

No. SC91571

In the
Missouri Supreme Court

CLARENCE BURGESS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Tom W. DePriest, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the dismissal of a motion to vacate judgment and sentence under Supreme Court Rule 24.035 in the Circuit Court of St. Louis County. The conviction sought to be vacated was for discharging a firearm at a building, § 571.030, RSMo 2000, for which Appellant was sentenced to fifteen years imprisonment, following the revocation of a five-year probationary term. In its opinion, the Eastern District transferred the case to this Court pursuant to Rule 83.02 due to a question of general interest or importance raised by Appellant's argument that a formal ethics opinion rendered his waiver of the right to seek post-conviction relief invalid. *Burgess v. State*, No. ED94641, slip op. at 6 (Mo. App. E.D. February 22, 2011).

STATEMENT OF FACTS

Appellant, Clarence Burgess, was charged in the Circuit Court of St. Louis County with discharging a firearm at a building. (L.F. 9). On April 24, 2008, Appellant appeared before the Honorable Tom W. DePriest to enter an *Alford*¹ plea of guilty to the charge. (L.F. 14).

Following negotiations, Appellant decided to withdraw his earlier not-guilty plea and instead enter a guilty plea to the charge. (L.F. 15). The plea court examined Appellant regarding his education, mental fitness, and understanding of the proceedings. (L.F. 16-17). Appellant acknowledged understanding the charge, and he indicated that he had advised plea counsel of all the facts and circumstances surrounding his crime. (L.F. 17-18). Appellant affirmed that plea counsel had fully explained the nature of the charge and explained all of the elements and possible defenses to him. (L.F. 18).

The prosecutor recited a factual basis for the charge, as well as the State's evidence supporting the charge. (L.F. 18-19). Essentially, Appellant had purchased some fake cocaine for \$90, and upon discovery of the nature of the substance, Appellant returned to the seller's home and demanded a refund. (L.F. 18-19). When he was advised that the seller was not home, Appellant drew a handgun while saying, "I'm going to shoot up the house." (L.F. 19). He then fired six rounds into the two

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

windows of the home. (L.F. 19). One eyewitness identified Appellant as the shooter. (L.F. 19). While refusing to admit the truth of the allegations, Appellant acknowledged that the evidence as stated by the prosecutor was such that he believed if his case went to trial, there was a substantial likelihood that he would be found guilty, and he indicated his desire to avoid the risk of receiving a greater sentence than he would be receiving under the plea agreement. (L.F. 19-20). Appellant acknowledged discussing the *Alford* plea with his attorney and indicated that he understood that an *Alford* plea had the same legal consequences as a regular guilty plea. (L.F. 20).

The prosecutor stated that the range of punishment for the crime was a mandatory fifteen-year sentence, but indicated that the State was recommending – pursuant to the plea agreement – that Appellant receive a fifteen-year suspended execution of sentence with a five-year probationary term, in exchange for the guilty plea and Appellant’s waiver of his right “to file any future post-conviction relief action under 24.035.” (L.F. 20-21).

Appellant acknowledged understanding the range of punishment and the recommendation. (L.F. 21). He further agreed that that was his understanding of what the State’s recommendation would be. (L.F. 21).

The court then addressed the voluntariness of Appellant’s plea. (L.F. 21). Appellant denied that any threats or promises had been made to him or his family to

induce his guilty plea. (L.F. 21). He also denied any refusal by plea counsel to comply with his requests. (L.F. 21). Appellant indicated that plea counsel had answered all of his questions and that he had been given enough time to discuss his case with plea counsel. (L.F. 21). Appellant denied any complaints or criticisms of counsel, and he denied knowing of anything she could have done but did not do, or any witnesses she should have spoken with but did not. (L.F. 21-22). Appellant affirmed that counsel had fully advised him as to all aspects of his case, including his legal rights and possible consequences of his *Alford* plea. (L.F. 22). Appellant advised the court that he believed plea counsel had adequately, completely, and effectively represented him in his defense to the charge. (L.F. 22).

The court then discussed the various rights attendant to a jury trial that Appellant was relinquishing by pleading guilty, and Appellant acknowledged understanding all of the rights and that he was waiving them by pleading guilty. (L.F. 22-24). Appellant advised the court that he was pleading guilty voluntarily and of his own free will because he was guilty of the crime charged. (L.F. 24). The court accepted Appellant's plea, sentenced him to fifteen years of imprisonment, suspended the execution of that sentence, and then placed Appellant on a five-year probationary term. (L.F. 25-26).

The court then addressed Appellant's waiver of his right to seek relief under Rule 24.035. (L.F. 26). The court asked Appellant if he understood his agreement to

waive that right, and Appellant initially responded, “No, no, sir. I don’t understand.” (L.F. 26). Counsel then requested to go off the record. (L.F. 26). The court noted, “The defendant stated I used some big words in going over the waiver. I have the waiver in front of me. Mr. Burgess, did you read this document?” (L.F. 26). The court was referring to Appellant’s previously-executed, written “Waiver of Right to Proceed Under Rule 24.035 for Post-Conviction Relief.” (L.F. 26; Supp. L.F. 1).

The written waiver contained acknowledgements by Appellant that he had been informed of his right to file a Rule 24.035 motion, that he understood the various claims that could be raised in that motion, and that Rule 24.035 is the exclusive procedure by which he could file those claims. (Supp. L.F. 1). The written waiver also indicated that, after being informed of his rights under Rule 24.035, Appellant wished to waive those rights “in return for the State’s agreement to recommend a specific sentence to the Court, or for such other agreements on behalf of the State.” (Supp. L.F. 1). The written waiver stated,

By so agreeing to waive this right Defendant understands that he/she will be forever barred from raising any such claims as enumerated above. Defendant also states to the Court that this waiver is made knowingly, voluntarily, and intelligently, with a full understanding of the above rights.

(Supp. L.F. 1). The waiver was signed by Appellant, plea counsel, the prosecutor, and the plea court. (Supp. L.F. 1).

Appellant indicated that he had read, understood, and signed the waiver. (L.F. 27). Plea counsel affirmed that the waiver was part of the plea agreement. (L.F. 27).

Appellant's probation was later revoked for a violation of the condition to obey all laws, as he pled guilty to a new charge out of the City of St. Louis. (L.F. 29). Following the revocation hearing, the court questioned Appellant about the assistance of counsel, and based upon his responses, the court determined that "no probable cause exists to believe that defendant has received ineffective assistance of counsel." (L.F. 36-38).

Thereafter, Appellant filed a *pro se* Rule 24.035 motion. (L.F. 42, 44-49). The motion court appointed counsel, and appointed counsel filed an amended motion, alleging that Appellant's waiver of his right to proceed under Rule 24.035 was invalid. (L.F. 50, 58-79). On the same day, Appellant also filed a motion for change of judge, alleging that Judge DePriest could not be fair and impartial to Appellant after having certified Appellant as an adult and accepting Appellant's waiver of his post-conviction rights. (L.F. 54-57). The motion for change of judge was denied. (L.F. 81). Pursuant to the State's motion, the motion court then dismissed Appellant's Rule 24.035 motion in accordance with his prior waiver. (L.F. 83-84). This appeal followed.

ARGUMENT

Point I

The motion court did not clearly err in dismissing Appellant’s Rule 24.035 motion because Appellant knowingly and voluntarily waived his right to seek post-conviction relief in that, before his plea hearing, he executed a written waiver of his right to seek post-conviction relief in exchange for a suspended execution of sentence and five years probation, and the trial court examined Appellant regarding his understanding of the waiver. The motion court committed no error in enforcing Appellant’s obligations under this contract. (Responds to Appellant’s Points I and III).²

Appellant argues that his waiver of his right to seek post-conviction relief pursuant to Rule 24.035 was unknowing, involuntary, and unintelligent because plea counsel was allegedly operating under a conflict of interest when she advised him to waive this right pursuant to plea negotiations with the State. But because Appellant’s waiver was knowingly, intelligently, and voluntarily entered into, this Court should

² Insofar as Appellant’s third point on appeal was never addressed by the motion court due to its dismissal of his Rule 24.035 motion, there is simply nothing for this Court to review, as no findings or conclusions were issued regarding Appellant’s third claim. *Clayton v. State*, 164 S.W.3d 111, 115 (Mo. App. E.D. 2005). Thus, Respondent will not address it either.

enforce Appellant's obligations under the plea agreement and dismiss this appeal based upon his waiver.

A. Standard of review.

“[R]eview of a dismissal of a 29.15 motion is limited to a determination of whether the trial court's findings and conclusions are clearly erroneous.” *State v. Sims*, 952 S.W.2d 286, 293 (Mo. App. W.D. 1997). “Findings and conclusions are clearly erroneous only if, after a review of the entire record, we are left with the definite and firm impression that a mistake has been made.” *Id.*

B. This appeal should be dismissed in light of the fact that Appellant knowingly, intelligently, and voluntarily waived his right to seek post-conviction relief.

“A movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently.” *Jackson v. State*, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007); *see also State v. Valdez*, 851 S.W.2d 20, 22 (Mo. App. W.D. 1993).

Here, the record demonstrates that Appellant knowingly, voluntarily, and intelligently waived his right to collaterally attack his conviction. First, he executed a written waiver before entering his guilty plea, and that waiver fully advised him of his rights pursuant to Rule 24.035. Specifically, the waiver advised Appellant that a Rule 24.035 motion

could be filed after judgment or sentence to seek relief from claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of:

1. Ineffective assistance of trial and appellate counsel[;]
2. The Court imposing the sentence was without jurisdiction to do so; or
3. The sentence imposed was in excess of the maximum sentence authorized by law.

(Supp. L.F. 1). The waiver contained an acknowledgment by Appellant that he was “aware that relief under Rule 24.035 is the exclusive procedure by which defendant could seek relief for any of the above claims.” (Supp. L.F. 1). The waiver further stated that “having been so informed of [his] rights to post conviction relief as stated above, defendant waives the right to file any such motion in return for the State’s agreement to recommend a specific sentence to the Court, or for such other agreements on behalf of the State.” (Supp. L.F. 1). The waiver indicated that “[b]y so agreeing to waive this right Defendant understands that [he] will be forever barred from raising any such claims as enumerated above.” (Supp. L.F. 1). Finally, within the waiver, Appellant stated that “this waiver is made knowingly, voluntarily, and intelligently, with a full understanding of the above rights.” (Supp. L.F. 1). The waiver was signed by Appellant, plea counsel, the prosecutor, and the court. (Supp. L.F. 1).

At the plea hearing, the plea court discussed the waiver with Appellant and asked if Appellant had read, understood, and signed the waiver. (L.F. 26-27). Appellant indicated that he had. (L.F. 26-27). The court also verified that Appellant's waiver was part of the plea agreement whereby the State agreed to recommend that execution of Appellant's mandatory sentence be suspended and that he be placed on probation in exchange for Appellant's waiver and guilty plea. (L.F. 20-21, 27). Appellant acknowledged understanding that agreement. (L.F. 21). He further indicated that it was his expectation when he entered his guilty plea that he would receive a fifteen-year sentence, with execution suspended, and a five-year probationary period. (L.F. 21).

Appellant acknowledges that a defendant can waive his right to a direct appeal or to file a motion for new trial, but he argues that the waiver of post-conviction relief is different, and he suggests that it constitutes a "first-tier" review, subject to higher scrutiny. (App. Br. 16-17). But this argument is internally inconsistent because direct appeal is, in fact, a first tier review, and if it can be waived – as Appellant acknowledges, so can the right to seek post-conviction relief because "[c]ollateral review is more like a second-tier appeal than a first-tier appeal as of right." *Martinez v. Schriro*, 623 F.3d 731, 741 (9th Cir. 2010); *see also Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987) ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal

proceeding itself, and it is in fact considered to be civil in nature.”). But even if the post-conviction procedure constituted a “first tier” review, that characterization alone would not render the procedure un-waivable, as there is nothing precluding a defendant’s choice to waive even traditional first tier review mechanisms, as Appellant concedes.

Additionally, in making this argument, Appellant overlooks the Eastern District’s holding in *Jackson v. State*, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007), that “[a] movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently,” as well as the Western District’s similar holding in *Valdez*, 851 S.W.2d at 22.³

Furthermore, the post-conviction relief procedure through Rule 24.035 is not a right of constitutional magnitude to be strictly scrutinized. *Reuscher v. State*, 887

³ Federal courts and other state courts also permit a defendant to waive post-conviction rights pursuant to an agreement with the government. *See e.g. U.S. v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991); *U.S. v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005); *Stahl v. State*, 972 So.2d 1013, 1015 (Fla. Dist. Ct. App. 2008); *Allen v. Thomas*, 458 S.E.2d 107, 108 (Ga. 1995); *Spoone v. State*, 665 S.E.2d 605, 607-608 (S.C. 2008).

S.W.2d 588, 590 (Mo. banc 1994) (“There is no constitutional right to a state post-conviction proceeding[.]”). In fact, movants often (and sometimes inadvertently) waive their rights to seek post-conviction relief, whether it be through untimely filing of a *pro se* motion, Supreme Court Rules 24.035(b) and 29.15(b); application of the escape rule, *State v. Troupe*, 891 S.W.2d 808, 809 (Mo. banc 1995); repeated assurances of satisfaction with counsel, *State v. Driver*, 912 S.W.2d 52, 55 (Mo. banc 1995); failing to include certain claims within the post-conviction motion, Supreme Court Rules 24.035(d) and 29.15(d); or simply deciding to forego post-conviction proceedings altogether. *Smith v. State*, 100 S.W.3d 805, 806 (Mo. banc 2003).

Here, Appellant’s waiver was not only voluntary and intentional, but, unlike movants in other waiver situations, Appellant actually received a benefit in exchange for his waiver – namely, he received an opportunity to avoid prison through probation, rather than having to immediately serve a mandatory fifteen-year term. Appellant argues that “a fifteen year sentence is not a ‘benefit of a bargain’ because fifteen years is the maximum time for an unenhanced class B felony.” (App. Br. 22-23). But Appellant ignores that fifteen years was also the mandatory minimum for his particular crime. Section 571.030.8, RSMo 2000 (“For the first violation a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony”). Moreover, the benefit of Appellant’s bargain lay in the fact that he was granted probation in accordance with the State’s recommendation, rather than being

sent directly to prison. Additionally, the prosecutor agreed to allow Appellant to enter an *Alford* plea, rather than a typical guilty plea.

It is important to allow defendants to use their post-conviction rights as bargaining chips in negotiations with the State. “If the government cannot obtain the benefit of avoiding collateral litigation . . . , then the government may not be willing to offer certain concessions, and a defendant may be unable to secure the bargain most favorable to his interests.” *Chesney v. U.S.*, 367 F.3d 1055, 1058-1059 (8th Cir. 2004). “To require that conclusion would seem . . . ‘to imprison a man in his privileges and call it the Constitution.’” *Id.* at 1059 (quoting Justice Frankfurter in *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 280 (1942)). A defendant should not be precluded from using his rights to negotiate a more favorable outcome, especially where agreements, such as this one, are entered into knowingly, voluntarily, and with a full understanding of the rights being waived. “A defendant can ‘maximize’ what he has to ‘sell’ only if he is permitted to offer what the prosecutor is most interested in buying.” *U.S. v. Mezzanatto*, 513 U.S. 196, 208 (1995).

“[A]s a logical matter, it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction.” *Id.* “A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips.” *Id.*

(determining that a criminal defendant's waiver of statutory exclusionary provisions regarding statements made during plea negotiations was valid and enforceable if entered into knowingly and voluntarily).

Because the record amply supports the fact that Appellant's waiver was knowing, voluntary, and intelligent, this Court should enforce his agreement and dismiss this appeal.

C. Formal Ethics Opinion 126 does not affect the validity of Appellant's waiver.

Appellant, while acknowledging that he previously waived his right to seek post-conviction relief, now argues that his waiver was unknowing and involuntary in that "trial counsel advised him while having a conflict of interest because her interest in avoiding a finding of ineffective assistance of counsel, in protecting her reputation, and in avoiding civil liability for legal malpractice was directly against Appellant's interest in challenging his convictions and avoiding a lengthy term of imprisonment." (App. Br. 14).

Appellant relies upon cases indicating that trial counsel's subsequent representation of a client in a post-conviction proceeding constitutes a conflict of interest. (App. Br. 16-17, 21). Appellant argues that plea counsel became de facto post-conviction counsel when she advised Appellant to waive his right to pursue a Rule 24.035 motion. (App. Br. 23). Thus, he reasons, there was an inherent conflict of interest in plea counsel's advice to Appellant that he waive the right to seek post-

conviction relief. (App. Br. 23). In support of his claimed conflict of interest, Appellant relies on a formal ethics opinion. (App. Br. 23). But Formal Opinion 126 is overbroad and has no effect on the validity of Appellant's waiver.

The first problem with Appellant's claim is that advising a client to waive post-conviction rights really does nothing to advance the attorney interests Appellant identifies. Waiving the right to assert post-conviction claims does not preclude a later finding that counsel was ineffective. What it waives is a defendant's ability to employ *a certain procedure* to challenge counsel's effectiveness; it does *not* waive a defendant's right to receive the effective assistance of counsel or his right to challenge counsel's effectiveness.⁴ Rule 29.07(b)(4) requires the court – in every case – to

⁴ A “[m]ovant is not totally precluded from litigating ineffective assistance of counsel claims [where he does not file a post-conviction motion under Rules 24.035 or 29.15] because he arguably could petition for federal post-conviction relief with a petition for federal habeas corpus.” *Clark v. State*, 261 S.W.3d 565, 571 (Mo. App. E.D. 2008) (denying the defendant's claim that appellate counsel was operating under a conflict of interest when she misadvised him as to the filing deadline for his Rule 29.15 motion, resulting in the involuntary waiver of Appellant's right to seek post-conviction relief); *see e.g. Ybarra v. Larkins*, 2009 WL 3160577 (E.D. Mo. 2009) (criminal defendant filed federal habeas action attacking counsel's effectiveness in

examine the defendant as to the assistance of counsel and make a determination “whether probable cause exists to believe the defendant has received ineffective assistance of counsel.” And here, even though Appellant had previously waived his right to proceed under Rule 24.035, the court still questioned Appellant about counsel’s assistance, and he expressed satisfaction with counsel’s services regarding his case. (L.F. 17-18, 21-22, 36-38).

As to counsel’s reputation, this interest is directly tied in with counsel’s interest in not being found ineffective. But as indicated above, having a client waive his right to seek post-conviction relief does not insulate counsel from such a determination, as a court is required by court rule to make a determination on counsel’s effectiveness in every case.

Finally, contrary to Appellant’s implication, the outcome of a post-conviction proceeding has no bearing on an attorney’s potential liability in a subsequent claim for legal malpractice. *Zweifel v. Zenge and Smith*, 778 S.W.2d 372, 375 (Mo. App. W.D. 1989) (because counsel is not a party to the post-conviction action, “[t]he decision of the court in that proceeding is not conclusive of [counsel’s] negligence in a malpractice action[.]”).

advising him to waive his right to seek post-conviction relief based on an alleged inherent conflict of interest).

The second problem with Appellant’s claim involves the interests Appellant identifies as belonging to himself – the interests in “challenging his convictions and avoiding a lengthy term of imprisonment.” (App. Br. 14). As to the first interest, at the time he pled guilty, Appellant did not opt to challenge his conviction at all. Instead, he pled guilty to the charged crime, indicating his decision to accept responsibility for his crime in exchange for a guaranteed sentence. And, as to his second interest in avoiding a lengthy term of imprisonment, this goal was actually achieved through his waiver of the right to seek post-conviction relief and the receipt of probation; thus, his interest was met – not foregone. In fact, the only reason Appellant is now serving a term of imprisonment is because he did not comply with the conditions of his probation. He could have avoided prison altogether based upon his waiver if he had complied with his probationary conditions. Thus, he has no one to blame but himself for having to serve a term of imprisonment.

In any event, the allegedly competing interests that Appellant ascribes to plea counsel and her client are not the only interests at play in a proposed post-conviction waiver situation. Counsel and her client also share an interest in obtaining the best possible outcome for the client, which in some situations (like Appellant’s) means waiving a rule-based right. And counsel should not be precluded from advising her client as to this course of action if it is to his benefit; likewise, her client should not be precluded from embarking on this course of action if he so chooses – after being fully

informed – merely because it was recommended by counsel that might *possibly* have additional personal reasons for making such a recommendation.

In Formal Opinion 126, regarding the waiver of post-conviction relief, the Advisory Committee indicated its belief that “[i]t is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel.” Advisory Comm. of the Supreme Court of Missouri, Formal Op. 126 (2009). In reaching this conclusion, the Advisory Committee determined that “[p]roviding such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel.” *Id.* The opinion also indicated that “it is inconsistent with the prosecutor’s duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct.” *Id.* But this opinion has no bearing on the enforceability of the contract Appellant entered into with the State, and it is incorrect in several respects.

“The essential elements of an enforceable contract are: (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation.” *Dean Machinery Co. v. Union Bank*, 106 S.W.3d 510, 520 (Mo. App. W.D. 2003). Here, Appellant contests only the propriety

of the subject matter of the contract based upon Formal Opinion 126. He makes no challenge to any of the other elements of an enforceable contract. But Appellant's reliance on Formal Opinion 126 is misplaced, as it does not void Appellant's otherwise valid and enforceable contract.

First, the opinion discourages only counsel's *advice* that a defendant waive; it does not preclude a defendant from actually waiving his right to collaterally attack his convictions. In other words, while the opinion has value in guiding counsel's obligation to reflect upon her position, it does not automatically render counsel incapable of giving adequate advice.⁵ Certainly a defendant proceeding *pro se* would be permitted to waive his post-conviction rights, so long as the record reflects that such waiver is knowingly, voluntarily, and intelligently entered into. The fact that a represented defendant had the added assistance of counsel in entering a waiver should not later provide blanket immunity from enforcement of the agreement, where the record demonstrates that he entered into it voluntarily, intelligently, and knowingly.

Second, even if defense counsel cannot ethically advise a defendant to waive his post-conviction rights, defense counsel is still duty-bound to advise a defendant

⁵ “[A] defense attorney is in the best position to determine when a conflict exists, [and] he has an ethical obligation to advise the court of any problem.” *Mickens v. Taylor*, 535 U.S. 162, 167 (2002) (citing *Holloway v. Arkansas*, 435 U.S. 475, 485-486 (1978)).

when such an offer has been made by the State, so that a defendant can make an informed decision as to how his case might proceed. Supreme Court Rule 4-1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

Finally, Formal Opinion 126 is overbroad in its assumption that defense counsel’s advice that a defendant waive his post-conviction rights will always result in an *actual* conflict of interest.⁶ While the potential for a conflict certainly exists in that counsel could seek to insulate his or her actions by recommending that a defendant waive his post-conviction rights when doing so would not be in the defendant’s best interest, Formal Opinion 126 goes too far in assuming that attorneys for the criminal defense bar will always seek to elevate their own interests above those of their client when given the opportunity. Indeed, in the absence of factual allegations indicating that “something [was] done by counsel, or something [was] forgone by counsel and lost to defendant, which was detrimental to the interests of defendant and advantageous to another,” *Helmig v. State*, 42 S.W.3d 658, 680 (Mo. App. E.D. 2001), it should be assumed that members of the criminal defense bar will carry out their other duties under the Rules of Professional Conduct (*e.g.* Rule 4-1.4(b)), candidly

⁶ “In order to establish a violation of the Sixth Amendment, a defendant . . . must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

explain the consequences of a defendant’s waiver, and zealously represent their clients by aligning their interests to seek the best possible outcome for their clients, even if that means advising their clients to relinquish a rule-based right.⁷ “[W]hile *Strickland* does state that counsel owes the client a duty to avoid conflicts of interest . . . , this is just one duty listed among others – the duties to advocate the defendant’s cause, to consult with and keep the defendant informed, and to employ skill and knowledge on the defendant’s behalf.” *Beets v. Scott*, 65 F.3d 1258, 1272 (5th Cir. 1995). And, in fact, it appears that counsel in Appellant’s case was focused on those other duties, considering that counsel did obtain a favorable outcome for Appellant, and Appellant’s Rule 24.035 motion did not allege, for example, that counsel failed to explain that Appellant was giving up the opportunity to challenge counsel’s performance through the formal post-conviction procedure.

It is enough that the criminal defendant know the general nature of the rights he is waiving; he is not required to be advised as to any specific claims of deficient performance that he might be able to later invoke in order for his waiver to be valid.

⁷ “[T]he possibility of conflict is insufficient to impugn a criminal conviction.” *Cuyler*, 446 U.S. at 350. “In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* “[A] theoretical conflict does not establish a constitutional violation[.]” *Mickens*, 535 U.S. at 179.

“[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.” *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original). “A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.” *Id.* at 629-630. Even if a movant lacks “a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State’s showing that the information it provided to him satisfied the constitutional minimum.” *Patterson v. Illinois*, 487 U.S. 285, 294 (1988) (discussing waiver of right to counsel pursuant to *Miranda* warnings).

Here, Appellant was fully advised as to the rights Rule 24.035 was designed to protect and that he was relinquishing through his plea agreement, and he has not contended otherwise. Even if *counsel* had failed to so advise him, he cannot demonstrate that he was unaware of the consequences of his waiver considering the fact that his written waiver fully outlined all of his rights under Rule 24.035 and that the court below addressed these rights with him as well. (Supp. L.F. 1; L.F. 34-35).

Formal Opinion 126 further indicated that negotiating a waiver of post-conviction rights would be unethical not only for defense counsel but also for the

prosecutor: “We believe that it is inconsistent with the prosecutor’s duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of postconviction rights based on ineffective assistance of counsel or prosecutorial misconduct.” Advisory Comm. of the Supreme Court of Missouri, Formal Op. 126 (2009) (*citing* Rules 4-3.8 and 8.4(d)). The opinion did not further elaborate as to how a prosecutor’s decision to seek such a waiver would violate these duties.

Contrary to the Advisory Committee’s belief, it is difficult to see how a prosecutor’s request that a defendant waive the right to collaterally attack a conviction – a proceeding that is not guaranteed by the Constitution – in exchange for a reduced sentence or other concessions would violate the prosecutor’s ethical duties. In the context of plea agreements, where the prosecutor asks the defendant to waive “the fundamental rights to a jury trial, to confront one’s accusers, to present witnesses in one’s defense, to remain silent, and to be convicted by proof beyond all reasonable doubt,” *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (internal citations omitted), the United States Supreme Court has lauded the prosecutor’s actions as “highly desirable.” *Id.* at 261.

In praising the use of plea agreements, the United States Supreme Court identified various interests served by the process:

It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 261.

As a condition of plea agreements, there are multiple benefits to allowing a defendant to waive his post-conviction rights pursuant to a request from the prosecutor and advice from counsel. First, the waiver of post-conviction rights serves the interest of finality in criminal cases by ensuring that a defendant does not later involve the State, the witnesses, and the victims in more litigation over his valid conviction after experiencing “buyer’s remorse” upon entering the penal system. *See U.S. v. Timmreck*, 441 U.S. 780, 784 (1979) (“Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.”).

Second, it provides a criminal defendant with a bargaining chip in plea negotiations to leverage a better position for himself when facing a loss of his liberty.

As noted in *Mezzanatto*, “If prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain.” *Mezzanatto*, 513 U.S. at 207-208. “If the government cannot obtain the benefit of avoiding collateral litigation . . . , then the government may not be willing to offer certain concessions, and a defendant may be unable to secure the bargain most favorable to his interests.” *Chesney*, 367 F.3d at 1058-1059. “[T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters.” *Adams*, 317 U.S. at 279.

Because it is wholly consistent with a prosecutor’s ethical duties as a minister of justice to request a defendant’s waiver of certain Constitutionally-guaranteed rights when engaging in plea bargaining, a prosecutor cannot be deemed unethical in seeking the waiver of a non-Constitutionally-guaranteed process in exchange for a sentencing cap as part of those plea negotiations.⁸ And while it is conceivable that in any given

⁸ Additionally, there was no reason for either the prosecutor or defense counsel in this particular case to believe that entering into this agreement would constitute an ethical violation, given that established case law permitted defendants to waive their post-conviction rights in exchange for a sentence reduction at the time the agreement was

case, a prosecutor might request this concession, knowing of a valid claim of ineffective assistance, “[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether.” *Mezzanatto*, 513 U.S. at 210. In any event, Appellant does not challenge the propriety of the prosecutor’s actions in seeking the waiver; rather, he challenges defense counsel’s conduct in advising Appellant to enter the waiver.

But, regardless of the ethicality of defense counsel’s actions related to the waiver, the plea agreement contract remains enforceable.⁹ “Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee to assistance of counsel.” *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). “When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state’s proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.” *Id.* While agreements that are predicated upon a violation of the law are illegal and

executed. *Jackson*, 241 S.W.3d at 833; *Valdez*, 851 S.W.2d at 22; and *Ferina v. State*, 742 S.W.2d 215, 217 (Mo. App. W.D. 1987).

⁹ “A plea agreement is a binding contract between the state and a defendant.” *Evans v. State*, 28 S.W.3d 434, 439 (Mo. App. S.D. 2000).

unenforceable, *Deja vu of Missouri, Inc. v. Talayna's Laclede's Landing, Inc.*, 34 S.W.3d 245, 249 (Mo. App. E.D. 2000), a violation of the ethical code does not automatically render a contract unenforceable.

“Failure to comply with an obligation or prohibition imposed by a Rule [of Professional Conduct] is a basis for invoking the disciplinary process.” Supreme Court Rule 4[19]. “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.” *Id.* at [20]. “The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.” *Id.*

“Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” *Id.* “The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.” *Id.*

In short, an alleged breach of ethical duties simply does not void an otherwise valid contract. In fact, the Fourth Circuit, addressing a similar claim based upon the North Carolina ethics opinion noted in Formal Opinion 126, found that the defendant’s “reliance on RPC 129 for the proposition that the plea is void is misplaced.” *U.S. v. Dorsey*, 4 F.3d 986, 1993 WL 329985, *2 (4th Cir. 1993)

(unpublished opinion, reported in a table). And in the context of criminal prosecution, a court should not tie a defendant's hands under the guise of protecting his legal rights. Where the record reflects that a defendant voluntarily, intelligently, and knowingly waived his right to collaterally attack a conviction in exchange for a reduced sentence, there is "no reason why such agreement should not be enforced." *Valdez*, 851 S.W.2d at 22. Because Appellant voluntarily, knowingly, and intelligently waived his right to collaterally attack his convictions, this appeal should be dismissed.

D. Prejudice cannot be presumed based solely upon a potential conflict of interest.

In both his amended motion and his brief, Appellant has argued that "prejudice is presumed" based upon the alleged conflict of interest he claims is inherent in plea counsel's advice that a defendant waive his right to seek post-conviction relief. (L.F. 74; App. Br. 24). But this argument is premised upon the notion that an actual conflict existed – a conclusion wholly unsupported by either the record or Appellant's factual allegations.

"[A] reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Cuyler*, 446 U.S. at 348. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not

established the constitutional predicate for his claim of ineffective assistance.” *Id.* at 350.

The *Cuyler* standard requires proof of effect upon representation, but once that effect is shown, a reviewing court presumes prejudice. *Mickens*, 535 U.S. at 173. The purpose of the presumed prejudice in *Cuyler* “is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant’s Sixth Amendment right to counsel.” *Id.* at 176. But the *Cuyler* standard is applicable only to conflict of interest situations involving multiple or serial representation; where the alleged conflict stems from a different source, such as the attorney’s duty of loyalty to the client, the more stringent *Strickland* standard, requiring an affirmative showing of prejudice, applies. *Id.* at 175-176; *U.S. v. Acty*, 77 F.3d 1054, 1057 n.3 (8th Cir. 1996); and *Swanner v. Nelson*, 2008 WL 5120040 (D. Kan. 2008) (not reported in F.Supp. 2d).

Here, Appellant has failed to demonstrate an actual conflict of interest. Where joint representation is not the source of the alleged conflict, “the defendant’s burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done.” *U.S. v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998). To make this showing, Appellant needed to demonstrate that counsel’s

motivation for advising him to waive his right to seek post-conviction relief was based upon a combination of counsel's knowledge that counsel had rendered ineffective assistance and counsel's desire to conceal that information, rather than upon counsel's legitimate trial strategy of achieving the best possible result for Appellant. *See e.g. Dukes v. Warden, Conn. State Prison*, 406 U.S. 250, 256 (1972) (nothing in the record established that counsel induced the defendant to plead guilty "in furtherance of a plan to obtain more favorable consideration from the court for other clients"); *Acty*, 77 F.3d at 1058 (nothing in the record "compels the conclusion that [counsel's] advice was motivated by an actual conflict"); *Ybarra*, 2009 WL 3160577 at *3 ("To establish that there was a conflict in representation, Petitioner must show 'that the conflict caused the attorney's choice' to engage or not engage in particular conduct." (quoting *Covey v. U.S.*, 377 F.3d 903, 908 (8th Cir. 2004))); and *Swanner*, 2008 WL 5120040 at *5 ("Petitioner has provided no evidence to demonstrate that [counsel's] decision to call some witnesses and not others was a result of the disciplinary complaint and not trial strategy.").

Nothing in either the record or Appellant's factual allegations supports the conclusion that counsel's advice that Appellant waive his right to seek post-conviction relief in exchange for probation as part of the plea agreement was motivated by anything other than counsel's desire to achieve the best possible outcome for her

client. And absent a showing of an actual conflict of interest, Appellant was required to demonstrate *Strickland* prejudice. This he did not do.

In the guilty plea context, “in order to satisfy the ‘prejudice’ requirement [of *Strickland*’s two-part test], the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Appellant has requested that his conviction and sentence be vacated due to counsel’s alleged conflict of interest, (L.F. 75), but Appellant has wholly failed to allege that but for the existence of the alleged conflict he would not have pleaded guilty but would have proceeded to trial. Rather, he alleged that “[b]ut for plea counsel’s coercion and inherent conflict, Movant Burgess would not [have] waived his post-conviction[] rights, but would have filed a Form 40, pursuing his post-conviction motion on its merits, and possibly appealing any denial of this motion to the Missouri Court of Appeals.” (L.F. 74-75). But it was not Appellant’s option to merely refrain from waiving his post-conviction rights. Rather, waiver of those rights was part of an overall plea agreement package, involving not only the waiver of post-conviction rights, but also a guaranteed result (probation) in exchange for Appellant’s guilty plea. Appellant does not get to belatedly opt which terms of his agreement to enforce. Appellant’s only option of avoiding the waiver was to reject the entire plea agreement. And this is exactly what he needed to allege to establish prejudice – that the waiver

affected the validity of his guilty plea. In other words, Appellant needed to allege that but for the allegedly invalid waiver of post-conviction rights, he would not have pled guilty, but would have pursued his right to trial. As Appellant has failed to allege the requisite prejudice, he cannot demonstrate that counsel was ineffective in advising him regarding the waiver of post-conviction rights, and this Court should enforce the waiver and dismiss the appeal.

Point II

The motion court did not abuse its discretion in overruling Appellant’s motion for change of judge in his post-conviction proceedings because Appellant’s motion was insufficient in that he failed to allege the existence of any extrajudicial source causing the motion court to be biased or prejudiced against Appellant. Rather, the basis for his motion is that the motion court judge made previous adverse rulings towards Appellant, but this is insufficient to warrant judicial disqualification.

Appellant argues that the motion court should have granted his change of judge motion because the motion court’s prior rulings certifying Appellant as an adult and accepting his plea agreement with a waiver of his right to seek post-conviction relief indicated that the judge was biased against Appellant. But because the court’s discretionary decisions were nothing more than rulings made in the ordinary course of presiding over the proceedings, Appellant failed to allege any basis for the disqualification. The motion court committed no error in overruling the motion.

A. Standard of review.

“A denial of a motion for change of judge is reviewed for an abuse of discretion.” *In re K.L.W.*, 131 S.W.3d 400, 404 (Mo. App. W.D. 2004). “An abuse of discretion is committed if the trial court’s decision defies logic under the circumstances, is sufficiently arbitrary and unreasonable to shock the conscience of

the court, and exhibits a dearth of careful consideration.” *Id.* “Our review must be based on the objective facts of the record from the standard point of a reasonable and disinterested bystander, unacquainted with the personality, the integrity and dedication of the judge.” *Id.*

B. Appellant’s motion for change of judge failed to allege disqualifying bias.

When Appellant filed his amended Rule 24.035 motion, he contemporaneously filed a “motion for change of judge or disqualification.” (L.F. 54). Appellant alleged in the motion that he could not “have a fair and impartial Rule 24.035 post-conviction proceeding before the Honorable Tom W. DePriest because Judge DePriest certified him as an adult in this case and accepted his waiver of his post-conviction rights.” (L.F. 54). Because of these rulings, Appellant believed that “Judge DePriest has prejudged the issue of ineffective assistance of trial counsel and could not be impartial in this case.” (L.F. 55). Appellant relied on the Canons of Judicial Conduct, specifically Canon 2A, to argue that “[a]s an arbiter and a highly visible symbol of government, the motion judge must avoid the very appearance of impropriety, regardless of whether the motion judge perceives an actual conflict of interest or whether the motion judge is actually biased against the defendant.” (L.F. 55). Appellant argued that “[t]here are other judges available in the Circuit, who have not previously been involved in this case, and under Missouri Supreme Court Rule 51.07, the Presiding Judge of the Twenty-First Judicial Circuit can designate another judge in

the Circuit when the original judge is disqualified.” (L.F. 56). The motion court denied Appellant’s motion. (L.F. 81).

“In post-conviction proceedings, unlike the automatic change of judge in civil proceedings under Rule 51.05, the movant must show a disqualifying bias and prejudice to receive a change of judge.” *State v. Tivis*, 948 S.W.2d 690, 699 (Mo. App. W.D. 1997).¹⁰ “Cause consists of evidence that the trial judge’s participation in the case was influenced by a personal bias or prejudice that arose from some extrajudicial source.” *Id.* “[T]here is a strong presumption that judges are impartial and can discern their own bias or prejudice.” *Id.*

Typical extrajudicial sources giving rise to the appearance of impropriety include: (1) cases where the judge has a pecuniary interest in the outcome, (2) cases where the judge has been the target of personal abuse or criticism from the party appearing before the judge, (3) cases where the judge is a material witness to relevant facts in the case, or (4) cases where the judge makes statements on the record indicating either an ethnic or racial bias. *Haynes v. State*, 937 S.W.2d 199, 202 (Mo. banc 1996).

But Appellant has alleged the existence of none of these factors. Rather, he relies upon language in the Code of Judicial Conduct, specifically Canon 3E, which

¹⁰ “[A] post-conviction movant is not entitled to a change of judge as a matter of right.” *State ex rel. Ferguson v. Corrigan*, 959 S.W.2d 113, 115 (Mo. banc 1997).

provides that “A judge shall recuse in a proceeding in which the judge’s impartiality might reasonably be questioned.” Supreme Court Rule 2.03, Canon 3E(1). He then asserts that because the motion court judge certified Appellant as an adult and because the motion court judge accepted Appellant’s prior waiver of his right to pursue post-conviction relief, “Judge DePriest had prejudged the issue of ineffective assistance of trial counsel and could not be impartial in this case.” (App. Br. 29-30).

There are two major flaws in Appellant’s argument: first, his reading of Canon 3E is overly broad, and second, a judge’s regular rulings in the ordinary course of presiding over a case without evidence of any extrajudicial sources cannot establish bias or prejudice requiring recusal.

In *Haynes*, this Court rejected the very interpretation of Canon 3E that Appellant advances in this case. *Haynes*, 937 S.W.2d at 204. There, the post-conviction movant had filed a change of judge motion based upon the judge’s comments at sentencing that the movant “was a monster who should die in prison” and if the judge did what he wanted to, “the movant would be ‘removed from the courtroom in pieces.’” *Id.* at 202. Despite these comments not falling within the typical categories demonstrating extrajudicial sources of bias and prejudice, the movant nevertheless argued that due process imposed a more demanding standard. *Id.* at 204. The movant read “a due process requirement into the phrase ‘including, but not limited to’ in Canon 3 D(1) to require recusal where ‘the judge’s impartiality

might reasonably be questioned’, regardless of any objective facts indicating a bias having an extrajudicial source or facts indicating a bias making fair judgment impossible.” *Id.* This Court rejected the argument and determined that “[t]he standard suggested is unacceptable” because “the ‘might reasonably be questioned’ standard, without a factual context, is subjective, leaving appellate courts at liberty to find a disqualifying bias from any hostile word, a maximum prison sentence or *even an adverse discretionary ruling.*” *Id.* (emphasis added). The Court stated that “[s]uch a vague standard is unworkable.” *Id.*

This is exactly the standard Appellant seeks to apply. Because Judge DePriest ruled adversely to him in the court’s discretionary decision to certify Appellant as an adult,¹¹ Appellant argues that Judge DePriest’s impartiality “might reasonably be questioned.” But “a judge’s regular rulings in the ordinary course of presiding over judicial proceedings properly before him will rarely if ever constitute evidence of partiality such as to require him in good conscience to recuse himself.” *Tivis*, 948 S.W.2d at 700. It is notable that Appellant never claims that Judge DePriest’s ruling on the certification issue was in error.

Additionally, Judge DePriest’s acceptance of Appellant’s waiver of his post-conviction rights as part of his plea agreement also does not indicate bias or prejudice. Appellant alleges that the acceptance of this waiver meant that Judge DePriest had

¹¹ See § 211.071.1, RSMo 2000.

“prejudged the issue of ineffective assistance of trial counsel.” (App. Br. 29). But Appellant’s allegation does not follow from Judge DePriest’s act of accepting a waiver that Appellant knowingly and voluntarily made in exchange for a lesser sentence. Even after accepting the waiver, the court still conducted an inquiry pursuant to Rule 29.07 regarding counsel’s effectiveness. (L.F. 36-38). Under Appellant’s logic, this inquiry would have been wholly unnecessary because Judge DePriest had already accepted Appellant’s waiver of his right to seek post-conviction relief, and therefore, determined that counsel was not ineffective. But, as noted in Point I, a movant’s waiver of his right to seek post-conviction relief is not a waiver of the right to the effective assistance of counsel. And Judge DePriest’s determination upon the conclusion of the Rule 29.07 inquiry did not constitute bias requiring recusal. *Tivis*, 948 S.W.2d at 700 (“the trial judge’s evaluation of defense counsel in his Rule 29.07 ruling does not constitute a disqualifying bias.”).

Appellant’s argument seems to be that because Judge DePriest was involved in his case during the plea, probation revocation, and sentencing, Judge DePriest could not preside over his post-conviction proceedings. But this Court has determined that there is great value in retaining the same judge over both the trial or plea and post-conviction proceedings. *Thomas v. State*, 808 S.W.2d 364, 366-367 (Mo. banc 1991) (recognizing that the judge in the trial or plea proceedings is “the judicial officer best acquainted with the case”). “The trial judge is . . . better equipped to assess defense

counsel's performance within the context of the entire case and to measure the impact of that performance on the outcome of the trial as required under *Strickland v. Washington*.” *Id.* at 367 (internal citation omitted). The Court noted that this was especially important in the context of Rule 24.035 motions because a “different judge is without the ability to assess the capacity of a defendant to plead guilty and the state of trial counsel’s preparation, except from the same cold record available to an appellate court.” *Id.*

Here, Judge DePriest was present to observe not only Appellant’s responses to questions regarding the waiver but also his demeanor in conjunction with those responses. Thus, Judge DePriest was in the best position to evaluate Appellant’s claim that his prior waiver was involuntary.

In short, because Appellant failed to allege the existence of any extrajudicial source of disqualifying bias, the motion court committed no error in overruling his motion for change of judge. Its decision should be affirmed.

CONCLUSION

The motion court did not err in dismissing Appellant's Rule 24.035 motion. Because he waived his right to seek post-conviction relief, Appellant's appeal from the dismissal should also be dismissed. In the alternative, the motion court's dismissal of the Rule 24.035 motion should be affirmed.

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 Missouri Supreme Court Rule 84.06 and contains 9,792 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 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 this _____ day of April, 2011, to:

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APPENDIX

Motion for Dismissal and Dismissal OrderA1

Order denying Motion to Change of Judge or DisqualificationA3