sentencing, *if the defendant entitled to jury sentencing meets his burden of showing a probability of prejudice from a joint trial*. Therefore, the

statute requires the defendant to meet a burden of showing prejudice that is in addition to the showing that he is entitled to jury sentencing, but the co-defendant is not entitled to jury sentencing. But the Missouri Court of Appeals already found that Kidd was not prejudiced by the joint trial. *Kidd* 990 S.W.2d 182-85. Therefore counsel was necessarily not ineffective for not arguing the trials should be severed based on his right to jury sentencing. The claim is also defaulted as it varies from the rejected claim Kidd presented in his post-conviction appeal that direct appeal counsel was ineffective for not alleging that it was error to find Kidd was a prior offender.

H. Kidd's claims of ineffective assistance of direct appeal counsel are without merit. To the extent Kidd raises cognizable claims, the claims are barred by Kidd's failure to properly present the claims in the ordinary course of review, or are precluded to the extent the Missouri courts already rejected variations of the claims in the ordinary course of review.

Kidd's next three claims allege direct appeal counsel was ineffective. Direct appeal counsel is expected to winnow out claims, and present only the arguments counsel views as strongest. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (experienced appellate advocates winnow weaker claims to focus on one

or at most a few important issues because multiple assignments of error can dilute and weaken a good case and will not help a bad one). Kidd presented four claims on direct appeal, including an allegation that it was error to try Kidd jointly with his co-defendant. *State. v. Kidd*, 900 S.W.3d 175 (Mo. App. W.D. 1999). Counsel made a reasonable selection of which claims to present and was under no duty to present additional claims.

Further, the Missouri Court of Appeals in the post-conviction appeal rejected a claim that direct appeal counsel was ineffective for not arguing that Kidd was erroneously found to be a prior offender. *State v. Kidd*, 75 S.W.3d 804 (Mo App. W.D. 2002). Insofar as Kidd is again litigating that claim of ineffective assistance of direct appeal counsel, his claim is precluded from habeas review. “[H]abeas review does not provide duplicative and unending challenges to the finality of a judgment so it is not appropriate to review claims already raised on direct appeal or during post-conviction proceedings.” *Strong*, 462 S.W. 3d at 734 (internal quotation marks omitted).

Insofar as Kidd brings different claims of ineffective assistance of direct appeal counsel, those claims are barred by Kidd’s failure to present the claims of ineffective assistance of direct appeal counsel in his Rule 29.15 motion and the appeal of the denial of that motion (Resp. Exs. 2 and 3). Missouri Supreme Court Rule 29.15.

- 1. The claim that counsel had a conflict with Kidd was a claim for the post-conviction review process that is not cognizable on direct appeal. To the extent Kidd is alleging an underlying claim that was cognizable on direct appeal, the claim of ineffective assistance of direct appeal counsel is both barred and without merit.**

Kidd alleges that direct appeal counsel was ineffective for not raising a claim that the trial court erred in not disqualifying trial counsel based on Kidd's allegation of a conflict with trial counsel (Habeas Petition at 92). Kidd and his post-conviction review counsel raised several claims of ineffective assistance of direct appeal counsel in the *pro se* and amended Rule 29.15 motions. But the current claim was not among them (Resp. Ex. 2 at 60-61). The claim is therefore procedurally barred from review because Kidd could have raised it in the Rule 29.15 motion, which is part of the ordinary course of review. Under Missouri law a claim that post-conviction counsel was ineffective for not including the claim in the Rule 29.15 motion is categorically unreviewable. *See Martin*, 386 S.W.3d 185-86 (*Martinez* speaks only to *federal* habeas corpus procedure). Further, even the federal courts do not apply *Martinez* ineffective assistance of post-conviction counsel analysis to defaulted claims of ineffective assistance of direct appeal

counsel as opposed to claims of ineffective assistance of trial counsel, *Dansby*, 766 F.3d at 33. Therefore, Kidd's current claim is barred from review.

The claim is also without merit. Direct appeal counsel was not ineffective for declining to include a claim that the trial court erred in not replacing Kidd's public defender because the public defender would not accept rudeness from persons who called the lawyer on Kidd's behalf, and allegedly did not allow Kidd to control the investigation of the case to the extent he wished (*See Habeas Petition at 76-84 discussing counsel's alleged deficiencies*). *See State v. Owsley*, 959 S.W.2d 89,792-93 (Mo. 1997) (trial court decision not to replace counsel based on alleged conflict is reviewed for a clear abuse of discretion and insofar as the claim is based on alleged failure to investigate or the conduct of a trial it is more properly raised as a Rule 29.15 ineffectiveness claim; breakdown in communication that is the fault of the client is not a reason to replace counsel).

Counsel reasonably presented the stronger claim that Kidd was erroneously found to be a prior offender. Direct appeal counsel was not ineffective.

- 2. The claim that direct appeal counsel was ineffective for not alleging a Due Process Clause violation occurred in co-defendant's closing argument is procedurally barred and without merit.**

Kidd alleges that direct appeal counsel was ineffective in not briefing a claim that the trial court committed a Due Process Clause violation by ruling against Kidd on an objection by Kidd, that the co-defendant's argument mischaracterized the evidence, and stating that the jury would recall the evidence (Habeas Petition at 92). The Missouri Court of Appeals already found the co-defendant's closing argument did not create a reasonable probability the outcome of the proceeding was changed when it rejected the claim that it was error to conduct a joint trial. *Kidd*, 990 S.W.2d 182-85. That dictates the result of this claim.

But the current claim is also procedurally barred. Any claim that direct appeal counsel was ineffective is defaulted because Kidd did not challenge the effectiveness of direct appeal counsel on this point in the Rule 29.15 litigation. *See Edwards v. Carpenter*, 529 U.S. 446 (2000) (claims that that counsel's ineffectiveness presents cause to excuse a default are themselves defaulted when not presented as independent Sixth Amendment claims in the ordinary course of review). Alleged ineffective assistance of post-conviction counsel cannot be cause that excuses the default of a claim of ineffective assistance of *direct appeal* counsel, as opposed to trial counsel, *Dansby* 766 F.3d at 833. Further, the court did nothing improper by not becoming embroiled in a dispute between the co-defendants on the meaning of testimony that the trial court instructed the

jury to resolve by recalling the evidence. But it is not necessary to reach that level of analysis, as the claim is defaulted and no prejudice resulted. And as the Missouri Court of Appeals pointed out in rejecting a claim on direct appeal that Kidd was prejudiced by a joint trial because of the co-defendant's closing argument, juries are presumed to follow the court's instructions, and the instruction that argument is not evidence was sufficient to cure any prejudice. *State v. Kidd*, 990 S.W.2d 175, 182-85 (Mo. App. W.D. 1999). The result would have necessarily have been the same had Kidd's appellate counsel phrased claim as error as based on the argument alone, rather than error based on the joint trial with the argument as the required showing of prejudice, as he did.

3. The claim that it was reversible error to try Kidd jointly with his co-defendant has already been rejected by the Missouri Court of Appeals. A claim that direct appeal counsel was ineffective for not presenting the claim differently is procedurally barred and without merit.

Kid alleges that direct appeal counsel was ineffective for not raising a claim that his case should not have been joined for trial with the case of his co-defendant because he was not a prior offender and therefore had a right to jury sentencing, but his co-defendant was a prior offender and had no right to jury sentencing (Habeas Petition at 92-93).

The Missouri Court of Appeals in the post-conviction appeal rejected a claim that direct appeal counsel was ineffective for not arguing that Kidd was erroneously found to be a prior offender. *State v. Kidd*, 75 S.W.3d 804 (Mo App. W.D. 2002). Insofar as Kidd is again litigating that same claim of ineffective assistance of direct appeal counsel claim, his claim is precluded from habeas review. “[H]abeas review does not provide duplicative and unending challenges to the finality of a judgment so it is not appropriate to review claims already raised on direct appeal or during post-conviction proceedings. *Strong*, 462 S.W. 3d at 734 (internal quotation marks omitted). Insofar as Kidd now changes the claim, the claim is barred from review.

The claim is also without merit. Missouri Revised Statute 545.880.2(1) requires a judge to sever the trial of co-defendant entitled to jury sentencing from the trial of a co-defendant not entitled to jury sentencing, *if the defendant entitled to jury sentencing meets his burden of showing a probability of prejudice from a joint trial*. Therefore, the statute requires the defendant to meet a burden of showing prejudice that is in addition to the showing that he is entitled to jury sentencing but the co-defendant is not entitled to jury sentencing. But the Missouri Court of Appeals already found that Kidd was not prejudiced by the joint trial. *Kidd* 990 S.W.2d 182-85. Therefore appellate counsel was necessarily

not ineffective for not arguing the trials should be severed based on his right to jury sentencing.

What Kidd has done here is cobble together his already denied claim that direct appeal counsel was ineffective for alleging he was wrongfully found to be a prior offender with his already denied claim that appellate counsel was ineffective for not alleging it was error to try him jointly with his co-defendant. He has changed the two rejected claims into a claim that direct appeal counsel was ineffective for not arguing that it was error to try Kidd jointly with his co-defendant *because* Kidd was not a prior offender but the co-defendant was a prior offender. But the new claim, like the already rejected claims is without merit. Section 545.880.2 does not guarantee separate trials automatically but rather puts the burden on the co-defendant entitled to jury trial to show prejudice from a joint trial. And as the Missouri Court of Appeals found there was no prejudice from the joint trial itself. The claim therefore would have failed and direct appeal counsel acted reasonably in not raising it. The claim is also procedurally barred. And Kidd cannot overcome the bar to review.

Conclusion

This Court should deny the petition for the writ of habeas corpus.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Michael Spillane
MICHAEL SPILLANE
Assistant Attorney General
Missouri Bar # 40704
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1307
(573) 751-2096 Fax
mike.spillane@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed using the Missouri e-Filing system. This Court's electronic filing system should serve counsel for Petitioner this 5th day of October, 2015.

/s/ Michael Spillane
MICHAEL SPILLANE
Assistant Attorney General