

IN THE
MISSOURI SUPREME COURT

KIMBER EDWARDS,)
)
)
 Appellant,)
)
 vs.) No. SC 86895
)
 STATE OF MISSOURI,)
)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION III
THE HONORABLE MARK SEIGEL, JUDGE

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Kimber Edwards, was jury tried and convicted of first degree murder, § 565.020 RSMo 2000,¹ in the Circuit Court of St. Louis County. The jury assessed punishment at death. This Court affirmed in *State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003), *cert. denied*, 540 U.S. 1186 (2004).

Mr. Edwards filed a *pro se* Rule 29.15² motion, which appointed counsel amended. The motion court denied a hearing on the claim that the codefendant, Orthell Wilson, recanted his accusations against Mr. Edwards and that Mr. Edwards is actually innocent (H.Tr. 274).³ The court held a hearing on other claims pled in the amended motion. *Id.* The court entered findings of fact and conclusions of law on five of fourteen claims pled and denied relief (L.F. 353-71).

Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

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

² All references to rules are to VAMR, unless specified otherwise.

³ Record citations are as follows: evidentiary hearing transcript (H.Tr.); legal file of 29.15 appeal (L.F.); trial transcript (Tr.); direct appeal legal file (D.L.F.); and exhibits (Ex.). Mr. Edwards requests that this Court take judicial notice of its files in *State v. Edwards*, S.Ct. No. 84648. Judge Seigel took judicial notice of the trial transcript, legal file, and this Court's opinion at the evidentiary hearing (H.Tr. 9).

STATEMENT OF FACTS

Police Interrogate Orthell Wilson

Based on the statements of Orthell Wilson, appellant, Kimber Edwards, was charged with first degree murder for the shooting death of his ex-wife, Kimberly Cantrell (D.L.F. 12-13). Police questioned Orthell, because he matched the description of the person knocking on the victim's door before she was shot (Tr. 1264-68). When the officers questioned Orthell, they became suspicious (Ex. 1, at 176). Orthell was nervous, he was sweating heavily and his heart was pounding so hard that they could see his shirt fall and rise. *Id.* He had a black backpack in a bedroom closet. *Id.* The suspect, seen at the victim's apartment shortly before the shooting, had a backpack (Tr. 1068). Orthell had a pile of clothes on a chair in the living room (Ex. 1, at 176). The police seized the backpack and the clothes. *Id.* They took Orthell to the station for questioning. *Id.*

Once at the station, officers fingerprinted Orthell and took his picture (Ex. 1, at 176). They took him to an interview room where two detectives questioned him (Ex. 1, at 177). Orthell had a violent criminal history, he had committed an armed robbery in Clayton in 1987 (Ex. 1, at 179). He handled guns in the military, including a M-16 assault rifle and a .45 caliber handgun. *Id.* Orthell denied handling a gun since the robbery. *Id.*

Officers questioned Orthell about the victim's shooting (Ex. 1, at 180). Orthell said he heard about it on the evening news on Thursday, August 24, 2000, but he knew nothing about it or the victim. *Id.*

The officers left the room and conferred with another detective (Ex. 1, at 180). Two witnesses had identified Orthell as the man who was knocking on the front door of the victim's house just before the shooting. *Id.* The detectives returned to the interview room, read Orthell his *Miranda* rights and obtained a waiver of those rights. *Id.* They confronted Orthell with the positive identification. *Id.* Orthell denied being in University City on August 22nd and denied being at the victim's apartment. *Id.* A sergeant entered the room and the officers continued to question Orthell, telling him that witnesses positively identified him. *Id.*

Orthell claimed that Mr. Edwards hired him to do a job, "to just go knock on the door, and see if she was there or not, and then to leave." (Ex. 1, at 180). If she answered, Orthell would pretend that he was at the wrong address. *Id.* Mr. Edwards paid him \$500.00 for this knocking. *Id.* Police officers did not believe this story and kept interrogating Orthell (Ex. 1, at 181). He recanted his statement. *Id.*

Orthell's next version was that Mr. Edwards hired him to intimidate her (Ex. 1, at 181). According to this version, Mr. Edwards had given him a key to the apartment. *Id.* Orthell went to the apartment, knocked on the door, and when no one answered, went inside and waited for her to come home (Ex. 1, at 181-82). When he heard the victim, he panicked, tried to run away, but met her in the hallway (Ex. 1, at 182). They both screamed and he fired the gun into the wall of the apartment. *Id.* He "sporadically" fired the gun, left the apartment and threw

the gloves away in a trash dumpster. *Id.* He could not remember where he had disposed of the gloves. *Id.*

Officers videotaped Orthell (Ex. 1, at 182). In this version, Orthell claimed that Mr. Edwards asked him to “intimidate” the woman for \$3,500.00. *Id.* Orthell recalled Mr. Edwards saying, “I need somebody to go over there and scare her, intimidate her.” *Id.* Orthell was supposed to scare her a little bit and tell her that “Kim wanted her to ‘slow down.’” *Id.* Orthell did not know the details of Mr. Edwards’ problems with his ex-wife, but thought they had a custody dispute (Ex. 1, at 182-83).

Later, Orthell shifted his statements from intimidation to killing. Even though Mr. Edwards never told him to kill her “per se,” that is what Orthell thought he was “saying in so many words” (Ex. 1, at 183). He wanted someone to “take her out.” *Id.* Orthell said that Mr. Edwards gave him the handgun to kill her. *Id.* Contrary to his earlier statements, Orthell now claimed that Mr. Edwards not only wanted intimidation, but kept pressuring him to kill her (*Id.*).

Orthell admitted going to the victim’s apartment on August 22, 2000 and shooting her (Ex. 1, at 183). Orthell again claimed the shots were accidental. *Id.* He fired 2-3 shots (Ex. 1, at 184). He said he got scared and left. *Id.* Later, Orthell said that he shot at the wall trying to miss her because he wanted to intimidate and scare her. *Id.*

Orthell said that after the shooting, he threw the gun in a “little alley” at 4267 N. 21st Street (Ex. 1, at 184, 186). However, when officers tried to verify

Orthell's information and took him to this area, they could not find the gun (Ex. 1, at 184, 241). After additional questioning, Orthell told officers he hid the gun in a vacant building across the street from his residence on Palm Street (Ex. 1, at 241). Orthell led the officers to the evidence. *Id.*

The officers arrested Orthell for first degree murder and armed criminal action (Ex. 1, at 185). He pled guilty and received a sentence of life without probation and parole (Tr. 1989).

State's Evidence at Trial – Orthell Central to Case

Orthell did not testify at Mr. Edwards' trial (Tr.). The State introduced selected statements, supposedly to show officers' subsequent conduct (Tr. 1344, 1394-95, 1470, 1472). Officers Siscel and Gage said that Orthell Wilson told them where he hid the murder weapon (Tr. 1344, 1470). Siscel described how they confronted Mr. Edwards with Orthell's statements (Tr. 1350-51). Officers told Mr. Edwards that they had questioned Orthell, and knew there was no Michael as he had claimed in his statements to officers (Tr. 1394).⁴

Mr. Edwards initially denied any involvement in the offense, but eventually agreed to make a statement if the police promised to leave his family alone (Tr. 1354-55). Mr. Edwards said that he had paid Michael to kill his ex-wife (Tr. 1361-75, Ex. 80C). When confronted with Orthell's statements, Mr. Edwards

⁴ The trial court sustained the defense objection to this statement (Tr. 1394-97), but the State argued it to the jury (Tr. 955, 1891-92).

made a second statement referring to Michael and Theo (Tr. 1398-1400). *Id.* Mr. Edwards had called Orthell “Theo” in the past (Tr. 1005).

The defense challenged the statements and established that Mr. Edwards agreed to tell the police what they wanted to hear if they would leave his family alone (Tr. 1414-15, 1418). The statement included false information, regarding a cashier’s check from Cass Commercial Bank and Veterans’ Currency Exchange (Tr. 1371-72, 1418, 1708-09, 1711).

Without Mr. Edwards’ statements, the State’s evidence pointed to Orthell. The victim’s neighbors identified Orthell as the man knocking on her door before she was shot (Tr. 1055-56, 1058-60, 1086-88, 1089-91, 1269, 1273). She died from two gunshot wounds to her head (Tr. 1132-34). Ballistic testing established that Orthell had the gun that fired the shots (Tr. 1344-48, 1470, 1474-85, 1589-91).

Donnell Watson said that Mr. Edwards visited Orthell, his tenant and employee, on Monday, Tuesday, and Wednesday evenings, August 21-23, 2000 (Tr. 1421-23, 1428-29, 1441, 1445). However, Donnell did not hear any of the conversations. *Id.*

Orthell’s brother, Hughie, testified for the State (Tr. 1603, 1607). Hughie had been convicted of felony drug possession (Tr. 1599-1600). Hughie lived at Mr. Edwards’ apartment, receiving free rent in exchange for work (Tr. 1600-02). Hughie repeatedly stole tools from Mr. Edwards (Tr. 1606-08, 1609). He pawned them to buy drugs. *Id.* Hughie and Mr. Edwards fought over the stealing and how

Mr. Edwards was paying Hughie for his work at the apartments (Tr. 1602-03, 1606-09). Eventually, Mr. Edwards threw him out; he did not want him living there (Tr. 1606-07). Hughie sued Mr. Edwards for injuries sustained when falling out of a tree (Tr. 1605, 1609-10). Hughie said that in August, 2000, he saw a gun on a table in his brother, Orthell's apartment while Mr. Edwards was there (Tr. 1612-14). Hughie said that Mr. Edwards told Orthell to put the gun away (Tr. 1614).

The State's theory was that Mr. Edwards hired Orthell to kill his ex-wife to avoid paying child support (Tr. 944-45, 956-67). Mr. Edwards and Ms. Cantrell had been married for a short time and had one daughter, Erica (Tr. 1326-27). They divorced in 1990 (Tr. 1327). They had disagreed about the child support and filed motions to modify (three motions by Mr. Edwards and one motion by Ms. Cantrell) (Tr. 1327-31, 1335). In March, 2000, Ms. Cantrell signed a complaint and the State charged Mr. Edwards with criminal nonsupport (Tr. 1663-65, 1668). Ms. Cantrell was listed as a witness (Tr. 1672). The case was scheduled for a settlement conference on August 25, 2000 (Tr. 1672). The State offered a suspended imposition of sentence, and five years probation if Mr. Edwards agreed to plead guilty and make a lump sum payment of \$1500.00 and agree to payments of \$500.00 each month (\$351-regular payment and \$149-arrearage) (Tr. 1686-88).

Arguments: Orthell Telling the Truth?

In his opening statement and closing argument, the prosecutor emphasized Orthell's statements to the police, saying he led the police to the murder weapon

(Tr. 951, 1888-89) and had said there is “no Michael” as Mr. Edwards told the police (Tr. 955). He argued how Mr. Edwards lied and Orthell told the truth, that Mr. Edwards had hired Orthell and tried to create a “web of deceit” to cover his tracks (Tr. 1890-91). He said, “I don’t think most people think Michael actually exists,” rather, Mr. Edwards and Orthell were guilty (Tr. 1891-92).

During their deliberations, jurors asked the court why Orthell did not testify (Tr. 1922). They wanted his deposition testimony (Tr. 1922). They requested the police reports from Detectives Gage and Siscel who had interviewed Orthell and testified about his statements (Tr. 1923). The jury found Mr. Edwards guilty of murder in the first degree, based on accomplice liability (D.L.F. 481).

Penalty Phase

The State called two victim impact witnesses, the victim’s younger sister and brother (Tr. 1930-36). They discussed Ms. Cantrell’s good qualities and how close they were to her (Tr. 1931-32, 1934-35).

The defense presented mitigating evidence, showing that Kimber Edwards worked hard, wanted to go to college and to get a better job (Tr. 1937, 1941). He loved his family and was good to others (Tr. 1951, 1953-54, 1970-72). He was a good friend (Tr. 1958-59, 1961). He treated his tenants well (Tr. 1962-63). He was considerate in his business relationships (Tr. 1970-71). McGraw and White, two coworkers liked him and trusted him (Tr. 1984, 1992).

Mr. Edwards cared about his family. He wanted the best for his three girls, including a college education (Tr. 1941, 2012). He played games with his children

and was involved in their school activities (Tr. 2008-2013). He organized their family reunions (Tr. 1944, 1950, 2013-21). Kimber's father, Emmrie, died in 1999 (Tr. 1945). This was hard for Kimber, since they had been very close (Tr. 1938, 1945, 1954-55).

Mr. Edwards had behaved extraordinarily well while in jail (Tr. 1992-93).

During the penalty phase, defense counsel offered Exhibit III, a certified copy of Orthell's judgment and sentence showing his sentence of life without probation or parole (Tr. 1989). The trial court refused to admit the evidence (Tr. 1989-90).

The jury deliberated more than four hours and assessed punishment at death, finding a single aggravator, that Mr. Edwards hired someone to kill the victim (Tr. 2050, 2052, D.L.F. 494). The jury rejected the other aggravators, that the murder was for monetary gain and because the victim was a witness in a pending prosecution (D.L.F. 485).

Appeal

On appeal, counsel raised a confrontation violation in admitting the officers' testimony about Orthell's statements (App. Br.). However, counsel did not raise a claim of error in the trial court's exclusion of Orthell's conviction and sentence as depriving the jury of relevant mitigating evidence (App. Br.).

This Court affirmed the conviction and sentence, denying the confrontation claim. *State v. Edwards*, 116 S.W.3d 511, 532 (Mo. banc 2003). Counsel filed a petition for certiorari. *Edwards v. Missouri*, 540 U.S. 1186 (2004). The Supreme

Court denied the petition on February 23, 2004. On March 8, 2004, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), holding that where testimonial evidence is at issue, the Sixth Amendment demands that the witness be unavailable and a prior opportunity for cross-examination, regardless of whether a court deems the statements reliable.

Postconviction Claims

Mr. Edwards' amended motion raised 14 issues (L.F. 25-306). The motion court denied a hearing on the claim that Orthell Wilson had recanted his statements to police and revealed that Mr. Edwards never hired him to kill Ms. Cantrell (H.Tr. 274). The court also did not allow Mr. Edwards to testify when he requested to testify at his hearing (H.Tr. 275-76).

Counsel presented evidence in support of other claims, including appellate counsel's ineffectiveness for failing to raise the exclusion of mitigating evidence on appeal (L.F. 51, 263-270). Mr. Edwards' appellate counsel acknowledged that the claim was preserved for review, had merit and should have been raised on appeal (H.Tr. 181-184).

Trial counsel also testified. They thought something was wrong with Mr. Edwards; something made him incapable of listening and responding rationally (H.Tr.205). Counsel could not communicate with him (H.Tr. 138, 205). He could decipher words, but could not understand the message (H.Tr. 121). Mr. Edwards stayed in his own world and operated out of his own thoughts (H.Tr. 131). He could not grasp consequences (H.Tr. 136). He became less rational as counsel's

representation continued (H.Tr. 207). Counsel had never seen a client more irrational than Mr. Edwards (H.Tr. 173).

Since counsel thought Mr. Edwards was incompetent and could not communicate in a rational way, they hired experts to examine him (H.Tr. 108-09, 145-46, 209-10). However, they did not do a full social history and provide this background information to the experts (H.Tr. 143-44, 146, 211, 219-20, 229). They did not send their experts all the available background records, including birth records and mental health records (H.Tr. 145, 210-11). Had counsel discovered Mr. Edwards was mentally ill, they would have litigated his competency to stand trial and would have presented his illness as mitigating evidence (H.Tr. 143). Counsel admitted that they had not discovered mitigating evidence of Mr. Edwards' troubled childhood (H.Tr. 215-19). Had counsel known about this evidence, she would have presented it (H.Tr. 220)

Mr. Edwards' Childhood

Mildred Thomas married Emmrie Edwards, on April 8, 1960, while she was several months pregnant (H.Tr. 17-19). After a difficult delivery, she had Emmrie, Jr., on June 16th (H.Tr. 18). When he was six weeks old, he quit sucking his bottle and appeared to have "strep" (H.Tr. 18). Mildred took him to the doctor and they gave him blue medicine to put in his mouth (H.Tr. 18-19). Mildred woke up the next morning and found her baby dead (H.Tr. 19).

The following October, Mildred and Emmrie, Sr. moved to St. Louis (H.Tr. 20). They lived with Emmrie's brother, David, his wife and their three children

(H.Tr. 20). Emmrie and Mildred fought (H.Tr. 20). Emmrie was jealous and would not let Mildred go outside (H.Tr. 21). He accused her of going places when she hadn't (H.Tr. 21). Mildred left Emmrie, but after only a week, returned home (H.Tr. 22).

The fighting continued (H.Tr. 22). She became pregnant again, but did not have any prenatal care (H.R. 23). She suffered from depression and did not eat regularly (H.Tr. 23). Mildred gave birth to Steveson⁵ on July 14, 1961 (H.Tr. 24, 28). Emmrie never came to the hospital (H.Tr. 26-27). She walked home from City Hospital with her newborn baby to their home in Peabody Project (H.Tr. 25-27).

Emmrie continued to fight with Mildred (H.Tr. 24-26). When a friend gave her clothes to wear, he ripped them off her (H.Tr. 24-25). Mildred did not adequately feed Steveson (H.Tr. 26, 268). When he was six weeks old, he was hospitalized for dehydration and malnourishment (H.Tr. 26, 268).

Mildred became pregnant with Kimber and again, she did not take care of herself (H.Tr. 28-29). She gave what little food she had to Steveson and ate very little herself (H.Tr. 28-29, 39, Draper Depo at 22). At one point, Mildred stopped eating and drinking all together; she wanted to die (H.Tr. 32). She considered

⁵ Steveson's name is spelled various ways in the record. Mr. Edwards uses the spelling on his birth certificate. Ex. 7, at 2672.

committing suicide by jumping out a window (H.Tr. 32, Draper Depo at 22). Her pregnancy with Kimber was the worst time of her life (Draper Depo at 23).

During this pregnancy, Emmrie beat and shoved Mildred and hit her in the stomach (H.Tr. 30). Mildred started sleeping with a pillow to try to protect her baby (H.Tr. 30). When she was seven months pregnant, she ran a 104 degree temperature (H.Tr. 29, 251, 272, Draper Depo at 23-24). Her doctor thought she would lose the baby, but she didn't (H.Tr. 29).

Kimber was born on March 29, 1964 (H.Tr. 31). The doctor and nurses had to stimulate Kimber, who was unresponsive and did not cry (H.Tr. 31-32, Draper Depo at 25). When they came home, Mildred realized that her baby was not normal (H.Tr. 33, Draper Depo at 25). He did not respond to Mildred, did not move from side to side, never moved his eyes, and did not smile or coo (H.Tr. 33, Draper Depo at 25).

As Kimber got older, he did not crawl or play with toys (H.Tr. 34). Steveson tried to play with his little brother, but Kimber just sat there (H.Tr. 35). Kimber went into his own world (H.Tr. 36). He sat ringing his little hands, pushing back and forth (H.Tr. 35). When Mildred tried to talk to him, he just shrugged his shoulders (H.Tr. 35). He blocked out his environment, just sitting, chewing his tongue (H.Tr. 36, 93, Draper Depo at 58). Kimber did not participate in sports or other activities (H.Tr. 36, 92). He did not have childhood friends (H.Tr. 36). When they traveled to see relatives, Kimber did not play with others

(H.Tr. 47). His grandpa realized that something was wrong and Kimber was not normal (H.Tr. 47).

The home environment did not improve, it worsened. They did not have enough food, clothing or heat (H.Tr. 34). The fighting escalated (H.Tr. 33). Emmrie and Mildred screamed at one another (H.Tr. 35-36). They threw objects (H.Tr. 36). Despite this chaos, Mildred became pregnant again and had Daniel on March 6, 1965 (H.Tr. 38). Mildred knew things would not get better, now she had three children to feed and protect (H.Tr. 39).

Emmrie was extremely jealous and Mildred and the children became isolated (H.Tr. 40-41, 84). They could not go outside and could not visit relatives (H.Tr. 40-41). If they did go places, Emmrie would complain if anyone spoke to Mildred, especially men (H.Tr. 83-84).

Emmrie constantly nagged, criticized and complained (H.Tr. 84-85). When he came home, if dinner was not made, he went on a rampage, cursing, hitting, pushing and fighting (H.Tr. 82). He pushed items off the table and then started beating Mildred, punching her in the side and holding her down (H.Tr. 85).

The fights were constant (H.Tr. 81-82). Emmrie punched Mildred in the face, giving her black eyes (H.Tr. 43, 82). He threw Mildred to the ground and grabbed her by the neck (H.Tr. 86, 87). Emmrie put his knee in her back and told her that she was going to learn to do what he told her (H.Tr. 87). He cut up her clothes and the pillows on the couch (H.Tr. 82). He flushed her medicine down the toilet (H.Tr. 82).

Kimber seemed to tune out the fighting (H.Tr. 41, 56). Kimber's cousin, Tangalayer Mansaw, tried to intervene (H.Tr. 85). She called 911 (H.Tr. 82, 85). The police often responded, and told Emmrie to leave (H.Tr. 87). They threatened that if they had to come again, someone would end up in jail (H.Tr. 87). But no one ever did. Rather, the same thing would happen the following week (H.Tr. 87).

Mansaw not only called the police, but she also tried to stop the fights (H.Tr. 88-89). Once, Mildred threw hot water at Emmrie, and hit Mansaw instead (H.Tr. 88-89). She had to go to the hospital in an ambulance and was not allowed to return to the Edwards' household for a long time (H.Tr. 88-89).

Emmrie not only beat Mildred, he beat his children too (H.Tr. 53). If they did not do their chores to his satisfaction, he would wake them from their sleep and beat them with a belt (H.Tr. 53, Draper Depo at 35). Steveson and Daniel ran away and cried, but Kimber just sat there and took it (H.Tr. 54, Draper Depo at 35). Sometimes, he rolled up in a ball, almost in a catatonic state (H.Tr. 54, Draper Depo at 36).

As they grew older, Steveson and Daniel were affectionate and happy, whereas Kimber did not show affection (H.Tr. 41, 92-93, 100). He withdrew and tried to separate himself from the others, keeping his clothes separate where they would not touch his brothers' clothes (H.Tr. 37, Draper Depo at 39). He could not tolerate his brother touching him at night so he put an ironing board in the bed to separate them (Draper Depo at 39). He separated his foods and could not consume

foods that had been mixed together or had touched each other (H.Tr. 37-38, 92, Draper Depo at 40-41, 88-89).

Emmrie was unfaithful to Mildred; he had a girlfriend (H.Tr. 42, 98). He dated Steveson's girlfriend while Steveson was dating her too (H.Tr. 42). Emmrie spent most of his time away from home. He had a grocery store, liquor store, shoe store and delivery service (H.Tr. 48). He controlled the finances (H.Tr. 49).

In 1975 and 1976, Mildred was hospitalized for depression (H.Tr. 45, 250). She was suicidal (H.Tr. 250). She suffered from depression and anxiety and took antipsychotic medications (H.Tr. 266). When Mildred returned home, Emmrie told her nothing was wrong, she should get herself together, and he was tired of her walking around, looking like she did (H.Tr. 46).

Mildred got a job at a nursing home, but Emmrie started stalking her at work (Draper Depo at 59-60). He peered in the windows, wanted to see her patients and find out what Mildred was doing. *Id.* Her employer would not tolerate Emmrie's behavior, so Mildred had to quit. *Id.* at 60.

Mildred's depression continued and the fighting got worse (H.Tr. 56). As her psychiatric condition worsened, she distanced herself from Kimber (Draper Depo at 51-52). She was preoccupied with her own problems and caring for herself. *Id.*

Emmrie died at home on August 31, 1999 (H.Tr. 57). The Edwards' raised thirteen foster children in this environment (H.Tr. 57).

Experts

Dr. Wanda Draper, a childhood development expert who trained at Harvard University, evaluated Mr. Edwards after trial (Draper Depo at 5-6, 14, Ex. 11, at 3368-79). She reviewed, Exhibits 1-11, background records of Mr. Edwards, including police reports, school, employment, correction, medical records, court files (Draper Depo at 14-15). She reviewed memos of witness interviews, Mrs. Edwards' mental health records, Catherine Luebbering, a mitigation specialist's social history, and reports by Drs. Cross, Stacy, and Logan. *Id.* Dr. Draper interviewed Mr. Edwards, his mother, Mildred, Donna Edwards, his sister-in-law, his brothers, Steveson and Daniel, and his maternal cousin Tangalayer Mansaw (Draper Depo, 16-17). She conferred with Dr. Cross, Dr. Logan, and Dr. Stacy (Draper Depo, 17).

Dr. Draper concluded that Mr. Edwards suffered from an attachment disorder, Asperger's Syndrome, and a nonverbal learning disability (Draper Depo at 25, 26, 32, 33, 44, 62, 65, 83). Mr. Edwards' chaotic family life impacted him (Draper Depo at 65, 83). His father abused him and his family and his mother neglected him. *Id.* Mildred was very ill, emotionally and psychologically. *Id.* As a result, Mr. Edwards was unable to function normally and appropriately in society. *Id.* at 84.

Similarly, Drs. Logan and Dr. Cross found that Mr. Edwards had a mental disease, Asperger's Syndrome, an autism spectrum disorder (Logan Depo, at 58, Cross Depo, at 155). He also suffered from an attachment disorder and nonverbal

learning disability (Cross Depo, at 155). Mr. Edwards' developmental disorder first manifested in early childhood and adolescence (Logan Depo, at 21). The disorder is difficult to diagnose with a clinical evaluation alone. *Id.* at 61. A social history is essential to the psychiatric evaluation. *Id.* at 62-63. As a result of Mr. Edwards' mental disease, he was not competent to stand trial. *Id.* at 58. His mental disease would have been mitigating, as it would have explained Mr. Edwards' demeanor, his lack of affect. *Id.* at 59.

Even though Dr. Cross had evaluated Mr. Edwards prior to trial, he did not diagnose his developmental disorder (Cross Depo, at 21). Trial counsel had not provided a complete social history and all relevant records. *Id.* at 21, 30-31, 42, 57, 102-09, 111). A social history was essential. *Id.* at 39.

Findings

The motion court entered specific findings of fact and conclusions of law on 5 of the 14 issues pled, denying relief (L.F. 353-71). This appeal follows.

POINTS RELIED ON

I. Mitigating Evidence - Orthell Wilson's Conviction and Sentence

The motion court clearly erred in denying Mr. Edwards' claim that appellate counsel was ineffective because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21 in that appellate counsel unreasonably failed to raise the trial court's error in excluding mitigating evidence, that his codefendant, Orthell Wilson, the triggerman, pleaded guilty and received a life sentence, since the claim had significant merit; the claim was preserved; and appellate counsel pursued weaker issues, including arguing that the codefendant's sentence must be considered in this Court's proportionality review. Mr. Edwards was prejudiced because, had the claim been raised, a reasonable probability exists that the outcome would have been different since this was a meritorious issue on appeal that would have resulted in a new penalty phase. There is a reasonable probability that had this mitigation been presented, at least one juror would have struck a different balance and voted for life.

Parker v. Dugger, 498 U.S. 308 (1991);

Lockett v. Ohio, 438 U.S. 586 (1978);

State v. Schneider, 736 S.W.2d 392 (1987); and

Mapes v. Tate, 388 F.3d 187 (6th Cir. 2004).

II. Mr. Edward's Could Not Confront Orthell Wilson and His Allegations

The motion court clearly erred in denying Mr. Edwards' postconviction motion because *Crawford* is retroactive and the admission of Orthell Wilson's out-of-court statements to police during his interrogation violated Mr. Edwards' rights to due process, a fair trial, and to confrontation, U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, §§10 and 18(a); in that the right to confrontation announced in *Crawford* is a watershed rule central to accuracy; and Orthell's statements to police officers were testimonial, the State did not show that Orthell was unavailable, and Mr. Edwards had no opportunity to cross-examine him.

Crawford v. Washington, 541 U.S. 36 (2004);

Teague v. Lane, 489 U.S. 288 (1989);

Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005); and

State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003).

**III. The Motion Court Refused to Hear Orthell Wilson's
Testimony Recanting His Allegations**

The motion court clearly erred in denying, without a hearing, Mr. Edwards' claim that Orthell recanted his allegations that Mr. Edwards hired him to kill Ms. Cantrell, and that the police forced him to confess, because this denied Mr. Edwards due process, a fair trial and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts not conclusions, that Mr. Edwards never hired Orthell to kill the victim, and that the police coerced his confession, and if these facts are proven, Mr. Edwards is entitled to relief, as they would show that Mr. Edwards is actually innocent and thus, cannot be convicted or executed.

State ex rel. Amrine v. Roper, 102 S.W.3d 541(Mo. banc 2003);

Herrera v. Collins, 506 U.S. 390 (1993);

Wilkes v. State, 82 S.W.3d 925 (Mo. banc 2002); and

Tisius v. State, ___S.W.3d ____ 2006 WL 44353, (Mo. banc, January 10, 2006).

IV. The Motion Court Did Not Make Findings On All Issues

The motion court clearly erred in denying Mr. Edwards' Rule 29.15 motion without entering specific findings of fact and conclusions of law on each of his claims, because this failure violated Rule 29.15 (j) and denied Mr. Edwards due process of law, U.S. Const., Amend. XIV; Mo. Const., Art. I, §10 in that the court never provided a basis for denying claims:

8 (e) that counsel was ineffective for failing to investigate Mr.

**Edwards' social history and present evidence of his
troubled childhood through his mother, Ms. Edwards;**

8 (j) whether *Crawford* is retroactive and applies to Mr.

Edwards' case;

8 (k) whether the codefendant's recantation of his allegations

against Mr. Edwards and his statements that Mr.

**Edwards never hired him to kill Ms. Cantrell is
exculpatory evidence warranting a new trial.**

**Without findings and conclusions on these issues, this Court cannot conduct
meaningful appellate review.**

Barry v. State, 850 S.W.2d 348 (Mo. banc 1993);

Jurek v. Texas, 428 U.S. 262 (1976);

Parker v. Dugger, 498 U.S. 308 (1991);

Kyles v. Whitley, 514 U.S. 419 (1995); and

Rule 29.15(j).

V. Mr. Edwards Was Not Allowed to Testify at 29.15 Hearing

The motion court clearly erred in denying Mr. Edwards his right to testify in support of his postconviction claims under Rule 29.15(i) because this denial violated his right to due process, U.S. Const., Amend. XIV; Mo. Const., Art. I, §10, in that Rule 29.15(i) provides a right to a movant to testify, Mr. Edwards informed the court that he wanted to testify, and it was fundamentally unfair to deny Mr. Edwards' claims of ineffective assistance of counsel based only on trial counsel's testimony regarding Mr. Edwards, without giving him an opportunity to rebut counsels' account of their conversations and to meet his burden of proof.

State v. Athanasiades, 857 S.W.2d 337 (Mo. App. E.D. 1993);

Ford v. Wainwright, 477 U.S. 399 (1986);

Wolff v. McDonnell, 418 U.S. 539 (1974); and

Rule 29.15(i).

VI. Mr. Edwards' Traumatic Childhood

The motion court clearly erred in denying Mr. Edwards' claim that trial counsel was ineffective for failing to investigate and present evidence of Mr. Edwards traumatic childhood, because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that trial counsel failed to investigate Mr. Edwards' childhood, through his mother-Mildred Edwards; his cousin-Tangalayer Mansaw; and a child development expert, such as Dr. Wanda Draper; and present evidence that he grew up in a violent and chaotic house filled with physical and emotional abuse; that his mother suffered from depression, was suicidal, could not adequately care for him; and without adequate nutrition and care, Mr. Edwards developed a detachment disorder, nonverbal learning disability and autism spectrum disorder. Counsel's failure to investigate was unreasonable and prejudiced Mr. Edwards, because, had the jury heard this mitigating evidence, a reasonable probability exists that at least one juror would have opted for a life sentence.

Wiggins v. Smith, 539 U.S. 510 (2003);

Williams v. Taylor, 529 U.S. 362 (2000);

Rompilla v. Beard, 125 S.Ct. 2456 (2005); and

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004).

VII. Mitigating Evidence – Expert Testimony

The motion court clearly erred in denying Mr. Edwards' claim that counsel should have investigated and presented evidence of Mr. Edwards' mental problems, because this denied him effective assistance of counsel, due process and non-arbitrary and capricious sentencing, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that had counsel reasonably investigated Mr. Edwards' background and provided that information to qualified experts such as Dr. Logan and Dr. Cross, the experts would have found that Mr. Edwards suffered from an autism spectrum disorder, Asperger's Disorder, which explained why he appeared cold and distant, and was unable to form appropriate social relationships. He also had a detachment disorder and a nonverbal learning disability that impaired his functioning. Had counsel presented this evidence there is a reasonable probability that the outcome would have been different, at least one juror would have opted for life.

Wiggins v. Smith, 539 U.S. 510 (2003);

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004).

Brown v. Sterns, 304 F.3d 677 (7th Cir. 2002); and

Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999).

VIII. Mr. Edward's Competence at Trial

The motion court clearly erred in denying Mr. Edwards' claim that counsel failed to adequately investigate and litigate his competency before trial, because this denied Mr. Edwards his rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel had doubts about Mr. Edwards' competency as he was irrational and could not assist in his defense, counsel hired experts to evaluate Mr. Edwards, but did not provide them with a complete social history and background records necessary for a thorough and accurate evaluation and had counsel provided the necessary information, a qualified expert, such as Dr. Logan, would have found that Mr. Edwards suffered from an autism spectrum disorder, Asperger's Syndrome, a mental disease or defect, that made him unable to assist counsel, since he could not consult with counsel with a reasonable degree of rational understanding.

Dusky v. United States, 362 U.S. 402 (1960);

Burt v. Uchtman, 422 F.3d 557 (7th Cir. 2005);

Hubbard v. State, 31 S.W.3d 25 (Mo. App. W.D. 2000); and

Ford v. Bowersox, 256 F.3d 783 (8th Cir. 2001); and

Section 552.020.

IX. Mr. Edward's Competence During the 29.15 Proceedings

The motion court clearly erred in ruling on Mr. Edwards' claims without first determining whether he was competent to proceed, because this deprived Mr. Edwards of his rights to due process, assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21 in that counsel's amended motion pled that he was incompetent and could not rationally communicate, understand the proceedings, or assist counsel; Dr. Logan testified that he suffered from a mental disease or defect and was not competent in the 29.15 proceedings and that counsel were doing what they thought was in Mr. Edwards best interests, contrary to Mr. Edwards' wishes; counsel and the court led Mr. Edwards to believe they were proceeding on his *pro se* motion when in reality, they were proceeding on counsel's amended motion that omitted the *pro se* claims; and counsel refused to allow Mr. Edwards to testify during the 29.15 proceedings, despite his unequivocal request. These facts constituted reasonable cause for the motion court to conclude that Mr. Edwards could not "consult with his lawyer with a reasonable degree of rational understanding" and did not possess a "rational as well as factual understanding of the proceedings against him." Additionally, if Mr. Edwards is incompetent, he cannot be executed.

Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003);

Carter v. State, 706 So.2d 873 (Fla. 1998);

State v. Debra A.E., 523 N.W.2d 727 (Wis. 1994); and

People v. Owens, 564 N.E.2d 1184 (1990).

**X. Judge's Statements About Public Defenders Called Into
Question His Ability to Be Fair and Impartial**

The motion court erred in denying Mr. Edwards' motion for a change of judge thereby denying Mr. Edwards due process, a full and fair hearing, and reliable sentencing U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that Judge Seigel's derogatory statements about public defenders, that they seem "to do everything they can to not represent people" and that "if they want to declare war on me, they've got it," made only days before Mr. Edwards' hearing, would cause a reasonable observer to question whether the judge could be fair and impartial, since Mr. Edwards was represented by public defenders. Mr. Edwards has been sentenced to death; therefore, due process and the Eighth Amendment require heightened reliability and careful review, not a decision-maker who has shown a high degree of antagonism as to make a fair judgment impossible.

In re Murchison, 349 U.S. 133 (1955);

Liteky v. United States, 510 U.S. 540 (1994);

Aetna Life Co. v. Lavoie, 475 U.S. 813 (1985); and

State v. Smulls, 935 S.W.2d 9 (Mo. banc 1996).

ARGUMENT

I. Mitigating Evidence - Orthell Wilson's Conviction and Sentence

The motion court clearly erred in denying Mr. Edwards' claim that appellate counsel was ineffective because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21 in that appellate counsel unreasonably failed to raise the trial court's error in excluding mitigating evidence, that his codefendant, Orthell Wilson, the triggerman, pleaded guilty and received a life sentence, since the claim had significant merit; the claim was preserved; and appellate counsel pursued weaker issues, including arguing that the codefendant's sentence must be considered in this Court's proportionality review. Mr. Edwards was prejudiced because, had the claim been raised, a reasonable probability exists that the outcome would have been different since this was a meritorious issue on appeal that would have resulted in a new penalty phase. There is a reasonable probability that had this mitigation been presented, at least one juror would have struck a different balance and voted for life.

During penalty phase, defense counsel wanted the jury to consider codefendant - Orthell Wilson's conviction and sentence (Tr. 1989). Orthell had pled guilty to first degree murder and received a sentence of life without probation or parole (Tr. 1989). Counsel tendered Exhibit III, a certified copy of Orthell's

judgment and sentence (Tr. 1989). The trial court overruled counsel's request and refused to admit the evidence (Tr. 1989-90).

In the motion for new trial, the defense alleged the trial court's error in failing to admit the certified copy of the codefendant's sentence and judgment (D.L.F. 560-61). The motion cited *Parker v. Dugger*, which ruled that the disposition of a codefendant's case is relevant mitigating evidence that must be considered. The motion for new trial noted that *Parker* was decided in 1991, four years after this Court's decision in *State v. Schneider*, 736 S.W.2d 392 (1987) which held such evidence inadmissible (L.F. 560-61).

On appeal, counsel raised 12 points of error for this Court's review (App.Br.- S.Ct. No. 84648). In appellant's statement of facts, counsel noted that the defense had requested that the jury be allowed to see the certified judgment and sentence of life without probation or parole from Orthell's case (App. Br. at 19). Appellate counsel filed Exhibit III with this Court, even though it had not been admitted into evidence (See, notice of filing of exhibits filed on February 5, 2003 in S.Ct. No. 84648). Yet counsel did not raise a claim of error in the trial court's exclusion of this mitigating evidence (App. Br.). Rather, counsel argued that Mr. Edwards' sentence was disproportionate since his codefendant, Orthell, received life without probation or parole (App. Br. at 133-34). Appellate counsel argued that while the jury was denied the opportunity to hear this relevant evidence, this Court must consider it in conducting proportionality review (App. Br. at 134).

In his amended 29.15 motion, Mr. Edwards alleged that appellate counsel was ineffective for failing to raise this issue on appeal (L.F. 51, 263-270). At the evidentiary hearing, appellate counsel acknowledged that the claim was preserved for review (H.Tr. 181-82). Counsel was familiar with *Parker v. Dugger*, which found it important for the sentencer to have information like a codefendant's sentence (H.Tr. 180). Counsel believed that the claim had merit under *Dugger* and *Lockett*⁶ and could not provide any specific reason for not raising it (H.Tr. 183). Counsel had included Orthell's conviction and sentence in her proportionality review argument, but neglected to raise the 8th Amendment *Lockett/Dugger* claim (H.Tr. 184-85). Counsel said she should have raised the claim (H.Tr. 184). She was familiar with Eric Schneider's case, but noted that Judge Blackmar and Judge Welliver had dissented in that case (H.Tr. 186). Additionally, *Schneider* predated *Parker v. Dugger*, so the United States Supreme Court decision made it a meritorious claim (H.Tr. 186). Counsel's notes by potential issues showed that she had focused on proportionality, rather than the jury's consideration of mitigating evidence (H.Tr. 187-88). Counsel wished that she had raised the claim (H.Tr. 188).

⁶ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (death penalty schemes must allow consideration "as a mitigating factor, any aspect of defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

The motion court found that appellate counsel was an experienced and effective capital appellate practitioner (L.F. 360). The court believed that she raised all the legitimate issues in the case. *Id.* The failure to raise the exclusion of Exhibit III, Orthell’s sentence and judgment, was not ineffective, because this evidence was “irrelevant.” *Id.* Even though counsel noted the objection was preserved, she was aware of Missouri case law sustaining the trial court’s ruling that the evidence was inadmissible (L.F. 360-61). Thus, the motion court found that to pursue this issue would have been futile (L.F. 361). The motion court found that counsel’s “testimony that she just overlooked or neglected to brief the issue on appeal is not credible, and further there is no reasonable likelihood that the outcome of the appeal would have been different had the issue been briefed.” *Id.*

Standard of Review

The motion court’s findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k). Findings and conclusions are “clearly erroneous” if, after reviewing the entire record, the court has the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996). The record shows clear error.

Mr. Edwards is entitled to effective assistance on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991). The standard for effectiveness of appellate counsel is the same as that for evaluating trial counsel's performance: Mr. Edwards must show that counsel's

performance was deficient and the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984). See, *Smith v. Robbins*, 528 U.S. 259, 285 (2000) and *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005) (proper standard for evaluating petitioner’s claim of ineffective assistance is *Strickland*). *Strickland* does not require the issue be a “dead-bang winner.” *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001). That requirement would be more onerous than *Strickland*’s reasonable probability standard. *Id.*

Here, counsel failed to raise an issue that had significant merit, raising “an inference that counsel performed beneath professional standards.” *Sumlin, supra* at 490. In *Parker v. Dugger*, 498 U.S. at 308, the Court reversed the Eleventh Circuit’s denial of habeas relief in a death case, holding that the Florida Supreme Court had incorrectly determined that the trial court found no mitigating circumstances and had failed to consider this mitigation in its appellate review. Among the mitigating circumstances the Florida Supreme Court improperly ignored was that none of Parker’s accomplices received a death sentence for the Sheppard murder.⁷ “Billy Long, who admitted shooting Nancy Sheppard, had been allowed to plead guilty to second-degree murder.” *Id.* at 314. That Long was the triggerman for the Sheppard murder, but received a lighter sentence than Parker, was significant mitigation. *Id.* at 316. This mitigation had to be considered “under both federal and Florida law.” *Id.* at 315, citing *Malloy v. State*, 382 So.2d 1190, 1193 (1979) (per curiam) (*lesser sentence for triggerman*).

⁷ Parker was convicted of three murders. *Id.* at 310.

Appellate counsel admitted that she was aware of *Parker v. Dugger* when she briefed Mr. Edwards' case (H.Tr. 180). This concession is hardly surprising since *Parker v. Dugger* was cited in trial counsel's motion for new trial (D.L.F. 560-61). Thus, counsel was on notice about the Supreme Court precedent and it would have been unreasonable for her not to be familiar with the decision.

Additionally, trial counsel had cited *State v. Schneider*, 736 S.W.2d 392 (Mo. banc 1987) which ruled that a defendant was not entitled to introduce evidence pertaining to a codefendant's plea agreement at penalty phase of trial. However, trial counsel pointed out that this case was decided years before the *Parker v. Dugger* decision and under that decision, the trial court could not refuse to consider such mitigating circumstances (D.L.F. 560-61).

Again, appellate counsel conceded that the claim was in the motion for new trial and that she was familiar with *Schneider* (H.Tr. 186). This concession was compelled by the record – the motion for new trial cited *Schneider* and noted the dates of the decisions (D.L.F. 560-61). Appellate counsel went further, illustrating her familiarity with the issue (H.Tr. 186). She knew that Judges Blackmar and Welliver dissented on this point (H.Tr. 186). Counsel's testimony is again supported. A review of the *Schneider* case shows that Judge Blackmar concluded:

I believe that the jury in considering the sentence of death, is entitled to know the disposition of the cases of co-participants. It is not enough to say that this evidence does not relate to the offense or to the defendant. The jury should have before it all evidence which a

reasonable person would consider important in determining the sentence. I am sure that jurors would want to know how co-participants have fared.

State v. Schneider, 736 S.W.2d at 405 (Blackmar, J., dissenting). Thus, at the time of Mr. Edwards' trial and appeal, counsel knew that Judge Blackmar's dissenting view had become the law of the land because of the Supreme Court's subsequent decision in *Parker v. Dugger*.⁸

Thus, contrary to the motion court's finding (L.F. 361), raising this issue would not have been futile. Rather, this Court would have been forced to reconsider *Schneider*, in light of *Parker v. Dugger*. This Court is bound to follow United States Supreme Court precedent under the command of the Supremacy Clause as to all federal constitutional issues. *Sours v. State*, 603 S.W.2d 592, 613 (Mo. banc 1980), citing, Art. VI, Section 2, of the United States Constitution.

Appellate counsel can be ineffective for failing to raise the trial court's improper exclusion of mitigating evidence. *Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004). In *Mapes*, the trial court had excluded evidence that Mapes was not the triggerman in a previous murder and instructed the jury that it could not consider this mitigating evidence relating to the prior conviction. *Id.* at 191-92. Mapes'

⁸ See also, *Richmond v. Lewis*, 506 U.S. 40, 44 (1992) (discussing mitigating circumstances including that Corella and Erwin were "involved in the offense but never charged with any crime").

appellate counsel raised twelve issues on appeal, but not the exclusion of mitigating evidence. *Id.* at 189. The reviewing court found counsel's performance unreasonable. *Id.* at 192. The Court said that the Eighth and Fourteenth Amendments require that the sentencer consider all mitigating evidence. *Id.*, quoting, *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) and *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

The trial court's exclusion of mitigating evidence was a significant and obvious claim, especially since *Eddings* was decided a year before Mapes' trial. *Mapes, supra* at 192. Further, the mitigation issue was preserved and stronger than other issues presented. *Id.* Counsel had raised eleven guilt phase issues despite overwhelming evidence of Mapes' guilt. *Id.* These errors were asserted in the face of contrary legal precedent. *Id.* Appellate counsel did not omit this claim to focus on stronger issues. *Id.* Counsel unreasonably failed to present this meritorious issue.

Like *Mapes*, the exclusion of mitigating evidence, a codefendant's conviction and sentence, had merit. The Supreme Court had recently decided *Parker v. Dugger*, as counsel was aware.

Additionally, the issue was preserved and much stronger than others that counsel presented, especially proportionality review. This Court has repeatedly held that proportionality review is not constitutionally required. *See, e.g., State v. Rousan*, 961 S.W.2d 831, 854 (Mo. banc 1998), citing *Pulley v. Harris*, 465 U.S. 37 (1984) (this Court need not consider that co-perpetrators in this case did not

receive the sentence of death); *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998) (co-actors' plea agreements and convictions for crimes other than first degree murder are not to be considered in the proportionality review of a death sentence); *State v. Roll*, 942 S.W.2d 370, 378 (Mo. banc 1997) (same); *State v. Gilmore*, 681 S.W.2d 934, 946 (Mo. banc 1984) (same). Relying on *Clay*, *supra*, this Court rejected Mr. Edwards' claim that his sentence was disproportionate, given Orthell Wilson's sentence. *State v. Edwards*, 116 S.W.3d 511, 549 (Mo. banc 2003). Considering this precedent, the failure to raise the exclusion of mitigating evidence under *Parker v. Dugger* was unreasonable.

Mr. Edwards was prejudiced by counsel's failure. To prove prejudice, Mr. Edwards must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2542 (2003); *Williams v. State*, *supra*. The Court must decide if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Congress has recognized that jurors would consider as mitigating whether "another defendant or defendants, equally culpable in the crime, will not be punished by death." *United States v. Bin Laden*, 156 F.Supp.2d 359, 369 (S.D.N.Y. 2001), *quoting*, 18 U.S.C. § 3592(a)(4). See also *Parker*, *supra* at 316 (that codefendant was the triggerman for the Sheppard murder, but received a lighter sentence than Parker, was significant mitigation).

The evidence that Orthell Wilson, the actual triggerman, received a more lenient sentence than death, may have caused one juror to vote for life. The jurors deliberated for several hours in deciding punishment, (Tr. 2050, 2052), twice as long as they did in guilt phase (Tr. 1921, 1923). The jurors only found one statutory aggravating circumstance, murder for hire (D.L.F. 494). They rejected two other statutory aggravating circumstances submitted (D.L.F. 485). Mr. Edwards had no prior criminal history (D.L.F. 487). His family loved and cared for him (Tr. Tr. 1951, 1953-54, 1970-72). He was a good friend (Tr. 1958-59, 1961). He treated his tenants well, understanding if they could not pay their rent on time (Tr. 1962-63). He was nice and considerate in his business relationships (Tr. 1970-71). His coworkers liked him and trusted him (Tr. 1984, 1992). Mr. Edwards had behaved extraordinarily well in jail, even though he had been kept in a severely restricted environment (Tr. 1992-93). Thus, had jurors been able to consider Orthell Wilson's more lenient sentence in deciding what punishment Mr. Edwards deserved, there is a reasonable probability that a juror would have considered a life sentence appropriate.

Because the jury was deprived of relevant mitigating evidence, this Court should reverse and remand for a new penalty phase.

II. Mr. Edward's Could Not Confront Orthell Wilson and His Allegations

The motion court clearly erred in denying Mr. Edwards' postconviction motion because *Crawford* is retroactive and the admission of Orthell Wilson's out-of-court statements to police during his interrogation violated Mr. Edwards' rights to due process, a fair trial, and to confrontation, U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, §§10 and 18(a); in that the right to confrontation announced in *Crawford* is a watershed rule central to accuracy; and Orthell's statements to police officers were testimonial, the State did not show that Orthell was unavailable, and Mr. Edwards had no opportunity to cross-examine him.

“Why did Orthell not testify?” Jurors asked this question during their deliberations (Tr. 1922). Did he give a deposition or some sworn testimony that jurors could consider? (Tr. 1922). The jurors instinctively wanted Orthell's allegations to be tested in court or while he was under oath. They knew that a codefendant might have every reason to lie, to color the truth with allegations against another, in order to escape the blame or to lessen his own culpability. But Mr. Edwards' jurors never had the opportunity to see Orthell testify. Mr. Edwards never had an opportunity to confront or cross-examine him. Instead, police officers told jurors that Orthell had implicated Mr. Edwards and led them to the murder weapon.

Mr. Edwards raised the denial of his right to confront Orthell on direct appeal. This Court rejected the claim, applying the law in effect at the time of the appeal – *Ohio v. Roberts*, 448 U.S. 56 (1980). After Mr. Edwards’ appeal, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). This Court should find *Crawford* retroactive and that Mr. Edwards’ right to confront his accuser was violated. A new trial should result.

Factual/Procedural History

During the investigation of Kimberly Cantrell’s death, Orthell Wilson became a suspect. He matched the description neighbors had given of the man knocking on Ms. Cantrell’s door shortly before she died. Police interrogated Orthell. He led them to the murder weapon and implicated Mr. Edwards in the killing. Orthell claimed that Mr. Edwards had hired him and that no one named Michael had been involved.

At trial, Orthell Wilson did not testify. However, several police officers testified about interviewing Orthell and the statements he made. Seargent Coleman told jurors that they questioned Orthell Wilson at the police department (Tr. 1268). Officers Siscel and Gage said that Orthell Wilson told them where he hid the murder weapon (Tr. 1344, 1470). Siscel told jurors that the officers told Mr. Edwards that they had questioned Orthell, and that he told them there was “no Michael” (Tr. 1394).

The trial court overruled objections to officers’ testimony about Orthell Wilson’s statements made during his interrogation (Tr. 1344, 1352, 1394-97,

1470-72), except when Siscel testified that Orthell said there was “no Michael” (Tr. 1395). The court said the statements were not admitted for their truth, but to show the officers’ subsequent conduct (Tr. 1344, 1395, 1472). However, the court refused counsel’s request for a limiting instruction telling the jurors the purpose of the testimony and directing them not to consider it for its truth (Tr. 1472).

The prosecutor argued the statements to prove that Mr. Edwards hired Orthell to kill the victim and was guilty. In his opening, the prosecutor said that Orthell matched the description of the man knocking on the door (Tr. 950-51). Police interrogated him and ultimately charged him with murder (Tr. 951). Orthell led the police to the murder weapon (Tr. 951). Officers told Mr. Edwards that they spoke to Orthell, and he says there is no Michael (Tr. 955).

In closing, the prosecutor again described how officers interrogated Orthell and how he led them to the murder weapon (Tr. 1888-89). He argued how Mr. Edwards lied and Orthell told the truth, that Mr. Edwards had hired Orthell and tried to create a “web of deceit” to cover his tracks (Tr. 1890-91). He said, “I don’t think most people think Michael actually exists,” rather, Mr. Edwards and Orthell were guilty (Tr. 1891-92).

Orthell’s testimony was important to jurors (Tr. 1922). They wanted him to testify or, at the very least, to review his sworn deposition testimony (Tr. 1922). They wanted to examine the police reports from Detectives Gage and Siscel who had interviewed Orthell and testified about his statements (Tr. 1923). Without an

opportunity to confront Orthell and his accusations against him, Mr. Edwards was convicted (Tr. 1923) and sentenced to death (Tr. 2052, D.L.F. 494).

Defense counsel raised the Sixth Amendment Confrontation issue, by objecting to this testimony and requesting a limiting instruction so that the jury would not consider the testimony for its truth (Tr. 1344, 1352, 1394-97, 1470-72). The trial court overruled Mr. Edwards' objections and refused to give any limiting instruction regarding this testimony. *Id.*

On appeal, Mr. Edwards raised the Sixth Amendment confrontation claim. This Court analyzed the claim as provided in *Ohio v. Roberts*, 448 U.S. 56 (1980), the controlling precedent at the time.⁹ This Court ruled that hearsay evidence is admissible if it "falls within a 'firmly rooted' exception or shows particular guarantees of trustworthiness." *State v. Edwards*, 116 S.W.3d at 532. This Court applied a deferential standard of review, noting that "[t]he trial court has broad discretion to admit and exclude evidence at trial." *Id.* Applying these rules, this Court found no abuse in admitting this evidence to show the officers' subsequent conduct and not for the truth of the matters stated. *Id.* at 533.

After this Court affirmed his conviction and sentence, Mr. Edwards filed a petition for certiorari. *Edwards v. Missouri*, 540 U.S. 1186 (2004). The Supreme

⁹ While this Court's opinion did not specifically cite *Roberts*, it applied its holding. *State v. Edwards*, 116 S.W.3d 511, 532 (Mo. banc 2003), citing *State v. Debler*, 856 S.W.2d, 641, 648 (Mo. banc 1993).

Court denied the petition on February 23, 2004, making his conviction and sentence final. See, *Griffith v. Kentucky*, 479 U.S. 314, 321, n. 6 (1987) (Court defined “final” as “a judgment of conviction has been rendered, the availability for appeal exhausted, and the time for a petition for certiorari has elapsed or a petition for certiorari finally denied).

Less than two weeks later, on March 8, 2004, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). There, the police gave Crawford and his wife *Miranda* warnings and then questioned them about a stabbing. *Id.* at 38-39. The wife did not testify at trial due to the state marital privilege and the State introduced her statements at trial. *Id.* at 40. The Court held that where testimonial evidence is at issue, the Sixth Amendment demands that the witness be unavailable and the defendant have a prior opportunity for cross-examination, regardless of whether a court deems the statements reliable. *Id.* at 68.

“Statements taken by police officers in the course of interrogations” are testimonial under even a narrow standard. *Id.* at 52. Accomplice confessions implicating an accused are particularly untrustworthy. *Id.* at 63-64. The statements often come in response to leading questions by an officer. *Id.* at 65. This evidence “seldom leads to the proper discovery of truth.” *Id.* at 49. The Framers were particularly concerned about *ex parte* examinations. *Id.* at 49, 50.

In so ruling, the Court found the Sixth Amendment right to confrontation is a “bedrock procedural guarantee.” *Id.* at 42. The Clause’s ultimate goal is to

ensure reliability of evidence. *Id.* at 61. Cross examination of witnesses is conducive to finding the truth. *Id.* at 61-62.

Crawford recognized that the confrontation clause does not bar admission of a statement admitted for purposes other than establishing the truth of the matter asserted. *Id.* at 59, n. 9, citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985). There, the confession of an accomplice was admitted for the non-hearsay purpose of rebutting defendant's testimony that his own confession was coercively derived from the accomplice's statement. *Id.* at 411-12. Before admitting the statement, the trial judge twice informed the jury that the statement was being admitted "not for the purpose of proving the truthfulness of the statement, but for the purpose of rebuttal only." *Id.* at 412. The judge also gave the jury a limiting instruction when instructing them on the law. *Id.* Given this limiting instruction, the Court found no confrontation violation. *Id.* at 414-15.

See also, *State v. Robinson*, 111 S.W.3d 510, 514 (Mo. App. S.D. 2003) (the trial court's failure to give a limiting instruction regarding how jury was to consider informant's statement exacerbated the likelihood jurors considered testimony for truth); *State v. Shigemura*, 680 S.W.2d 256, 257-58 (Mo. App. E.D. 1984) (hearsay statement that defendant had stolen property was exacerbated by trial judge's failure to give a limiting instruction, allowing the jury to consider the statements as evidence linking defendant to the crime). Here, the trial judge also failed to give a limiting instruction, so the jury was free to use Orthell's statements as evidence of guilt. That danger is real since the prosecutor argued the statements

for their truth. *Cf. State v. Garrett*, 139 S.W.3d 577 (Mo. App. S.D. 2004) (informant's statement that defendant sold drugs out of his home was inadmissible hearsay, since the prosecutor argued the statements for their truth, rather than subsequent police conduct).

Postconviction Claim

Mr. Edwards filed his postconviction action and alleged that *Crawford* was retroactive to his case (L.F. 49-50, 241-54). The motion court did not make any specific findings of fact or conclusions of law on this issue (L.F. 353-71). This Court should review this claim since it is a legal issue that can be decided without findings. *See, Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993) (one of two exceptions to the requirement of specific findings and conclusions is where the issue is one of law). Alternatively, this Court should remand for findings of fact and conclusions of law on this and other issues. *See, Point IV, infra*.

Standard of Review

This Court reviews the motion court's judgment denying relief for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

Teague Standard for Retroactivity

The motion court clearly erred in denying Mr. Edwards' claim that *Crawford* is retroactive. Several courts have addressed the question of *Crawford*'s

retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989). In *Teague*, the Court held that generally, new rules of constitutional procedure will not be applicable to those cases that have become final before the new rules are announced. *Id.* at 310. A new rule is defined as one that “breaks new ground or imposes a new obligation on the States or the Federal Government.” *Id.* at 301. A case decides a new rule “if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Id.*

The Court found two exceptions to the general rule of non-retroactivity: if the conduct cannot be criminalized; or if the rule of criminal procedure is a watershed rule, a bedrock principle, central to an accurate determination of guilt or innocence. *Id.* at 311, 313. The Court provided the example of the right to counsel as a watershed rule that is central to an accurate determination of guilt or innocence. *Id.* at 311.

New Rule

Initially, this Court must decide whether *Crawford* created a new rule. Judge Noonan ruled that *Crawford* did not create a new rule. *Bockting v. Bayer*, 399 F.3d 1010, 1023 (9th Cir. 2005) (Noonan, J., concurring). In reaching this conclusion, Judge Noonan focused on this language in *Crawford*:

Our cases have thus remained faithful to the Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Id., quoting *Crawford*, 124 S.Ct. at 1369.

The majority disagreed with Judge Noonan. *Bockting, supra* at 1014-15.¹⁰ The rule in *Crawford* was not dictated by then existing precedent and deviated from the test announced in *Ohio v. Roberts*. *Bockting, supra*. *Roberts* relied on evidentiary principles of reliability and trustworthiness, not the constitutional principle of confrontation. *Id.* The dissenters in *Crawford* concluded that the Court had overruled *Roberts* and had adopted a new interpretation of the Confrontation Clause. *Id.*, citing *Crawford*, 124 S.Ct. at 1378 and 1374.

Mr. Edwards' case illustrates that *Crawford* did announce a new rule. Under *Crawford*, courts cannot apply a deferential standard of review to the admission of hearsay testimony. Rather, courts must decide if the statements are testimonial and whether the witness is unavailable and the

¹⁰ Most courts have agreed with the majority and found that *Crawford* announced a new rule. See e.g. *People v. Watson*, 798 N.Y.S.2d 712, 2004 WL 2567124 (N.Y.Sup. 2004); *Brown v. Uphoff*, 391 F.3d 1219 (10th Cir. 2004); *Mungo v. Duncan*, 393 F.3d 327 (2nd Cir. 2004); *Murillo v. Frank*, 402 F.3d 786 (7th Cir. 2005); *Evans v. Luebbbers*, 371 F.3d 438 (8th Cir. 2004); *Dorothy v. Jones*, 398 F.3d 783 (6th Cir. 2005). At least one federal district court agreed with Judge Noonan, ruling that *Crawford* did not announce a new rule. *Richardson v. Newland*, 342 F.Supp.2d 900 (E.D. Cal. 2004).

defendant had a prior opportunity to cross-examine the witness. Applying this test, the Court would have found a confrontation violation. Orthell's statements to the police were testimonial. The police acknowledged that Orthell was a suspect, they gave him *Miranda* warnings, and interrogated him at the police station. Just like the police officers' interrogation of Crawford's wife, here the statements were testimonial.

Additionally, there was no showing that Orthell was unavailable to testify and that Mr. Edwards had a prior opportunity for cross-examination. At the time of trial, Orthell had pled guilty and had received a sentence of life without probation or parole (Tr. 1989-90, Ex. III). Once a witness pleads guilty and is sentenced, he can no longer claim his privilege against self-incrimination. *Mitchell v. United States*, 526 U.S. 314 (1999). Mr. Edwards also had no opportunity to cross-examine Orthell. Thus, the statements should have been excluded.

Right to Confrontation is a Watershed Rule Central to Accuracy

Crawford should be retroactive to cases on collateral review because the right to confrontation is a watershed rule of criminal procedure that is central to an accurate determination of guilt or innocence. *Teague, supra* at 311-13. The Sixth Amendment right to confrontation is a "bedrock procedural guarantee." *Crawford*, 541 U.S. at 42. The Clause's ultimate goal is to ensure reliability of evidence. *Id.* at 61. Cross examination of witnesses is conducive to finding the truth. *Id.* at 61-62.

Thus, based on the plain language used in *Crawford* itself, courts have found it to be retroactive. *Bockting*, 399 F.3d at 1016. Justice Scalia’s recitation of the history, purpose, and place of the confrontation clause establishes that it is a watershed rule, a fundamental rule “without which the likelihood of an accurate conviction is seriously diminished.” *Id.*, quoting *Schiro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 2523 (2004) and *Teague*, 489 U.S. at 313. Confrontation implicates the accuracy of the criminal proceeding. *Bockting*, 399 F.3d at 1016. Again, the court looked to *Crawford* itself in reaching this conclusion. *Id.* at 1017. The entire purpose of confrontation is to promote accuracy. *Id.*, citing *Crawford*, 124 S.Ct. at 1370. “Open examination of witnesses is much more conducive to clearing up of truth.” *Bockting*, *supra* at 1017, quoting *Crawford*, 124 S.Ct. at 1370 and 3 Blackstone, Commentaries. Confronting witnesses is designed to subject them to rigorous testing in an adversary proceeding before the trier of fact. *Bockting*, *supra* at 1018.

New York has also found *Crawford* to be retroactive. *People v. Watson*, *supra*. Like *Bockting*, the court relied to *Crawford*’s declaration that the Sixth Amendment’s Confrontation Clause is a “bedrock procedural guarantee.” *Id.* at 6, quoting *Crawford*, 124 S.Ct. at 1359. Cross-examination is the “greatest legal engine ever invented for the discovery of truth.” *Watson*, *supra*, quoting *White v. Illinois*, 502 U.S. 346, 356 (1992). The *Watson* court also looked to two pre-*Teague* cases, finding a defendant’s right to confrontation to be retroactive. *Roberts v. Russell*, 392 U.S. 293 (1968), applying *Bruton v. United States*, 391

U.S. 123 (1968); and *Berger v. California*, 393 U.S. 314 (1969), applying the rule in *Barber v. Page*, 390 U.S. 719 (1968).

Even courts finding *Crawford* not to be retroactive, acknowledge that *Crawford*'s language suggests otherwise. *Brown v. Uphoff*, 391 F.3d at 1226 (“It is true that in *Crawford* the Court referred to the protections of the Confrontation Clause as a ‘bedrock procedural guarantee’”). But since harmless error analysis applies to confrontation claims, the court concluded they could not be retroactive. *Id.*

In *Mungo*, the court found that the *Crawford* rule does not improve the overall accuracy of the criminal process. *Mungo*, 393 F.3d at 335. The Court recognized that *Crawford* established the principle that “cross-examination is a better engine of truth-determination than a judge’s assessment of reliability of uncross-examined hearsay.” *Id.* The court then rejected this proposition, saying it “does not necessarily follow that *Crawford* will improve the accuracy of the process.” *Id.* at 335-336.

In *Murillo*, the court simply ignored *Crawford*'s language that the right to confrontation is a “bedrock procedural guarantee.” *Murillo v. Frank*, 402 F.3d at 790. It ruled that confrontation is not as fundamental as a jury trial,¹¹ held not to

¹¹ This Court disagreed with *Murillo*, finding the right to a jury trial on any fact that increases punishment should be retroactively applied. *State v. Whitfield*, 107

be retroactive. *Id.* The court acknowledged that it was a “close question” on whether *Crawford* helps accurate decision making. *Id.* Live testimony is preferable to affidavits and transcribed confessions, because cross-examination can probe the weaknesses. *Id.* But the court thought recorded testimony is sometimes better than silence. *Id.* It also concluded that since a confrontation violation can be harmless, it could not be retroactive. *Id.* at 791-92.

The Sixth Circuit recognized that the Effective Death Penalty Act of 1996 adds another wrinkle to retroactivity analysis on federal habeas review. *Dorchy v. Jones*, 398 F.3d at 787. AEDPA tells federal courts “hands off, unless the judgment in place is based on an error grave enough to be called ‘unreasonable’”. *Id.* quoting *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996). Thus, if a State court applied *Ohio v. Roberts*, the controlling Supreme Court precedent at the time of its decision, it could hardly be viewed as “unreasonable.” *Dorchy, supra* at 788.

Finally, in *Evans v. Luebbbers*, the court doubted *Crawford*’s retroactivity, since the *Crawford* Court did not decide the issue. 371 F.3d at 444-45. The court concluded that *Crawford* did not fit within the *Teague* exception, providing no analysis for its conclusion. *Id.* at 445. Even assuming *Crawford* did apply retroactively, the statements at issue were not testimonial. *Id.*

S.W.3d 253, 266 (Mo. banc 2003), applying *Linkletter v. Walker*, 381 U.S. 618 (1965); and *Stovall v. Denno*, 388 U.S. 293 (1967).

This Court should find *Crawford* retroactive, even applying *Teague*'s analysis. The plain language shows that the right to confrontation is a watershed rule of criminal procedure, central to an accurate determination of guilt or innocence.

Whitfield's Retroactivity Analysis

This Court applied the *Linkletter-Stovall* analysis in determining the retroactivity of *Ring*'s requirement of a jury determination of facts necessary to make a defendant death eligible. *Whitfield, supra* at 266. That test looks at three factors:

- 1) the purpose to be served by the new standards;
- 2) the extent of reliance by law enforcement on the old standards;
- 3) the effect on the administration of justice of a retroactive application of the new standards.

Id. Applying this test here, the Court should rule that *Crawford* is retroactive.

The purpose of *Crawford*'s test for the right to confrontation is to ensure that witnesses testifying against a defendant are subject to cross-examination. The Court believed that juries could best determine the truthfulness of a witness by seeing that witness cross-examined, rather than leaving the Sixth Amendment protection to "the vagaries of the rules of evidence, much less to amorphous notions of reliability.'" *Crawford*, 541 U.S. at 61-62. The Court was particularly concerned about admitting accomplice's confessions implicating the accused. *Id.* at 63-64.

Orthell's statements implicating Mr. Edwards show why cross-examination is necessary. Orthell gave different statements to the police, first denying his involvement, then saying that Mr. Edwards only wanted him to scare the victim, not kill her, and finally claiming that Mr. Edwards hired him to kill her. Which version is the truth? Orthell tried to minimize his own involvement, saying the shooting was accidental, that he panicked. Orthell also lied to the police about evidence, including gloves he said he used and the location of the gun. He lied to the police about having handled a gun. He had a prior violent record, an armed robbery in Clayton. Mr. Edwards had no criminal record. He had never been convicted of a violent crime.

The jury should have been allowed to assess Orthell's credibility through the greatest legal engine for the truth, cross-examination. The State introduced selected statements to show that Orthell had implicated Mr. Edwards in the crime, that he hired Orthell to kill the victim. The State told jurors to believe Orthell, not Mr. Edwards. The jury wanted to hear from Orthell. They wondered why he did not testify. Cross-examination is central to an accurate determination of guilt and innocence. Mr. Edwards was denied that right.

The second factor favors retroactivity. Law enforcement officers do not question suspects with the expectation that their statements will be introduced at a codefendant's trial. Even before *Crawford*, accomplice confessions were generally inadmissible where the defendant had no opportunity to cross-examine.

See, *Bruton v. United States*, 391 U.S. 123 (1968); *Roberts v. Russell*, 392 U.S. 293, 294-95 (1968); and *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965).

Finally, retroactive application of *Crawford* should not adversely affect the administration of justice. Officers still can question suspects and their statements can be admitted against them at trial. They simply cannot be used against others, who have had no opportunity to cross-examine them. The right to “cross-examination is a tool used to flesh out the truth, not an empty procedure.” *Crawford, supra* at 1377 (Rehnquist, J., concurring). Any system of administration of justice should be concerned with getting at the truth, especially in death penalty cases.

Mr. Edwards’ jury could not get at the truth in this case, since Orthell did not testify. Under *Crawford*, officers’ testimony about his statements violated Mr. Edwards’ right to confrontation. A new trial should result.

III. The Motion Court Refused to Hear Orthell Wilson's
Testimony Recanting His Allegations

The motion court clearly erred in denying, without a hearing, Mr. Edwards' claim that Orthell recanted his allegations that Mr. Edwards hired him to kill Ms. Cantrell, and that the police forced him to confess, because this denied Mr. Edwards due process, a fair trial and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts not conclusions, that Mr. Edwards never hired Orthell to kill the victim, and that the police coerced his confession, and if these facts are proven, Mr. Edwards is entitled to relief, as they would show that Mr. Edwards is actually innocent and thus, cannot be convicted or executed.

Where was Orthell? Not at Mr. Edwards' trial and because of the motion court's ruling, not at Mr. Edwards' evidentiary hearing. Despite the allegations that Orthell had recanted his confession and admitted that he lied about Mr. Edwards hiring him to kill Ms. Cantrell, the motion court denied the claim without hearing any evidence. Despite the allegations of police misconduct in coercing a confession, the motion court refused to hear evidence on this claim. The motion alleged facts, not conclusions, entitling Mr. Edwards to relief. A remand for a hearing should result.

Claim in Amended Motion

Mr. Edwards' amended motion claimed that Orthell Wilson recanted his confession implicating Mr. Edwards (L.F. 50). He claimed that police coerced his confession and that Mr. Edwards never hired him to commit the crime (L.F. 50).

This claim pled specific facts outlining Orthell's proposed testimony (L.F. 257-62). Orthell felt guilty about implicating Mr. Edwards for a crime he did not commit (L.F. 257). He told the police what they wanted to hear, because he thought he would get a good deal and Mr. Edwards would not be convicted (L.F. 257). Mr. Edwards never hired him to kill Ms. Cantrell (L.F. 257).

Orthell knew about the murder from information he heard on the street (L.F. 258). He knew a gun was hidden in a house across the street (L.F. 258). Orthell owned two guns, a 9 millimeter and a .38 (L.F. 258). His brother, Hughie, and his friend Donnell Watson, knew about the guns since they lived with him in the past (L.F. 258). Mr. Edwards never gave him a gun and never saw his guns (L.F. 258).

Police showed Orthell and his neighbors a composite sketch that looked like Orthell or his brother Hughie (L.F. 258). The two could pass for identical twins (L.F. 258). Orthell thought police would blame him or his brother, Hughie (L.F. 258). Orthell wanted to protect his brother, who had a drug problem, was emotionally fragile and had a child that needed to be supported (L.F. 258).

Orthell claimed his confession was coerced. Police placed him in a small interrogation room, locked the door, and interrogated him for hours (L.F. 259).

They did not tell him he had a right to an attorney (L.F. 259). Even though he repeatedly told them he was not involved in Ms. Cantrell's murder, the police continued to question him until he told them what they wanted to hear (L.F. 259). He said that Mr. Edwards hired him to kill Ms. Cantrell, but it was not true (L.F. 259). Police forced him to go to the crime scene; they forced him into the police car (L.F. 259). He did not know how the crime occurred (L.F. 260).

Orthell pled guilty to avoid a death sentence and to protect his brother, Hughie (L.F. 259-260). Orthell did not believe Mr. Edwards would be convicted since Orthell refused to testify against him (L.F. 260-61).

Orthell had a good relationship with Mr. Edwards (L.F. 261). He had given Orthell a job and a place to live when he was homeless (L.F. 261). Mr. Edwards never discussed his relationship with his ex-wife (L.F. 261). Orthell had met Ms. Cantrell and she seemed to have a cordial relationship with Mr. Edwards (L.F. 261-62). While Mr. Edwards wanted Erica to live with him, he never complained about his child support (L.F. 261). Orthell saw Mr. Edwards with his daughters when he came to the apartments where Orthell lived (L.F. 261). He was a loving father and devoted to his daughters (L.F. 261).

The motion court denied a hearing on this claim (H.Tr. 274), without any findings (L.F. 353-71).

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*.

Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002).

“An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief.” *Id.* at 928 (emphasis in original).

Here, the motion court provided no basis for denying this claim without a hearing. Such findings are necessary for appellate review. *See*, Point IV, *infra*. However, this Court should reverse and remand with instructions to the motion court to grant a hearing on this claim of actual innocence.

That Orthell Wilson falsely accused Mr. Edwards is a factual claim, that if true, would entitle Mr. Edwards to relief. This claim is not refuted by the record, as Orthell Wilson has never testified at trial or at an evidentiary hearing about his statements implicating Mr. Edwards.

Mr. Edwards was prejudiced by Orthell’s false statements. Police focused on Mr. Edwards as a result of his statements. The state proceeded with the theory that Mr. Edwards hired Orthell to kill his ex-wife. Orthell’s proposed testimony that Mr. Edwards never hired him is exculpatory evidence showing that Mr. Edwards is actually innocent.

Executing an innocent person violates the constitution under the Eighth and Fourteenth Amendments. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547, n.3 (Mo. banc 2003), *citing*, *Herrera v. Collins*, 506 U.S. 390 (1993). Further, as a matter of state law, execution of an innocent person is prohibited. *Amrine, supra* at 547, n.3. “No person shall be deprived of life, liberty, or property without due process of law.” *Id.*, *quoting* Article I, § 10 of the Mo. Const. This protects the individual from the arbitrary exercise of governmental power. *Amrine, supra*. “[T]he purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent.” *Id.*

A due process claim is appropriately raised in a Rule 29.15 motion if it could not have been raised on direct appeal. *Tisius v. State*, ___S.W.3d ___ 2006 WL 44353, at 2 (Mo. banc, January 10, 2006). Here, Mr. Edwards could not have raised the claim on direct appeal, because Orthell recanted after the trial.

Given these principles, the motion court clearly erred in failing to grant a hearing on this claim. Mr. Edwards realizes that recantations are not always favored by the law. *Amrine, supra* at 549 (J. Wolff, concurring). However, as the facts of *Amrine* show, sometimes recantations provide compelling evidence of innocence. It depends on the circumstances and the credibility of the witnesses. However, without a hearing the motion court could not determine if Orthell Wilson was credible in his recantation. When credibility is the key, a hearing is

appropriate. *Amrine, supra* at 551 (J. Benton, dissenting) and 552 (J. Price, dissenting).

This Court should remand for a hearing on Mr. Edwards' claim of innocence. The motion court must hear Orthell Wilson testify to determine the credibility of his claims that Mr. Edwards never hired him to kill Ms. Cantrell.

IV. The Motion Court Did Not Make Findings On All Issues

The motion court clearly erred in denying Mr. Edwards' Rule 29.15 motion without entering specific findings of fact and conclusions of law on each of his claims, because this failure violated Rule 29.15 (j) and denied Mr. Edwards due process of law, U.S. Const., Amend. XIV; Mo. Const., Art. I, §10 in that the court never provided a basis for denying claims:

8 (e) that counsel was ineffective for failing to investigate Mr.

**Edwards' social history and present evidence of his
troubled childhood through his mother, Ms. Edwards;**

8 (j) whether *Crawford* is retroactive and applies to Mr.

Edwards' case;

8 (k) whether the codefendant's recantation of his allegations

against Mr. Edwards and his statements that Mr.

**Edwards never hired him to kill Ms. Cantrell is
exculpatory evidence warranting a new trial.**

Without findings and conclusions on these issues, this Court cannot conduct meaningful appellate review.

Mr. Edwards' amended motion raised 14 issues (L.F. 25-306). Yet the motion court only entered specific findings of fact and conclusions of law on 5 of the issues pled (L.F. 353-71). Without such findings, this Court cannot engage in

meaningful appellate review, as required by due process. This Court should reverse and remand to the motion court to comply with Rule 29.15 (j).

The motion court issued specific findings on five claims:

- a) Dr. Logan (L.F. 361-63);
- b) Dr. Draper (L.F. 363-64);
- c) Dr. Cross (L.F. 364-67);
- f) Tanjalore Manslaw (L.F. 367-68); and
- l) appellate's counsel's failure to raise a claim regarding the exclusion of the codefendant's conviction and sentence (L.F. 359-61).

The motion court did not address the 9 remaining issues (L.F. 353-71).

The motion court never addressed the allegation that trial counsel was ineffective for failing to investigate and present evidence of Mr. Edwards' traumatic childhood through his mother, Mildred Edwards,' testimony. The motion court did not decide whether *Crawford* is retroactive to Mr. Edwards' case. The court denied a hearing on the claim that the codefendant recanted his allegations against Mr. Edwards, providing exculpatory evidence and proving Mr. Edwards' actual innocence (H.Tr. 274).

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*. Findings are clearly erroneous if, after reviewing the entire record, this Court is

left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc1996).

Rule 29.15 (j) provides in relevant part:

The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held.

This Court interpreted the identical provision contained in Rule 24.035 (i) which requires such findings. *Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993). “Since appellate review is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous . . . the findings of fact and conclusions of law must be sufficiently specific to allow meaningful appellate review.” *Id.* at 350. “The plain language of the rule dictates that the motion court is required to issue findings of fact and conclusions of law whether or not a hearing is held in order for appellate review.” *Id.* Without such findings, this Court cannot engage in meaningful appellate review. *Id.*

Meaningful and fair appellate review is required by the Due Process Clause of the Fourteenth Amendment. The purpose of appellate review is to provide "a means to promote the evenhanded, rational, and consistent imposition of the death sentence . . ." *Jurek v. Texas*, 428 U.S. 262, 276 (1976). Meaningful appellate review plays a "crucial role" in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The “duty to search for constitutional error with painstaking care is never more

exacting than it is in a capital case.” *Kyles v. Whitley*, 514 U.S. 419, 422 (1995), quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987).

This Court has found only two exceptions to the requirement of specific findings and conclusions: 1) the issue is one of law;¹² and 2) a hearing is granted on the motion and no substantive evidence is presented to support the allegation.¹³ *Barry, supra* at 350.

Mildred Edwards: Violent/Traumatic Childhood

Claim (e) does not fit within either of these exceptions. The amended motion alleged that trial counsel was ineffective for failing to investigate and present evidence of Mr. Edwards’ childhood through his mother, Mildred Edwards (L.F. 41-43, 169-92). Both Ms. Edwards and trial counsel testified (H.Tr. 10-75, 188-236).

Trial counsel admitted that she did not know many details about Mr. Edwards’ traumatic childhood and his odd behaviors that signaled mental health issues. Counsel did not know that Mr. Edwards chewed his tongue when he was a

¹² Arguably, Claim J, whether *Crawford* is retroactive to Mr. Edwards’ case, is a legal issue. See, Point II, *supra*. However, the claim also includes factual questions. Accordingly, Mr. Edwards includes the issue here, because the motion court should have provided some basis for denying the claim.

¹³ This exception applies to Claims d, g, h, i, m, and n because postconviction counsel presented no evidence to support these claims.

child (H.Tr. 193, 198, 217). She had no idea that he separated his clothes and put an ironing board between him and his brother, Daniel, when they slept in the same bed (H.Tr. 194).

Counsel neglected to learn about the home environment: that Steve suffered from malnutrition as a baby, that Mildred did not have food for the children when they were little, and that Emmrie kept her from going to the store to buy food (H.Tr. 217). Counsel admitted that she was unaware of much mitigating evidence about Mr. Edwards' father, Emmrie, and his treatment of his wife and children (H.Tr. 195-96). She had not discovered Emmrie's abusive and controlling nature or how severely he beat the children (H.Tr. 195-96, 216). Counsel was unaware that Emmrie beat Mildred while she was pregnant with Kimber (H.Tr. 217). She did not know that Emmrie would not allow Mildred to take Kimber to the hospital when he was little (H.Tr. 217).

Counsel did not know the extent of the father's infidelity and the impact it had on Mildred and the children (H.Tr. 215-16). She knew nothing about his jealousy, his stalking his wife, and his interfering with her job at a nursing home (H.Tr. 217-18).

Counsel admitted that had she investigated and discovered the evidence of violence in the home, she would have introduced it in the penalty phase (H.Tr. 220). Counsel realized that Mildred's trial testimony did not go well (H.Tr. 214). She did not provide an accurate picture of Mr. Edwards during his childhood (H.Tr. 214-15).

Yet the motion court never addressed this claim of ineffectiveness. Accordingly, this Court is left to speculate the basis for denying relief on this claim. Did the Court think counsel acted reasonably in her investigation? Would this evidence make no difference to the outcome? One can only guess why the motion court denied relief on the failure to elicit this mitigating evidence from Mildred.

Is *Crawford* Retroactive?

The motion court failed to specifically address Claim (j), alleging that *Crawford* should apply retroactively to Mr. Edwards' case (L.F. 49-50, 24-54). This Court can only speculate on why this claim was denied.

Orthell Recants Allegations Against Mr. Edwards

Similarly, this Court can only speculate as to why the motion court denied Claim (k) without a hearing. This claim alleged that Mr. Edwards was innocent of the charged offense (L.F. 50-51). Orthell had recanted his confession and said Mr. Edwards never hired him to kill the victim (H.Tr. 50-51, 254-55). Yet the motion court failed to provide any reason for denying the claim (L.F. 353-71).

Since the motion court's judgment is not supported by specific findings of fact and conclusions of law, this Court cannot meaningful review them for clear error. This Court should reverse the motion court's denial of relief and remand for specific findings and conclusions on all issues.

V. Mr. Edwards Was Not Allowed to Testify at 29.15 Hearing

The motion court clearly erred in denying Mr. Edwards his right to testify in support of his postconviction claims under Rule 29.15(i) because this denial violated his right to due process, U.S. Const., Amend. XIV; Mo. Const., Art. I, §10, in that Rule 29.15(i) provides a right to a movant to testify, Mr. Edwards informed the court that he wanted to testify, and it was fundamentally unfair to deny Mr. Edwards' claims of ineffective assistance of counsel based only on trial counsel's testimony regarding Mr. Edwards, without giving him an opportunity to rebut counsels' account of their conversations and to meet his burden of proof.

Mr. Edwards asked to testify in support of his claims in his postconviction action. The motion court refused, saying that the decision was for his attorneys to make. The motion court clearly erred as 29.15(i) provides the right to testify and places the burden on movant to prove his claims by a preponderance of the evidence. It would be fundamentally unfair to place the burden on the movant and then deny him the opportunity to meet that burden. This Court must reverse and remand for a fair hearing in which Mr. Edwards is given an opportunity to testify, either in person or by deposition.

Mr. Edwards' Request to Testify

After witnesses testified at the 29.15 hearing, Mr. Edwards asked the court whether he could testify (H.Tr. 275-76). The following exchange took place:

THE DEFENDANT: Your Honor, do I get to say anything on the stand or off the stand? I'd like to testify here today or some time soon, if I can.

THE COURT: Not at this point. You'll have ample time to discuss whatever you want to discuss with your attorneys. Okay.

THE DEFENDANT: I won't be allowed to testify at all?

THE COURT: That's not up to me to say. That's between you and your attorneys.

THE DEFENDANT: I'd like to let the Court know I would like to testify.

THE COURT: I suggest you convey that thought to your attorneys.

THE DEFENDANT: I did and they haven't responded in six months.

THE COURT: I'm sure they'll address that issue with you.
(H.Tr. 275-76).

The motion court improperly ruled that counsel could decide whether the client testified at the 29.15 proceedings. Mr. Edwards had a fundamental right to testify and the motion court clearly erred in failing to protect that right.

Standard of Review

This Court reviews claims in postconviction proceedings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*. The Rule

29.15 proceedings must comport with due process. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991).

Rule 29.15(i) provides:

At any hearing ordered by the court the movant need not be present. *The court may order that testimony of movant shall be received by deposition.* The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of evidence.

(Emphasis added). The rule recognizes that a movant has a right to testify, but leaves it to the court's discretion as to whether to hear the testimony in person or by deposition. The rule places the burden on the movant to prove his claims by a preponderance of the evidence. Thus, it is fundamentally unfair to deprive a movant of his rights under the rule and to deprive him of a fair opportunity to meet his burden as provided by the rule. *See, Ford v. Wainwright*, 477 U.S. 399, 428 (1986)(O'Connor, J., concurring and dissenting); and *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (once a state creates a right, it is protected by due process and cannot arbitrarily be denied).

Denying a movant the right to testify, as provided by the rule, is reversible error. *State v. Athanasiades*, 857 S.W.2d 337, 341 (Mo. App., E.D. 1993). In *Athanasiades*, the movant filed a Rule 29.15 motion alleging ineffective assistance

of counsel. *Id.* at 538-41. The motion court held an evidentiary hearing on 23 points, but permitted movant to only call his trial counsel as a witness. *Id.* at 339. The court did not allow movant to testify. *Id.*

The motion court credited trial counsel's testimony without giving Athanasiades an opportunity to rebut the testimony. *Id.* Trial counsel indicated that he followed Athanasiades' wishes in how he handled the case, in particular in how he cross-examined a witness. *Id.* at 339-41. Whether trial counsel actually followed his client's wishes, whether the client wanted to control the litigation and whether counsel's testimony was credible, were all factual issues that could not be decided without Athanasiades' testimony. *Id.* at 341. Therefore, the motion court erred in not allowing him to testify in support of his claims. *Id.*

The Court of Appeals recognized that a movant does not have the right to be present, but he does have a right to testify. *Athanasiades, supra* at 339. The rule places the burden on movant to prove his claims by a preponderance of evidence. *Id.* Thus, it is only fair that he be allowed to present his own testimony to support his claims and to rebut the testimony of his former trial counsel. *Id.*

Similarly, here, the motion court erred in not allowing Mr. Edwards to testify. He had the burden of proving his claims by a preponderance of evidence and should have been allowed to testify and to rebut trial counsel's testimony on claims of ineffectiveness. The motion court found that counsel met with Mr. Edwards more than twenty times and had many phone conversations with him (L.F. 356). The court found that they discussed the State's case against Mr.

Edwards and possible defenses (L.F. 356). Based on counsel's testimony, the court found that Mr. Edwards provided counsel with names of witnesses and counsel interviewed them (L.F. 356). The court ruled that as a result of these discussions, counsel developed a guilt phase trial strategy, with which Mr. Edwards agreed (L.F. 357). The court also found that they developed a strategy to save his life (L.F. 357-59). The court found that Mr. Edwards told the defense team what witnesses could testify in penalty phase (L.F. 359).

The court made all these factual findings without the benefit of Mr. Edwards' testimony, even though he expressed his desire to testify on his own behalf (H.Tr. 275-76). Having denied him the opportunity to prove counsel's ineffectiveness, the court then found that he did not meet his burden of proof (L.F. 370). The court ruled that Mr. Edwards had failed to show that counsel did not act reasonably and did not overcome the presumption of competency (L.F. 370). These issues could not be fairly adjudicated without Mr. Edwards' testimony. Thus, the court erred in refusing to allow him to testify, either at the hearing or by deposition. This Court should reverse the denial of relief and remand so that Mr. Edwards can testify either in person or by deposition.

**VI. The Jury Never Heard Mitigating Evidence About
Mr. Edwards' Traumatic Childhood**

The motion court clearly erred in denying Mr. Edwards' claim that trial counsel was ineffective for failing to investigate and present evidence of Mr. Edwards traumatic childhood, because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that trial counsel failed to investigate Mr. Edwards' childhood, through his mother-Mildred Edwards; his cousin-Tangalayer Mansaw; and a child development expert, such as Dr. Wanda Draper; and present evidence that he grew up in a violent and chaotic house filled with physical and emotional abuse; that his mother suffered from depression, was suicidal, could not adequately care for him; and without adequate nutrition and care, Mr. Edwards developed a detachment disorder, nonverbal learning disability and autism spectrum disorder. Counsel's failure to investigate was unreasonable and prejudiced Mr. Edwards, because, had the jury heard this mitigating evidence, a reasonable probability exists that at least one juror would have opted for a life sentence.

Mr. Edwards grew up in a violent and chaotic household. His father was abusive and extremely jealous. His mother, depressed and suicidal, could not properly care for him. He did not receive proper prenatal care and had

complications at birth. The result was a baby, a boy, and ultimately a man who was not normal. He wasn't affectionate and couldn't interact with others. He went into his own world. Experts concluded he had a detachment disorder, a learning disability and an autism spectrum disorder. His family just knew he was different and didn't fit in.

Trial counsel also knew something was terribly wrong. Yet they failed to adequately investigate and find out about his troubled, chaotic childhood. They failed to present this relevant mitigating evidence to the jury. As this Court put it: "He offered little evidence in the way of mitigation other than testimony from family and friends offered in his support." *State v. Edwards*, 116 S.W.3d 511, 550 (Mo. banc 2003). That evidence did nothing to explain the killing. *Id.* Counsel admitted they did not discover this mitigation. Counsel admitted that had she known about it, she would have introduced it during penalty phase. Counsel was constitutionally ineffective. This Court must reverse and remand for a new penalty phase.

Mr. Edwards' Childhood

Mr. Edwards' mother, Mildred, had a hard time raising her children. She married her husband, Emmrie Edwards, while several months pregnant (H.Tr. 17-19). Her first baby died when he was just six weeks old (H.Tr. 18, 19).

Emmrie was controlling, abusive and jealous (H.Tr. 20, 21, 22, 33, 35-36, 40-41, 84). When a friend gave Mildred clothes to wear, he ripped them off her (H.Tr. 24-25). While she was pregnant with Kimber, Emmrie beat Mildred,

shoved her and hit her in the stomach (H.Tr. 30). When Emmrie came home at night, he often went on a rampage, cursing, hitting, pushing and fighting (H.Tr. 82). He pushed items off the table and then started beating Mildred, punching her in the side and holding her down (H.Tr. 85). Emmrie punched Mildred in the face, giving her black eyes (H.Tr. 43, 82). He threw Mildred to the ground and grabbed her by the neck (H.Tr. 86, 87). Emmrie put his knee in her back and told her that she was going to learn to do what he told her (H.Tr. 87). He cut up her clothes and the pillows on the couch (H.Tr. 82). He flushed her medicine down the toilet (H.Tr. 82).

Emmrie beat his children too. He would wake them from their sleep and beat them with a belt (H.Tr. 53, Draper Depo at 35). Steveson and Daniel ran away and cried, but Kimber just took the beatings (H.Tr. 54, Draper Depo at 35). Sometimes, he rolled up in a ball, almost in a catatonic state (H.Tr. 54, Draper Depo at 36).

Mildred could not adequately care for her children. When Steveson was six weeks old, he was hospitalized for dehydration and malnourishment (H.Tr. 26, 268). They did not have enough food, clothing or heat (H.Tr. 34).

Mildred was clinically depressed (H.Tr. 23). She did not eat regularly during any of her pregnancies, including when she was pregnant with Kimber (H.Tr. 23, 28-29, 39, Draper Depo at 22). When she was seven months pregnant, she ran a 104 degree temperature (H.Tr. 29, 251, 272, Draper Depo at 23-24). At one point during Kimber's pregnancy, Mildred stopped eating and drinking all

together; she wanted to die (H.Tr. 32). She considered suicide (H.Tr. 32, Draper Depo at 22). Her pregnancy with Kimber was the worst time of her life (Draper Depo at 23).

In 1975 and 1976, Mildred was hospitalized for her depression (H.Tr. 45, 250). She was suicidal (H.Tr. 250). Medical records showed she took antipsychotic medications (H.Tr. 266). When Mildred returned home, Emmrie told her nothing was wrong, she should get herself together, and he was tired of her walking around, looking like she did (H.Tr. 46).

Kimber came into this chaotic environment on March 29, 1964 (H.Tr. 31). His delivery was abnormal. He did not cry, and his doctor had to stimulate him (H.Tr. 31-32, Draper Depo at 25). Mildred realized that something was wrong with him (H.Tr. 33, Draper Depo at 25). Kimber did not respond, he did not move from side to side, he never moved his eyes, and he did not smile or coo (H.Tr. 33, Draper Depo at 25).

As Kimber got older, he did not crawl or play with toys (H.Tr. 34). He went into his own world, ringing his little hands, pushing back and forth (H.Tr. 35-36). He blocked out his environment, just sitting, chewing his tongue (H.Tr. 36, 93, Draper Depo at 58).

As he grew older Kimber withdrew and became emotionally distant (H.Tr. 41, 92-93, 100). He tried to separate himself from the others, keeping his clothes separate where they would not touch his brothers' clothes (H.Tr. 37, Draper Depo at 39). He could not tolerate his brother touching him at night so he put an ironing

board in the bed to separate them (Draper Depo at 39). He separated his foods and could not consume foods that had been mixed together or had touched each other (H.Tr. 37-38, 92, Draper Depo at 40-41, 88-89). Kimber kept his emotional distance (H.Tr. 56).

Dr. Draper, a childhood development expert, concluded that Mr. Edwards suffered from an attachment disorder, Asperger's Syndrome, and a nonverbal learning disability (Draper Depo at 25, 26, 32, 33, 44, 62, 65, 83). A normal child has five innate human characteristics necessary to make normal attachments: 1) crying, 2) sucking, 3) smiling, 4) clinging, and 5) following. *Id.* at 25-26. Mr. Edwards did not have these characteristics and Mildred's stress and inability to respond in an appropriate manner exacerbated the problem. *Id.* at 26. As a result, Mr. Edwards could not learn to trust and did not have the capacity for reciprocal relationships, based on mutuality. *Id.* at 26-27, 44. Mr. Edwards cared about people, but could not show affection. *Id.* at 30.

He had trouble with social cues, and was unable to listen and process what he heard. *Id.* at 33, 62. He could send messages, but not receive them. *Id.* at 34. As a result, he isolated himself so that he would not have to communicate with others. *Id.* He built a shell around himself to protect himself from others. *Id.* at 38, 84.

Postconviction Claims

Mr. Edwards' amended motion alleged that counsel was ineffective for failing to investigate and present evidence of Mr. Edwards' chaotic childhood

through his mother – Mildred, his cousin - Tangalayer Mansaw, and Dr. Draper (L.F. 35, 41-43, 43-44, 72-101, 169-92, 192-204). Trial counsel admitted that she never even contacted Mansaw who verified all the violence in the home (H.Tr. 219). Counsel did meet with Mildred prior to trial (H.Tr. 10-11). Mildred answered all the questions asked (H.Tr. 72, 74). She gave counsel permission to get her medical records (H.Tr. 11). She agreed to testify in the penalty phase and did testify truthfully (H.Tr. 12, 74-75).

Yet trial counsel did not know many details about Mr. Edwards’ traumatic childhood and his odd behaviors that signaled mental health issues. Counsel did not know that Mr. Edwards chewed his tongue when he was a child (H.Tr. 193, 198, 217). She had no idea that he separated his clothes and put an ironing board between him and his brother, Daniel (H.Tr. 194).

Counsel failed to learn about the home environment: that Steve suffered from malnutrition as a baby, that Mildred did not have food for the children when they were little, and that Emmrie kept her from going to the store to buy food (H.Tr. 217). Counsel admitted that she had not discovered Emmrie’s abusive and controlling nature or how severely he beat the children (H.Tr. 195-96, 216). Counsel was unaware that Emmrie beat Mildred while she was pregnant with Kimber (H.Tr. 217).

Counsel did not know the extent of the father’s infidelity and the impact it had on Mildred and the children (H.Tr. 215-16). She had no idea that the father’s brother had made sexual advances toward Mildred (H.Tr. 215-16). She knew

nothing about his jealousy, his stalking his wife, and his interfering with her job at a nursing home (H.Tr. 217-18).

Counsel admitted that had she investigated and discovered the evidence of violence in the home, she would have introduced it (H.Tr. 220). Counsel realized that Mildred's trial testimony did not go well (H.Tr. 214). She did not provide an accurate picture of Mr. Edwards during his childhood (H.Tr. 214-15).

Court's Findings

The motion court made no specific findings regarding counsel's failure to call Mildred (L.F. 353-71). See Point IV, *supra*. In its general findings about counsel's trial strategy in penalty phase, the motion court found that counsel chose to present evidence of Mr. Edwards' good acts and that he was loved by family, friends and coworkers (L.F. 358). Counsel called Mr. Edwards' mother to establish that she loved her son and that his death would hurt her (L.F. 358). The strategy was to show Mr. Edwards' value and his family's pain if he were to be executed (L.F. 358-59). The Court concluded, contrary to counsel's testimony, that defense counsel would not have wanted to portray Mr. Edwards as disconnected and from a dysfunctional family (L.F. 359).

As to Mansaw, the court found "that she would have added nothing significant and that there is no reasonable probability that the outcome of the case would have been different had she been called." (L.F. 368).

As to the failure to call Dr. Draper, or another childhood development expert, the court found that such an expert would have been counterproductive to

counsel's trial strategy of showing Mr. Edwards to be "an integral, fully functioning and connected member of a good family of decent people" (L.F. 363). Showing the problems of Mr. Edwards' parents and relationship with their children would have made Mildred "unsympathetic" and portrayed Mr. Edwards as a "disconnected loner who no one would really miss if he was executed." (L.F. 363). Showing Mildred's depression would have also been counterproductive to the trial strategy (L.F. 363).

The motion court criticized Dr. Draper for consulting with other experts and with postconviction counsel (L.F. 363). The court ruled the independence of her expert opinion had been compromised and carried no weight (L.F. 363-64). Further, the outcome would not have been different had she been called (L.F. 364).

The motion court clearly erred.

Standard of Review

The court's findings are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*.

To establish ineffective assistance, Mr. Edwards must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct.1495, 1511-12 (2000). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003)(emphasis in original); *Hutchison v. State*, 150 S.W.3d

292, 302 (Mo. banc 2004). To prove prejudice, Mr. Edwards must show a “reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Wiggins, supra*, at 2542. When deciding if Mr. Edwards established prejudice, this Court must “evaluate the totality of the evidence - - ‘both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*’” *Wiggins, supra* at 2543, quoting *Williams v. Taylor*, 120 S.Ct. at 1515 (emphasis in opinion).

Evidence of a turbulent, chaotic childhood is compelling mitigating evidence that a jury must be allowed to consider under the Eighth Amendment. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). In *Williams*, counsel was ineffective for not investigating and presenting substantial mitigation of Williams’ nightmarish childhood. *Williams, supra* at 1514.

Similarly, Wiggins’ counsel was constitutionally ineffective for failing to investigate Wiggins’ life history, that included severe physical and sexual abuse. *Wiggins, supra*, at 2538. Wiggins’ counsel hired a psychologist who tested Wiggins and concluded he had an IQ of 79, had difficulty coping with demanding situations, and exhibited personality disorder features. *Id.*, at 2536. Counsel reviewed a PSI that referenced Wiggins’ “misery as youth” and documented his placement in foster care. *Id.* Counsel also obtained social service records regarding foster care. *Id.*

This investigation was insufficient. *Id.*, at 2536-38. Counsel had a duty to pursue leads in order to make informed choices about how to proceed and what evidence to present. *Id.* When assessing the reasonableness of an attorney's investigation, a court must not only consider the quantum of evidence known to counsel, but whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 2538. Wiggins' counsel failed to follow leads and discover readily available evidence of severe physical and sexual abuse. *Id.*

In *Rompilla v. Beard*, 125 S.Ct. 2456, 2469 (2005), the Court again found counsel ineffective for failing to investigate and present mitigating evidence. Counsel's failure to examine a file on Rompilla's prior conviction resulted in counsel missing mitigating evidence of Rompilla's childhood and mental health. *Id.* at 2468. Rompilla was reared in a slum environment, quit school at 16 and had a series of incarcerations, often assaultive and related to over indulgence of alcohol. *Id.* Test results suggested mental illness and limited intellectual functioning. *Id.* This evidence was much different than the childhood portrayed by Rompilla and his family. *Id.* The jury never heard this evidence, nor did the mental health experts who examined Rompilla. *Id.* at 2469. Had counsel conducted a reasonable investigation they could have presented mitigating evidence of Rompilla's difficult childhood, mental illness and impaired intellectual functioning. *Id.*

Consistent with *Williams*, *Wiggins*, and *Rompilla*, this Court has found counsel ineffective for failing to investigate and present evidence of medical,

educational, family, and social history. *Hutchison v. State*, 150 S.W.3d 292, 308 (Mo. banc 2004). In *Hutchison*, counsel focused on guilt phase and failed to investigate their client's childhood and mental problems. *Id.* at 302-308. Counsel's failure was unreasonable and *Hutchison* was prejudiced, since the jury heard none of this mitigating evidence. *Id.*

Here, too, counsel failed to follow leads and discover readily available evidence of a traumatic and chaotic childhood. Counsel never interviewed Mr. Edwards' cousin, Mansaw, even though she stayed at the Edwards' house while growing up and was readily available prior to trial. Mansaw lived in Breckenridge, Missouri, but since her mother worked two jobs, Mansaw was always at the Edwards' (H.Tr. 77-79). She celebrated all her birthdays there (H.Tr. 79). Kimber was like a brother to her (H.Tr. 79). Thus, she had much first-hand information about the emotional and physical abuse Mildred and the children suffered. She often got caught in the middle of these fights and tried to intervene (H.Tr. 85, 88-89, 90). When she was burnt with scalding water, she had to be hospitalized (H.Tr. 88-89). She knew how depressed Mildred was and how worn down she was by Emmrie's nagging, constant criticism, jealousy, threats and beatings (H.Tr. 82-89, 97-99).

Contrary to the motion court's ruling, Mansaw's testimony would have been "significant" mitigation. As *Eddings*, *Williams*, *Wiggins* and *Rompilla* teach, a miserable childhood of neglect and violence is relevant mitigating evidence. This Court noted that counsel had provided little evidence in mitigation and did

not explain his behavior. *Edwards*, 116 S.W.3d at 550. Surely, the jury noticed the lack of mitigation too.

The evidence of Mr. Edwards' violent and chaotic childhood bears little relation to the pleas for mercy by Mr. Edwards' family and friends who portrayed him as a loving, caring father (Tr. 1951, 1953-54, 1970-72, 2008-13). This undiscovered "mitigating evidence, taken as a whole might well have influenced the jury's appraisal of [Mr. Edwards'] culpability." *Rompilla*, 125 S.Ct. at 2469, quoting, *Wiggins*, 539 U.S. at 538 and *Williams*, 529 U.S. at 398. It undermines confidence in the outcome.

Further, the evidence of a violent and chaotic childhood was not inconsistent with counsel's strategy to establish that Mr. Edwards had done nice things for family, friends and coworkers and was loved by them. That Mildred was depressed, suicidal and could not adequately care for her children, did not mean that she did not love them. Indeed, this evidence would have shown how remarkable Mr. Edwards' love and kind acts were, given his chaotic and troubled background. The evidence explained why he could not express emotion, why he withdrew into his own world and why he needed to be in control of his surroundings. The evidence was consistent with him caring and loving his family, but it also explained his behavior, which on the surface could appear as being cold and uncaring.

The motion court's suggestion that explaining a difficult, traumatic and chaotic childhood is counterproductive to showing "a good family of decent

people” (L.F. 363) does not withstand scrutiny. Neither does the finding that these problems would have made Mildred “unsympathetic” and Mr. Edwards as a “disconnected loner who no one would really miss if he was executed.” (L.F. 363).

Good families and decent people suffer from depression. Contrary to making Mildred appear “unsympathetic,” this evidence shows that she tried her best to deal with a horribly abusive situation and with her own mental illness. She tried to protect her children as best as she could. The motion court’s findings simply do not square with trial counsel’s testimony that she would have wanted to present this evidence had she discovered it (H.Tr. 220).

Finally, the motion court clearly erred in giving Dr. Draper’s testimony no weight because she consulted with other experts and postconviction counsel (L.F. 363-64). Experts often consult with each other, providing opinions in their relevant areas of expertise. *See e.g., Hutchison, supra* at 307 (several postconviction experts reviewed background material and analyzed Hutchison’s problems). As Dr. Draper, a Harvard-trained child developmentalist explained, she does not administer standardized psychological testing (Draper Depo, 4-6, 10). A qualified psychologist must do that. *Id.* at 10, 111. Only a psychologist or psychiatrist can diagnose a mental illness. *Id.* at 110-111. See also, ABA Guidelines for the Appt. and Performance of Defense Counsel in Death Penalty Cases, Rule 4.1(B), Rev.Ed. 2003, commentary, discussing the need for counsel to consult with experts. Dr. Draper properly consulted with other experts and testified about Mr. Edwards’ childhood development, her area of expertise. The

motion court should not have discounted this testimony. It was relevant mitigating evidence the jury should have considered.

Since counsel failed to investigate and present mitigating evidence, this Court should reverse the denial of postconviction relief and remand for a new penalty phase.

VII. Mitigating Evidence – Expert Testimony

The motion court clearly erred in denying Mr. Edwards’ claim that counsel should have investigated and presented evidence of Mr. Edwards’ mental problems, because this denied him effective assistance of counsel, due process and non-arbitrary and capricious sentencing, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that had counsel reasonably investigated Mr. Edwards’ background and provided that information to qualified experts such as Dr. Logan and Dr. Cross, the experts would have found that Mr. Edwards suffered from an autism spectrum disorder, Asperger’s Disorder, which explained why he appeared cold and distant, and was unable to form appropriate social relationships. He also had a detachment disorder and a nonverbal learning disability that impaired his functioning. Had counsel presented this evidence there is a reasonable probability that the outcome would have been different, at least one juror would have opted for life.

Counsel failed to conduct a reasonable investigation into Mr. Edwards’ traumatic childhood. They did not complete a thorough social history for their experts. Without this information, the experts did not diagnose Mr. Edwards’ mental problems. Had counsel acted reasonably, their pretrial expert, Dr. Cross, would have found Mr. Edwards suffered from a detachment disorder, Asperger’s Disorder, and a nonverbal learning disability (Cross Depo, at 155). Dr. Logan, a

qualified psychiatrist, reviewed all relevant background material and agreed that Mr. Edwards had Asperger's Syndrome, a mental disease or defect (Logan Depo, at 58).

Psychological testing showed a 25 point difference in his verbal and performance IQs, which should have been a red flag that he had problems (Cross Depo, at 65-67, 81, 82, Logan Depo at 38). It signaled brain damage or organic problems (Logan Depo at 38).

The motion court denied the claims that counsel was ineffective for failing to present this mitigating evidence through Dr. Logan (L.F. 361-62) and Dr. Cross (L.F. 364-65). The Court found that Dr. Logan's testimony would have been contrary to the trial strategy of portraying him as a "connected, interacting and functioning member of society" (L.F. 362). The defense's strategy was to portray Mr. Edwards' family as a cohesive, loving group of people. *Id.* The court found that to portray Mildred Edwards as a seriously depressed, dysfunctional mother who did not protect her children from an abusive father was contrary to their strategy. *Id.*

As to Dr. Cross, the Court again found that his testimony would have been counterproductive to the trial strategy of showing Mr. Edwards as having deep and meaningful relationships with his family (L.F. 364). Mildred's severe depression and other mental problems made her an unsympathetic mother who the jury could have reasonably concluded would not have been harmed by the execution of her son (L.F. 364). The Court believed Asperger's Disorder made Mr. Edwards appear

socially disconnected and unable to relate to others (L.F. 365). The Court criticized Dr. Cross for not telling counsel he had not received birth and medical records as promised by counsel and the records were unnecessary for Dr. Cross' evaluation (L.F. 365-66). Dr. Cross' pretrial testing did not show any mental illness (L.F. 366-67). Dr. Cross' opinions and conclusions carried "no weight" since they were reached only after meeting with Mr. Edwards' postconviction counsel (L.F. 367).

These findings are clearly erroneous and must be reversed.

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Mr. Edwards must show that counsel's performance was deficient and prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 120 S.Ct. 1495, 1511-12 (2000). The Sixth Amendment guarantee of effective assistance requires counsel to "discover *all reasonably available* mitigating evidence." *Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003) (emphasis in original).

Counsel must investigate their client's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Id.*, citing 1 ABA Standards for Criminal Justice, 4-4.1, commentary, pg. 4-55. Investigation is essential. *Wiggins, supra*. Critical to this investigation is consulting expert and lay witnesses along with supporting documentation. *See*, ABA Guidelines for the

Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003), Guideline 10.11,F.2. These witnesses and records provide “insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability. . .” *Id.* See also, *Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004) (counsel ineffective for failing to investigate client’s background and present expert testimony).

If a defendant demonstrates his mental condition is significant, he is entitled, at a minimum, to access to a “*competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense.” *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (emphasis added). The Missouri Legislature has found mental illness is significant mitigation. See Sections 565.032.3(2) and (6), RSMo, 2000.

When retaining a psychiatrist or psychologist to evaluate a client’s mental state, counsel must provide the expert with all relevant background materials relevant to the evaluation. See, *Brown v. Sterns*, 304 F.3d 677, 696-97 (7th Cir. 2002) (evaluating psychiatrist’s expert opinion regarding defendant’s mental status will be based primarily on “past psychiatric history, family history, criminal activity and medical records”); *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999) (counsel ineffective for not giving an expert relevant background materials for the evaluation). See, also ABA Standards of Criminal Justice:

(b) Attorney’s duty to provide information. The attorney initiating an evaluation should take appropriate measures to obtain and submit

to the evaluator any record or information that the mental health or mental retardation profession regards as necessary for conducting a thorough evaluation on the matter(s) referred. Ordinarily, such records and information will include relevant medical and psychological records, police and other law enforcement reports, confessions or statements made by defendant, investigative reports, autopsy reports, toxicological studies, and transcripts of pretrial hearings. The attorney should also obtain and submit to the evaluator any other record or information that the attorney believes may be of assistance in facilitating a thorough evaluation on the matter(s) referred.

ABA Standards for Criminal Justice 7-3.5. These standards are “guides to determining what is reasonable,” under the Sixth Amendment. *Rompilla*, 125 S.Ct. at 2466, quoting *Wiggins*, 539 U.S. at 524 and *Strickland*, 466 U.S. at 688.

In *Wallace*, counsel failed to learn about Wallace’s family history, including his psychotic, alcoholic and anorexic mother. 184 F.3d at 1116. Wallace’s home life was chaotic. *Id.* Wallace started sniffing glue and gasoline between the ages of ten and twelve and experienced head traumas. *Id.* An attorney has a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts *do not request.* *Id.* at 1117.

Just like *Wallace*, counsel ineffectively failed to investigate Mr. Edwards' background and provide all relevant information to the experts. They did not do a full social history (H.Tr. 143-44, 146, 211, 219-20, 229). They did not send their experts all the available background records, including birth records and mental health records (H.Tr. 145, 210-11). This background information was critical to evaluating Mr. Edwards (Logan Depo, at 21). A social history is essential to the psychiatric evaluation. *Id.* at 62-63. Counsel had the responsibility of providing the experts with this information, even if they did not request it.

The motion court gave Dr. Cross' opinion no weight because he consulted with other experts and postconviction counsel before arriving at a diagnosis (L.F. 367). Experts often consult with each other, providing opinions in their relevant areas of expertise. *See e.g., Hutchison, supra* at 307 (several postconviction experts reviewed background material and analyzed Hutchison's problems).

Further, a state postconviction's judge's finding that a witness is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995). That observation could not substitute for the jury's appraisal at trial. *Id.* Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).

Having been provided complete information in the 29.15 case, Dr. Logan found that Mr. Edwards suffered from an autism spectrum disorder, Asperger's Disorder (Logan Depo 21-22, 58). This mental disorder is closely related to autism (Logan Depo at 21). It is a pervasive developmental disorder (Logan Depo

at 21). People suffering from this disorder fail to form appropriate social relationships, to recognize social cues, have appropriate responsiveness to other people and have preoccupations with objects, of very narrow, stereotyped interests (Logan Depo at 22).

Mr. Edwards' autism spectrum disorder would have been mitigating. It would have explained his odd demeanor and inappropriate facial expressions. Without expert testimony, Mr. Edwards could seem uncaring and without remorse. With the testimony, jurors would have understood that he could not function normally. He could not interact with others in a socially appropriate way. He had to retreat into his own psychological world. He needed to be rigid and controlling. That is the only way he could cope.

Counsel failed to give their mental health experts a complete social history and relevant background records. They did not present available evidence of Mr. Edwards' emotional and mental problems. Had jurors heard such testimony, at least one juror likely would have opted for a life sentence. A new penalty phase should result.

VIII. Mr. Edward's Competence at Trial

The motion court clearly erred in denying Mr. Edwards' claim that counsel failed to adequately investigate and litigate his competency before trial, because this denied Mr. Edwards his rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel had doubts about Mr. Edwards' competency as he was irrational and could not assist in his defense, counsel hired experts to evaluate Mr. Edwards, but did not provide them with a complete social history and background records necessary for a thorough and accurate evaluation and had counsel provided the necessary information, a qualified expert, such as Dr. Logan, would have found that Mr. Edwards suffered from an autism spectrum disorder, Asperger's Syndrome, a mental disease or defect, that made him unable to assist counsel, since he could not consult with counsel with a reasonable degree of rational understanding.

Trial counsel knew something was wrong with Mr. Edwards; he could not listen and respond rationally (H.Tr.205). Counsel could not communicate with him (H.Tr. 138, 205). Since counsel thought Mr. Edwards was incompetent and could not communicate in a rational way, they hired experts to examine him (H.Tr. 108-09, 145-46, 209-10). However, they did not do a full social history and

provide this background information to the experts (H.Tr. 143-44, 146, 211, 219-20, 229).

Had counsel adequately investigated and provided their experts with all relevant information, they would have discovered that Mr. Edwards suffers from a pervasive development disorder, Asperger's Disorder (Logan Depo, at 58, Cross Depo, at 155). As a result, he was incompetent to stand trial (Logan Depo, at 58.). He could not assist in his defense, he did not have the ability to consult with his counsel with a reasonable degree of rational understanding. *Id.*

Counsel was ineffective in failing to investigate competency and provide their experts with all relevant information necessary for a competency evaluation. As a result, this Court should reverse and remand for new trial proceedings.

Counsel believed Mr. Edwards was Incompetent

Trial counsel Charlie Moreland and Michelle Monahan represented Mr. Edwards 16 months before trial (H.Tr. 104, 107). Moreland had handled more than 50 capital cases over the past ten years with 18 going to trial (H.Tr. 104-05). He had never had a client more irrational than Mr. Edwards (H.Tr. 173). He focused on details and missed the big picture (H.Tr. 119). Mr. Edwards went over the same things over and over (H.Tr. 120-21, 170-72). He fixated on irrelevant details, obsessed about them, to the exclusion of relevant, important information helpful to his defense (H.Tr. 124-27, 129-30, 131-32, 136, 172, 173). Counsel could not communicate with Mr. Edwards (H.Tr. 121, 166). They could decipher his words, but could not understand his message (H.Tr. 121). Similarly, Mr.

Edwards could not comprehend the advice counsel provided him (H.Tr. 121, 124). Their relationship broke down quickly; they could not communicate (H.Tr. 128, 133-34). Counsel's investigator believed Mr. Edwards was "delusional" and was in "Kimber's World" (H.Tr. 130-31). Every member of the defense team was frustrated with communication problems (H.Tr. 138).

Mr. Edwards did not understand consequences (H.Tr. 136, 139). He believed that after the suppression hearing he would walk out the door and that his case would not go to trial (H.Tr. 136). He could not understand that his statement to police would be viewed as a confession (H.Tr. 139).

Incomplete Evaluations

Counsel hired three mental health experts, Dr. Cross, Dr. Stacey, and Dr. Rabun to evaluate Mr. Edwards for competency, his inability to communicate and assist his defense (H.Tr. 109, 145-46, 155, 157, 167). However, counsel had not fully investigated and prepared a social history for the experts (H.Tr. 143, 144, 146, 166, 167). Counsel did not provide the experts with all relevant records, including Mr. Edwards' medical records and his mother's mental health records (H.Tr. 145, 166).

Counsel did not know much information critical to a mental health evaluation (H.Tr. 111). Counsel never knew that Mr. Edwards did not respond to his mother as an infant; he did not cry, suck, cling or smile; he did not respond to facial expressions or coos (H.Tr. 111). Counsel was unaware of the family violence, turmoil and his mother's depression (H.Tr. 115-16). They did not know

about unusual behaviors, like tongue chewing (H.Tr. 112, 119), and separating clothes (H.Tr. 113-14). Since counsel did not have this information, they could not provide a complete social history and all the relevant records to their experts. *Id.* at 21, 30-31, 42, 57, 102-09, 111).

Based on the incomplete information, none of the three doctors found Mr. Edwards incompetent, unable to assist in his defense (H.Tr. 167-68, 169). Had counsel provided their experts with all relevant background material, they would have discovered that Mr. Edwards suffered from a mental illness. A social history is essential to the psychiatric evaluation. (Logan Depo, at 62-63, Cross Depo, at 39).

Having been provided complete information in the 29.15 case, Dr. Logan found that Mr. Edwards suffered from an autism spectrum disorder, Asperger's Disorder, and was incompetent to stand trial (Logan Depo 21-22, 45-49, 58). He had an intellectual understanding of the roles of the attorneys and judge, the charges against him and penalties. *Id.* at 45-46. However, he was unable to work with defense counsel, he could not interact or understand what counsel tried to communicate. *Id.* at 46-47, 58. Mr. Edwards could not incorporate his attorneys' advice. *Id.* at 48, 56-57, 58-59. His inability to communicate was not caused by Mr. Edwards being difficult, rather it stemmed from his mental disorder. *Id.* at 49.

Motion Court's Findings

The motion court denied Mr. Edwards' postconviction claim (L.F. 33-35, 52-72) that counsel was ineffective for failing to litigate his competency to stand

trial (L.F. 361-63). The court found that trial counsel did investigate Mr. Edwards' social history and found nothing to suggest a mental disease or defect, such as Asperger's Disorder (L.F. 361-62). The Court would not have found Mr. Edwards incompetent based on Dr. Logan's testimony (L.F. 362). Since Mr. Edwards understood the role of the judge, his attorney, the prosecutor, the jury and the courtroom proceedings, he was competent (L.F. 362-63). These findings and conclusions show that the motion court applied the wrong legal standard for competency and thus, are clearly erroneous.

Standard of Review

The court's findings are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*.

A conviction of an incompetent defendant violates due process. *Pate v. Robinson*, 383 U.S. 375 (1966). State procedures must be adequate to protect that right. *Id.* To be competent, an accused must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or *to assist in his own defense* shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Section 552.020 (emphasis added).

Counsel can be ineffective for failing to investigate and litigate competency. *Hemme v. State*, 680 S.W.2d 734, 736 (Mo. App. W.D. 1984). If counsel believes his client is incompetent, he must inform the court and litigate the issue. *Miller v. State*, 498 S.W.2d 79 (Mo. App. K.C. 1973); and *Hemme, supra* at 736.

To establish that counsel was ineffective for failing to investigate and litigate competency, Mr. Edwards must demonstrate that counsel acted unreasonably and show that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice, Mr. Edwards must demonstrate a reasonable probability that he was incompetent, sufficient to undermine confidence in the outcome. *Hubbard v. State*, 31 S.W.3d 25, 28 (Mo. App. W.D. 2000); *see also, Ford v. Bowersox*, 256 F.3d 783 (8th Cir. 2001) (counsel's failure to request a competency hearing objectively unreasonable where evidence raised a substantial doubt about the defendant's competence to stand trial).

Here, counsel believed their client was incompetent. He was delusional and irrational. They could not communicate with him. Counsel hired three experts, but failed to provide them with the necessary information to adequately evaluate him.

Counsel was ineffective. Their conduct was similar to that in *Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005). There, counsel suspected that their client might be incompetent and had him evaluated by a psychologist eight months before his trial began. *Id.* at 559. The psychologists noted several psychological

impairments, but deemed Burt fit to stand trial. *Id.* at 559, 561. The psychologist did not have any of Burt's records showing he had taken powerful psychotropic medications. *Id.* During trial, Burt abruptly changed his plea to guilty against the advice of his attorneys. *Id.* at 562. Counsel never requested further evaluation to determine competency. *Id.*

The 7th Circuit concluded counsel was ineffective for failing to seek an additional competency hearing. *Id.* at 567-68. They knew their client was irrational, his desire to smoke was more important than getting a death sentence. *Id.* at 567. Burt had frequent mood swings. *Id.* at 568. He was belligerent and explosive. *Id.* Burt had threatened to kill someone in the courthouse. *Id.* Burt did not comprehend their legal advice. *Id.* at 570. Counsel had no strategic reason for not requesting a competency hearing. *Id.* at 568. They had not adequately investigated their client's mental health problems. *Id.* They had not provided the pretrial expert with the relevant records for the evaluation. *Id.* at 559. The Court found prejudice, a reasonable probability that Burt would have been found incompetent had counsel requested a competency hearing. *Id.* at 569.

Here too, counsel was ineffective. They believed their client was incompetent, but failed to investigate and provide their experts with relevant background material. The motion court denied this claim, misapplying the legal standard for competency under *Dusky*. Since Mr. Edwards had a rational and factual understanding of the legal proceedings against him, the Court concluded he was competent (L.F. 362-63). The Court ignored that he could not consult with

his lawyer with a reasonable degree of rational understanding, that he could not assist in his own defense. *Dusky, supra*; § 552.020. Had the motion court applied the appropriate legal standard, it would have found Mr. Edwards incompetent. This Court must reverse and remand for new trial proceedings. Mr. Edwards should not be tried unless and until he is competent to stand trial.

IX. Mr. Edward's Competence During the 29.15 Proceedings

The motion court clearly erred in ruling on Mr. Edwards' claims without first determining whether he was competent to proceed, because this deprived Mr. Edwards of his rights to due process, assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21 in that counsel's amended motion pled that he was incompetent and could not rationally communicate, understand the proceedings, or assist counsel; Dr. Logan testified that he suffered from a mental disease or defect and was not competent in the 29.15 proceedings and that counsel were doing what they thought was in Mr. Edwards best interests, contrary to Mr. Edwards' wishes; counsel and the court led Mr. Edwards to believe they were proceeding on his *pro se* motion when in reality, they were proceeding on counsel's amended motion that omitted the *pro se* claims; and counsel refused to allow Mr. Edwards to testify during the 29.15 proceedings, despite his unequivocal request. These facts constituted reasonable cause for the motion court to conclude that Mr. Edwards could not "consult with his lawyer with a reasonable degree of rational understanding" and did not possess a "rational as well as factual understanding of the proceedings against him." Additionally, if Mr. Edwards is incompetent, he cannot be executed.

Alternatively, the motion court abused its discretion in overruling Mr. Edwards' *pro se* motion for continuance and should have allowed 29.15 counsel to withdraw so that conflict-free counsel could be appointed.

Mr. Edwards' case raises an unanswered question: whether the right to counsel under 29.15 implies a right of the movant to be competent for those proceedings. Other courts¹⁴ addressing this issue have found such a right, especially where the postconviction procedures bar successive petitions. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003); *Carter v. State*, 706 So.2d 873, 876 (Fla. 1998); *State v. Debra A.E.*, 523 N.W.2d 727, 735-36 (Wis. 1994); and *People v. Owens*, 564 N.E.2d 1184, 1190 (1990). Here, the motion court had reasonable cause to believe Mr. Edwards was incompetent at the 29.15 proceedings. Thus, the motion court should have stayed the proceedings and

¹⁴ Counsel has found no Missouri case directly on point. However, cases have held that a movant has no right to a competency determination under §552.020, *Shaw v. State*, 686 S.W.2d 513 (Mo. App., E.D. 1985); *Brown v. State*, 485 S.W.2d 424 (Mo. 1972). Judge Dierker did order a competency evaluation in a death penalty postconviction case to determine whether the client was competent to proceed. His subsequent finding of competency in the 29.15 action was not addressed on the appeal. *Simmons v. State*, 955 S.W.2d 752 (Mo. banc 1997). Appellant asks this Court to take judicial notice of its files in Mr. Simmons' case.

ordered a competency evaluation to determine Mr. Edwards' competency and his ability to assist counsel in the 29.15 proceedings.

Postconviction counsel believed that Mr. Edwards was not competent and could not assist them in the 29.15 proceeding (L.F. 65). In his amended motion, counsel indicated that Mr. Edwards was unable to assist counsel in their pursuit of postconviction relief (L.F. 65). According to the pleading, Mr. Edwards and counsel's focus conflicted and counsel pursued goals without Mr. Edwards' understanding or assistance (L.F. 65). Counsel believed Mr. Edwards' mental illness prevented him from making informed decisions regarding his defense and prevented him from assisting counsel at trial and during the postconviction process (L.F. 66).

Dr. Logan concluded that Mr. Edwards suffered from a pervasive developmental disorder closely related to autism, Asperger's Disorder (Logan Depo at 18, 20-21). As a result, Dr. Logan did not believe that Mr. Edwards was competent (Logan Depo at 45-46). Mr. Edwards' intellectual understanding was fine; he knew the roles of counsel, the judge and prosecutor, and understood the charges and the penalties. *Id.* However, his mental deficits made him unable to assist defense counsel. *Id.* at 46. Mr. Edwards could not incorporate his attorneys' advice. *Id.* at 48. Mr. Edwards's postconviction attorneys proceeded, based on their obligation to do what they thought was in Mr. Edwards' best interests, even when Mr. Edwards disagreed. *Id.* at 80.

Even though counsel's pleading and their expert concluded that Mr. Edwards was incompetent, counsel did not request a competency hearing or ask the motion court to stay the proceedings until Mr. Edwards became competent. Rather, counsel proceeded without Mr. Edwards' assistance.

Counsel pursued different goals than those desired by Mr. Edwards (L.F. 25-306), dropping most of his *pro se* claims (L.F. 4-14). The lack of communication between counsel and Mr. Edwards was apparent from the start of the hearing: counsel moved to amend the *pro se* claims by interlineations (H.Tr. 8), even though they had abandoned the claim by not including it and the amended motion. Rule 29.15 (i).¹⁵ Counsel also refused to allow Mr. Edwards to testify at the 29.15 hearing (H.Tr. 275-76).

Standard of Review

This Court reviews the motion court's decision for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993). "If a judge at any stage of a criminal proceeding has reasonable cause to believe the accused, as a result of mental disease or defect, lacks capacity to understand the proceedings against him

¹⁵ Rule 29.15 (i) provides that the hearing "shall be confined to the claims contained in the last timely motion." Thus, the motion court cannot consider *pro se* claims not included in the amended motion. *See, e.g., Cullom v. State*, 141 S.W.3d 477 (Mo. App., E.D. 2004) (movant not entitled to postconviction review of *pro se* claim where amended motion did not raise the claim).

or to assist in his defense, the judge must order a mental examination.” *State v. Messenheimer*, 817 S.W.2d 273, 278 (Mo. App., S.D. 1991). *See, also, Drope v. Missouri*, 420 U.S. 162, 180 (1975). This principle ensures a defendant’s due process right to a fair trial. *Id.*, at 171-72. Additionally, the Eighth Amendment forbids executing a prisoner who is mentally incompetent. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). *See, also*, §552.060.1.

But what about the proceedings in between the criminal trial and the execution? A court’s duty to insure competency has been applied when a convicted defendant *waives* his rights to postconviction proceedings. *See, Rees v. Peyton*, 384 U.S. 312, 313-14 (1966) (per curiam) (the Supreme Court ordered the case remanded for a determination as to Rees’ competency to forgo further appeals of his federal habeas action); *Smith v. State*, 100 S.W.3d 805 (Mo. banc 2003) (evidence sufficient to support finding that Smith was competent to dismiss 29.15 motion).

However, the issue here is not whether Mr. Edwards is competent to *waive* his 29.15 proceeding. Rather, the issue is whether Mr. Edwards is competent to *proceed* with his 29.15 action. Given postconviction counsel’s statements that Mr. Edwards was incompetent, that he could not understand and assist in litigating his postconviction claims, and the evidence supporting those assertions, the motion court should have stayed the proceedings, ordered a mental evaluation, and refused to proceed until and unless the court found that Mr. Edwards was competent and could assist in the 29.15 proceedings.

In *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003), the court ruled that the statutory right to counsel in federal postconviction proceedings in capital cases implies a statutory right to competence in those proceedings. Counsel's assistance depends in substantial measure on the petitioner's ability to communicate with the counsel. *Id.* Implying a right to competence from counsel was supported by Supreme Court decisions. *Id.*, discussing, *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) and *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring in the judgment). The Supreme Court often grounds the constitutional competence-to-stand-trial requirement in the Sixth Amendment right to counsel. *Rohan ex rel. Gates, supra*, at 813. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel ..." *Id.*, quoting, *Cooper*, 517 U.S. at 354; and *Riggins*, 504 U.S. at 139-40. *Rees* also supported the 9th Circuit's decision. *Rohan ex rel. Gates, supra*, at 815.

State court decisions also have required petitioners to be competent when pursuing state postconviction relief. *Rohan ex rel. Gates, supra*, at 816, citing, *Carter v. State*, 706 So.2d 873, 876 (Fla.1998); *State v. Debra A.E.*, 523 N.W.2d 727, 735-36 (Wis.1994); *People v. Owens*, 564 N.E.2d 1184, 1190 (Ill. 1990).

In *Carter*, 706 So.2d at 875, the Florida Supreme Court held that a judicial determination of competency is required if reasonable grounds exist to believe a capital defendant is incompetent to proceed in postconviction proceedings. The Court ruled that the defendant must be competent if factual matters are at issue,

which require a defendant's input. *Id.* The Court distinguished purely legal issues, such as a vagueness challenge to the heinous, atrocious or cruel instruction. *Id.* at 876, n.4. Such claims can proceed without a defendant's input. *Id.* at 875-76. In contrast, resolution of factual claims require a competent defendant, who can assist counsel by relaying factual information. *Id.* at 875. Otherwise, the "right to collateral counsel, as well as postconviction proceedings themselves would be practically meaningless." *Id.*

In *Debra A.E.*, 523 N.W.2d at 729, the Wisconsin Supreme Court held that a circuit court should determine competency when it had reason to believe that the defendant, in the postconviction relief proceedings, is unable to assist counsel or make decisions committed by the law to defendant without a reasonable degree of rational understanding. The Court considered two defendants in separate cases, Nesja and Debra A.E. *Id.* at 730-731. Nesja sent his attorney volumes of letters indicating delusional thinking and could not assist counsel in determining the merit of potential issues. *Id.* at 730. Debra A.E. had been found incompetent before trial and postconviction counsel had questions about her competency to make decisions regarding further legal proceedings or her ability to assist in the postconviction proceedings. *Id.* Since defendants must decide whether to proceed with or forego postconviction relief, what objectives to pursue, and what issues to raise, the defendant must be competent. *Id.*, at 732. Defendants must assist counsel in developing issues and providing a factual foundation for the claims. *Id.*

The Court applied a “reason to doubt” standard for competency, the same standard as for trial proceedings. *Id.* at 734. Postconviction counsel may file a motion for competency, but, even without such a motion, a circuit court must, *sua sponte*, raise the issue if it has reason to doubt a defendant’s competency. *Id.*

Similarly, Illinois has found that courts are obligated to consider whether a postconviction petitioner is mentally competent to consult with counsel, where acts in the record raise a *bona fide* doubt as to petitioner’s mental ability to communicate with postconviction counsel. *Owens*, 564 N.E.2d at 1188. In Illinois, the statute providing postconviction relief requires the appointment of counsel. *Id.* at 1186-87. Counsel must consult with the indigent petitioner, ascertain his claims and examine the record, and then amend the petition to present the constitutional claims. *Id.* at 1187. However, counsel cannot perform these functions and raise all viable claims if his client cannot rationally communicate because of a mental defect. *Id.*, at 1187-88.

Like these states, Rule 29.15(e) provides the mandatory appointment for counsel. Rule 29.15(e). The rule mandates that counsel: “ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims “*known to the movant*” as a basis for attacking the judgment and sentence.” *Id.* (emphasis added). Counsel cannot perform these duties where a client is incompetent and cannot rationally communicate due to a mental defect. Mr. Edwards’ counsel admitted as much, verifying that Mr. Edwards could not assist in the pursuit of postconviction relief. He could not

make informed decisions about what issues to raise. Counsel pursued different goals than Mr. Edwards. Due to Mr. Edwards' mental illness, counsel could not ascertain facts to support claims or, include all meritorious claims. Under these circumstances, the motion court should have stayed the proceedings to determine Mr. Edwards' competence.

Mr. Edwards recognizes that other courts have ruled to the contrary. *Commonwealth v. Haag*, 809 A.2d 271, 280-81 & n. 11, 282-85 (Pa. 2002); *Ex parte Mines*, 26 S.W.3d 910, 912-16 (Tex. Crim. App. 2000); *Fisher v. State*, 845 P.2d 1272, 1275-77 (Okla. Crim. App. 1992). These cases are inapplicable and unpersuasive.

In Oklahoma, an incompetent petitioner can file a successive petition upon regaining competence. *Fisher*, 845 P.2d at 1277. However, in Missouri, there is no provision for successive petitions under Rule 29.15 (b). Rather, the failure to file a motion within the time provided by the Rule constitutes a complete waiver of the claim. *Smith v. State*, 21 S.W.3d 830, 831 (Mo. banc 2000); *Vicory v. State*, 117 S.W.3d 158, 160-61 (Mo. App. S.D. 2003).

Haag also relied on the prospect of successive petitions to reject a competence requirement, citing *Fisher*, in support. 809 A.2d at 280-81 & n. 11. The Court ruled that successive petitions would not be time-barred. *Haag*, 809 A.2d at 280 n. 11.

The Ninth Circuit analyzed *Mines*, decided by the Texas Court of Criminal Appeals, and found it unpersuasive. *Rohan*, 334 F.3d at 817. *Mines* took an

extreme position that competence was not relevant at all. *Id.* The Texas decision simply enumerated the rights a habeas petitioner does not enjoy. *Id.* That did not address the relevance of competence to those rights he does. *Id.*

Since this Court does not allow successive petitions and finds a waiver of claims not pled and litigated in 29.15 proceedings, this Court should rule that a movant must be competent to proceed in 29.15 proceeding. The court should remand for a competency determination.

Conflict of Interest

Alternatively, should this Court find insufficient facts to question Mr. Edwards' competency, this Court should rule that the motion court abused its discretion in overruling Mr. Edwards' *pro se* motion for continuance, so he could obtain conflict-free counsel. Mr. Edwards filed a motion indicating he wanted new counsel appointed (L.F. 311-13). The motion court summarily denied the motion (H.Tr. 6-8).

Mr. Edwards does not have the right to the counsel of his choice, but postconviction counsel should not represent a movant if he has a conflict of interest. *See e.g., State v. Taylor*, 1 S.W.3d 610, 611-12 (Mo. App., W.D. 1999) (Defendant's trial counsel represented him on direct appeal and advised him not to file a rule 29.15 motion); *State v. Griddine*, 75 S.W.3d 741, 742-43 (Mo. App., W.D. 2002) (same).

In *Griddine* and *Taylor*, counsel had an actual conflict of interest, because counsel "was caught between his obligation to do his best for [Mr.] Taylor and a

desire to protect his own reputation and financial interests.” *Griddine, supra*, at 744, quoting, *Taylor* at 612. Because of the conflict, Taylor and Griddine could not obtain review of their ineffective assistance of counsel claims.

Similarly, counsel can have an actual conflict of interest if they have irreconcilable difference with their client. *State v. Smith*, 586 S.W.2d 399, 401 (Mo. App., W.D. 1979). Such a conflict exists where there is a total breakdown in communication. *Id.*, citing, *United States v. Hart*, 557 F.2d 162 (8th Cir. 1977).

The court knew that counsel and Mr. Edwards had irreconcilable differences. They were not communicating and were pursuing different objectives (L.F. 65-66). Counsel led Mr. Edwards to believe he could amend his *pro se* motion on the date of the hearing even though Rule 29.15 and cases had ruled they could only proceed on claims in the amended motion. Counsel would not allow Mr. Edwards to testify and would not discuss it with him (H.Tr. 275-76). Because of this total breakdown in communication and resulting conflict, the motion court abused its discretion in denying Mr. Edwards’ motion for continuance and substitute counsel. This Court should reverse and remand for appointment of conflict-free counsel who will represent Mr. Edwards in the 29.15 proceedings.

**X. Judge's Statements About Public Defenders Called Into
Question His Ability to Be Fair and Impartial**

The motion court erred in denying Mr. Edwards' motion for a change of judge thereby denying Mr. Edwards due process, a full and fair hearing, and reliable sentencing U.S. Const., Amends. VI, VIII, XIV, and Mo. Const., Art. I, §§10, 18(a), and 21, in that Judge Seigel's derogatory statements about public defenders, that they seem "to do everything they can to not represent people" and that "if they want to declare war on me, they've got it," made only days before Mr. Edwards' hearing, would cause a reasonable observer to question whether the judge could be fair and impartial, since Mr. Edwards was represented by public defenders. Mr. Edwards has been sentenced to death; therefore, due process and the Eighth Amendment require heightened reliability and careful review, not a decision-maker who has shown a high degree of antagonism as to make a fair judgment impossible.

Mr. Edwards' 29.15 hearing was held on September 13 and 14, 2004 (H.Tr. 4, 104). Only a few days earlier, Judge Seigel made disparaging remarks about public defenders in a criminal case before him. He said, "the public defenders office seems to do everything they can to not represent people" (L.F. 315). Judge Seigel said, "the Public Defender's Office is trying to do anything they can do to not represent somebody" (L.F. 315). Judge Seigel threatened, "if they [the public defender system] want to declare war on me, they've got it" (L.F. 315).

Having learned of the Court's disparaging remarks, Mr. Edwards' counsel was concerned that Judge Seigel could not be fair and impartial and filed a motion to disqualify him (L.F. 314-22. D.Tr. 1-2). Judge Weisman considered the motion and denied it (D.Tr. 4). The court ruled that even if Judge Seigel made these statements, they did not go to his ability and willingness to give Mr. Edwards a fair hearing (D.Tr. 4).

Judge Seigel then heard the evidence at the 29.15 hearing and by deposition and denied relief (L.F. 353-71).

Standard of Review and Constitutional Provisions

Due process requires a fair hearing in 29.15 proceedings. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991). See, also, *In re Murchison*, 349 U.S. 133, 136 (1955). The test for disqualification is "whether a reasonable person would have a factual basis to find an appearance of impropriety and doubt the impartiality of the court." *State v. Smulls*, 935 S.W.2d 9, 24 (Mo. banc 1996). Where a judge has a deep-seated favoritism or antagonism that would make a fair judgment impossible, he must recuse himself. *Liteky v. United States*, 510 U.S. 540, 555 (1994). This Court reviews whether the trial judge erred in refusing to sustain a motion to recuse. *Smulls, supra*.

In *Smulls*, the trial judge's statements on the record indicated racial bias and required his disqualification in the 29.15 proceedings. *Id.*, at 25-27. The factual allegations in Smulls' motion for disqualification were compelling in light of the trial record. *Id.*, at 25. Even though this Court acknowledged benefits from

having the judge who presided at trial rule on postconviction claims, it recognized fundamental fairness may require the trial judge to recuse in a postconviction proceeding. *Id.*

Fundamental fairness requires a trial judge to be free of the appearance of bias against the defendant. *Id.* The standard is not whether the judge is actually prejudiced. Due process and Rule 2, Canon 3D require a judge to recuse where his “impartiality might reasonably be questioned.” *Smulls, supra* at 26, citing *In re Murchison*, 349 U.S. 133, 136 (1955). “Justice must satisfy the appearance of justice.” *Aetna Life Co. v. Lavoie*, 475 U.S. 813, 825 (1985). The benefit of any doubt is accorded a litigant, not a judge. *Smulls*, 935 S.W.2d at 26-27.

Here, as in *Smulls*, Judge Weisman erred in not granting Mr. Edwards’ motion for change of judge. Judge Seigel’s disparaging remarks about public defenders, that they “do everything they can to not represent people” (L.F. 315) and that he was “at war” with the public defender’s office (L.F. 315) would cause a reasonable observer to question whether he could be impartial. He had such a high degree of antagonism towards public defenders that a fair judgment was impossible.

Additionally, this is a death case; therefore, due process and the Eighth Amendment require a heightened need for reliability. *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985). This Court should reverse and remand for a new hearing before a fair and impartial judge.

CONCLUSION

Mr. Edwards requests the following relief:

Points I, VI, VII, a new penalty phase;

Points II and VIII, a new trial;

Point III, a remand for an evidentiary hearing in which Orthell is called to testify;

Point IV, a remand for specific findings of fact and conclusions of law;

Point V, a remand so that Mr. Edwards can testify;

Point IX, a remand for a competency hearing; and

Point X, a remand for a new 29.15 proceeding before a different judge.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 28,189 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in February, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 6th day of February, 2006, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Melinda K. Pendergraph