

No. SC86895

IN THE
SUPREME COURT OF MISSOURI

KIMBER EDWARDS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

APPEAL FROM ST. LOUIS COUNTY CIRCUIT COURT
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE MARK D. SEIGEL, JUDGE

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a St. Louis County Circuit Court judgment overruling Appellant's Rule 29.15 postconviction motion seeking to vacate and set aside his first-degree murder conviction and death sentence. Because this appeal involves a sentence of death, this Court has exclusive appellate jurisdiction. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

Appellant was indicted in St. Louis County Circuit Court on one count of first-degree murder and one count of armed criminal action for the contract killing of his ex-wife, Kimberly Cantrell, who was shot to death in her University City home on August 22, 2000. (L.F. 20-21).¹ A jury trial on the murder charge was held in St. Louis County Circuit Court before Judge Mark D. Seigel from April 17 to April 26, 2002. (L.F. 8-10; PCR

¹The abbreviations “L.F.” and “Tr.” refer to the legal file and transcript in Appellant’s direct appeal, No. SC84648. The abbreviations “PCR L.F.,” “PCR Tr.,” and “Supp. PCR Tr.” refer to the legal file, transcript, and supplemental transcript in this postconviction appeal. Deposition testimony admitted into evidence by the motion court is identified by the name of the deponent and the abbreviation “Depo.” The abbreviation “State’s Ex.” and “Deft’s Ex.” refer to exhibits offered by the State and Appellant and admitted into evidence during Appellant’s trial. The abbreviation “Movant’s Ex.” refers to exhibits offered by Appellant and admitted into evidence during the postconviction evidentiary hearing.

L.F. 354). Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

Appellant and Kimberly Cantrell married in 1985. (Tr. 1326). Their daughter Erica was born in 1986. (Tr. 991). They divorced in 1990, and Appellant was ordered to pay \$35 per week in child support. (Tr. 1327). In 1995, Appellant's support payment increased to \$351 per month. (Tr. 1328, 1339).

Appellant filed three modification motions seeking to reduce this payment, but was unsuccessful. (Tr. 1327-32).

When Appellant failed to pay any child support from March 1999 to March 2000, he was indicted on a felony non-support charge. (Tr. 1665, 1669-71; State's Ex. 84A). That indictment listed Appellant's ex-wife as a witness. (Tr. 1671; State's Ex. 84A). The State offered Appellant a plea agreement for a suspended imposition of sentence and five years probation, including a lump-sum payment of \$1500 and an increased support payment of \$500 per month. (Tr. 1686-89). Appellant never responded to that offer. (Tr. 1691). A scheduling conference in the non-support case was scheduled for August 25, 2000, two days before Ms. Cantrell's body was discovered. (Tr.

1673-74, 1693).

Appellant, a St. Louis City Correctional Officer, and his second wife (Jada) owned twelve apartments on Palm Street in St. Louis City. (Tr. 1221, 1712, 1804). In Spring or Summer 2000, Appellant asked Hughie Wilson, a former tenant and apartment complex employee, where he could get a “throwaway” gun or “burn”— a gun used once and then discarded. (Tr. 1621, 1651-52). Hughie’s brother, Orthel Wilson, was then living in one of Appellant’s apartments at 2101 Palm.² (Tr. 1421-22, 1807, 1856). Orthel, whom Appellant also referred to as “Theo,” lived rent-free in the apartment in exchange for doing maintenance work and other jobs for Appellant at the apartment complex. (Tr. 1005-06, 1813, 1851).

In early August 2000, Hughie, while visiting his brother Orthel at the Palm Street apartment, saw a .38 caliber handgun sitting on a table in Orthel’s room. (Tr. 1612-14, 1654).

Appellant, who was also there, told Orthel to put the gun away. (Tr. 1614). Hughie later testified that the gun he saw looked

²Because they share the same last name, Hughie and Orthel Wilson are referred to by their first names in this brief.

similar to the gun eventually identified as the murder weapon. (Tr. 1615; State's Ex. 52).

Appellant visited Orthel at the apartment after 8 p.m. on August 21, 2000 — the day before the murder. (Tr. 1428). The next morning, August 22, 2000, Orthel and his roommate, Donnell Watson, drove in Donnell's car to the Creve Coeur Racquet Club, where they both worked. (Tr. 1424, 1430). Orthel had a black backpack with him when he left that morning. (Tr. 1433). After they got off work at approximately 4 p.m., Orthel asked Donnell to drop him off at the corner of Midland and Olive. (Tr. 1436). Orthel, still carrying his black backpack, got out of the car at 4:30 p.m. (Tr. 1438-39). Appellant's ex-wife lived at 1122 Midland, which was only 200-300 yards from where Orthel was dropped off. (Tr. 992, 1279).

Ms. Cantrell's next-door neighbor, ninth-grader Christopher Harrington, saw Orthel, who was carrying the black backpack, knocking and banging on the victim's door late that same afternoon. (Tr. 1106). Orthel walked away after no one answered the door. (Tr. 1083). Christopher's twelve-year

old brother, Brandon Harrington, was also home that afternoon, and heard several gunshots come from Ms. Cantrell's apartment at approximately 5:30 p.m. (Tr. 1111-12, 1115). After the first shot, Brandon heard a woman scream and a door slam. (Tr. 1112-13, 1121).

Ms. Cantrell had been seen leaving work at approximately 5:06 p.m. that same day (August 22). (Tr. 1710; L.F. 448). It was a twelve- or thirteen-minute drive from Ms. Cantrell's office to her home. (Tr. 1277). Ms. Cantrell was also enrolled in a computer class at a local university. (Tr. 1709). Ms. Cantrell did not show up to the first class, which was held on August 22, 2000, at 7:30 p.m. (Tr. 1709; L.F. 450). Ms. Cantrell also did not show up for work the next morning (August 23, 2000) and never called to say she was not coming, "which was unusual for her." (Tr. 1710; L.F. 448).

On August 23, 2000, Ms. Cantrell and Appellant's daughter, Erica, called her Aunt Phyllis (Ms. Cantrell's sister) to tell her that her mother had not shown up for work. (Tr. 975, 995). Erica was scheduled to return home to her mother the next day after having been with Appellant the previous three

weeks. (Tr. 994). Later that evening, Aunt Phyllis, Appellant's mother (Mildred Edwards), and another woman went to Ms. Cantrell's home to check on her. (Tr. 974-77). They entered with a key and discovered Ms. Cantrell's body. (Tr. 978). She had been shot twice in the head at close range. (Tr. 1132-40).

After talking with Ms. Cantrell's family and partially investigating the crime scene, University City detectives went to Appellant's St. Louis City home in the early-morning hours of August 24 to see if Appellant had any information they could use in the investigation and to exclude Appellant as a potential suspect. (Tr. 1241-42, 1256, 1280). Appellant voluntarily agreed to go with the detectives to the University City police station. (Tr. 989, 1242, 1464). The detectives drove Appellant, his wife (Jada), Appellant's daughters (Erica and Britney), and Jada's daughter (Tierra) to the police station. (Tr. 999, 1243-44, 1260, 1465).

Appellant told the detectives that he did not kill his ex-wife and did not know anybody that would want her dead. (Tr. 1193-94, 1212, 1222, 1256-57). Appellant said that he had been out of town and had returned on August 22, spending the day

taking the girls to appointments and working on an electrical problem for a tenant in one of his Palm Street apartments. (Tr. 1195, 1257, 1263). Appellant also said that he avoided the victim because they argued over custody and child support issues. (Tr. 1232). He described their ongoing dispute over child support and said that the victim was bitter and angry over it. (Tr. 1232-33). The detectives drove Appellant, his wife, and two of the girls (Britney and Tierra) back home after the interviews. (Tr. 1196, 1305). Erica was placed in Aunt Phyllis's custody. (Tr.983, 1004).

On August 26, 2000, the detectives went to Palm Street to interview the tenant Appellant had helped with the electrical problem. (Tr. 1263). While they were there they saw Orthel Wilson sitting on the steps in front of the apartments. (Tr. 1264-66). Because Orthel matched the description of the person the next-door neighbor had seen knocking on Ms. Cantrell's door the afternoon of August 22, they decided to talk to him also. (Tr. 1267). Orthel agreed to go with the detectives to the police station for an interview. (Tr. 1268). In Orthel's apartment, the detectives found a black backpack matching the description of

the one Orthel was seen carrying. (Tr. 1269-70). Inside the backpack, police found rubber fingertips. (Tr. 1278). After interviewing Orthel, the police charged him with first-degree murder in the victim's death. (Tr. 1274).

The next day, August 27, 2000, Orthel accompanied the police to a vacant house located on 21st Street in St. Louis City, where he had hidden the murder weapon. (Tr. 1343-44, 1474-76). The detectives found the gun and a box of ammunition hidden between some doors. (Tr. 1347, 1474-77). The gun had been recently fired and three rounds were missing. (Tr. 1980-81). Police had already recovered three bullets, two from the victim's body and one from inside the furnace room in the victim's home. (Tr. 1148, 1182). The gun police recovered was later determined to be the murder weapon. (Tr. 1589, 1591).

Later that day, detectives arrested and interviewed Appellant. (Tr. 1155-56, 1349). The detectives informed Appellant that Orthel was in custody, that they had talked to Orthel, and that they had recovered the murder weapon. (Tr. 1352-53). After hearing this, Appellant said he would make a

statement. (Tr. 1354).

After receiving his Miranda warnings and waiving them in writing, Appellant confessed that he had hired someone named “Michael” or “Mike” to kill his ex-wife. (Tr. 1355-61; State’s Ex. 80B). Appellant said “Michael” had overheard him talking about the problems Appellant was having with Ms. Cantrell, and he told Appellant that he had taken care of a similar problem by doing that person in. (Tr. 1361-62). Appellant said he and “Michael” had two meetings, one in March 2000 and the other on Palm Street in April 2000, and that Appellant ultimately agreed to pay “Michael” \$1600 to kill Ms. Cantrell. (Tr. 1362-64). Appellant said he told “Michael” that he would only deal with him and no one else. (Tr. 1364). During the interview, the detectives gave Appellant a calender so he could determine on which dates he and “Michael” had met. (Tr. 1363).

Appellant said that he had additional meetings with “Michael” in June, July, and August 2000, and that he learned that “Michael” might have been working with someone else. (Tr. 1365-68). Appellant said he told “Michael” his ex-wife’s address,

her regular routine, and that Appellant would be able to get a key to her house (Tr. 1367-70).³ Appellant told “Michael” that his ex-wife should be dead before a scheduled court appearance in Appellant’s non-support case. (Tr. 1370).

The detectives asked Appellant if “Michael” was really Orthel Wilson, but Appellant denied that he was. (Tr. 1373). Appellant did say, however, that Orthel (“Theo”) had approached him and asked Appellant why he did not give “the job” to him. (State’s Ex. 80C). On the same day Orthel allegedly made this statement, Appellant claimed that he saw Orthel sitting in the passenger seat of the car “Michael” arrived in for a meeting with Appellant. (Tr. 1375; State’s Ex. 80C). Appellant also said that Orthel told him that he had helped with the murder and that Appellant should give him some money. (Tr. 1375). Appellant said he told Orthel to get his money from “Michael.” (Tr. 1375).

³Other evidence showed that Erica kept a key to her mother’s house in her backpack, which she had with her at Appellant’s house during the time she stayed with him just before her mother’s murder. (Tr. 1008-10).

Although Appellant refused to make a videotaped statement, he did make a written statement. (Tr. 1376). Appellant first prepared an outline and then wrote a two-page statement confirming what he had told the detectives. (Tr. 1376-85; State's Ex. 80C).

The next day (August 28, 2000), the detectives again talked to Orthel Wilson, and, in turn, re-interviewed Appellant. (Tr. 1389). After again being read his Miranda warnings and waiving them in writing, Appellant told the detectives that he had left out some details and wanted to make another statement. (Tr. 1389-98; State's Ex. 81B). Appellant then wrote a one-page statement in which he said that Orthel ("Theo") approached him on August 3 and told Appellant that he and "Michael" were working together, that Appellant initially acted like he did not know what Orthel was talking about, but that he then told Orthel that he would get paid whatever Orthel and Michael had agreed on. (Tr. 1401-03; State's Ex. 81C). Appellant also wrote that on August 24 Orthel left a message saying that the job was done and that he wanted to get paid. (Tr. 1402; State's Ex. 81C).

Appellant testified during the guilt phase and denied that he had met with Orthel on August 22, 23, or 24. (Tr. 1863). He also said that he had nothing to do with Ms. Cantrell's murder, but admitted that he had given a written statement to police saying that he did. (Tr. 1851, 1868-69). The jury found Appellant guilty of first-degree murder. (L.F. 481).

During the penalty phase the State presented only two victim-impact witnesses, Ms. Cantrell's sister and brother. (Tr. 1930-36). Appellant presented nine witnesses who were family, friends, and coworkers (Tr. 1936-2030). The jury found one statutory aggravating circumstance: that Appellant hired Orthel Wilson and/or a person known only as "Michael" to murder the victim. (L.F. 494). It recommended a sentence of death, which the trial court later imposed. (L.F. 494, 750-52).

Appellant appealed to this Court, which affirmed Appellant's conviction and death sentence. *See State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003), *cert. denied*, 540 U.S. 1186 (2004).

Appellant then filed a pro se Rule 29.15 motion in St. Louis County Circuit Court, (PCR L.F. 4-14), and an amended motion

was later filed by appointed counsel, (PCR L.F. 25-306). After holding an evidentiary hearing, the motion court entered its findings, conclusions of law, and judgment overruling Appellant's Rule 29.15 motion. (PCR L.F. 353-71).

STANDARD of REVIEW

Appellate review of a judgment overruling a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are “clearly erroneous.” *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in post-conviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). “Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made.” *Morrow*, 21 S.W.3d at 822.

To establish ineffective assistance of counsel, the movant must show both (1) that his counsel’s performance failed to conform to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances; and, (2) that the movant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984); *Barnett*, 103 S.W.3d at 768. To prevail on a claim of ineffective assistance of counsel, the movant must show that counsel’s performance was so deficient as to be

unreasonable under the circumstances and that counsel's errors were so serious as to deprive the movant of a fair trial, the result of which is unreliable. *See Strickland*, 466 U.S. at 687-88. "To demonstrate prejudice, a movant must show that, but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different." *Id.* In proving that counsel's performance did not conform to this standard, the movant must rebut the strong presumption that counsel was competent and that any challenged action was a part of counsel's sound trial strategy. *Barnett*, 103 S.W.3d at 769; *Sidebottom v. State*, 781 S.W.2d 791, 796 (Mo. banc 1989). The motion court is not required to address both components of the inquiry if the movant makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

A movant, even in capital cases, is not automatically entitled to an evidentiary hearing on claims raised in a Rule 29.15 motion. An evidentiary hearing is required only if the motion: (1) alleges facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the records and files in the case; and (3) the matters complained of must

have resulted in prejudice. *Ringo v. State*, 120 S.W.3d 743, 745
(Mo. banc 2003); *Barnett*, 103 S.W.3d at 769.

ARGUMENT

I. (Accomplice's Sentence)

The motion court did not clearly err in overruling, after an evidentiary hearing, Appellant's claim that his direct-appeal counsel was ineffective for not appealing the trial court's penalty-phase ruling to exclude evidence of the sentence Appellant's accomplice (Orthel Wilson) received for Ms. Cantrell's murder because that issue would not have required an appellate reversal in that (1) the trial court's ruling was consistent with this Court's previous decision in *State v. Schneider*; (2) this not mitigation evidence that the defendant has a constitutional right to present; and, (3) the motion court did not find direct-appeal counsel's testimony that the issue had some merit and that she simply "overlooked" it to be credible.

This Court has held that evidence of an accomplice's sentence is irrelevant in determining the proper sentence a defendant should receive. Indeed, in Appellant's direct appeal this Court rejected his claim that his sentence was disproportionate because his accomplice received a sentence less than death. *See Edwards*, 116 S.W.3d at 548-49.

Nevertheless, Appellant claims that his direct-appeal counsel was constitutionally ineffective for failing to specifically

challenge the trial court's penalty-phase ruling to exclude evidence that his accomplice (Orthel Wilson) pleaded guilty to first-degree murder and received a life sentence for his role in Ms. Cantrell's murder.

Appellant's claim cannot withstand scrutiny on several grounds. First, this evidence was irrelevant under previously declared Missouri law, and it did not constitute mitigation evidence that a capital defendant has a constitutional right to present such during the penalty phase. Second, the motion court did not find direct-appeal counsel's testimony that she overlooked this claim as credible. Third, Appellant's argument is based on a misreading of the United States Supreme Court's decision in *Parker v. Dugger*. Fourth, courts in other states have already rejected similar claims. And, fifth, allowing evidence of accomplices' sentences would serve only to confuse and misdirect the jury in carrying out its penalty-phase responsibilities.

A. The record of Orthel Wilson's conviction and sentence.

During the penalty phase, the trial court sustained the State's objection to Appellant's offer into evidence of a certified

copy of the judgment and sentence of Orthel Wilson. (Tr. 1989-90). That exhibit showed that Mr. Wilson pleaded guilty to first-degree murder in the death of Kimberly Cantrell and received a sentence of life imprisonment without the possibility of probation or parole. (Tr. 1989; Deft's Ex. III). This issue was included in Appellant's motion for new trial. (L.F. 560-61).

Although this issue was not separately raised during Appellant's direct appeal, Appellant's appellate counsel raised it as part of this Court's proportionality review in capital cases. *See Edwards*, 116 S.W.3d at 548-49.

During the evidentiary hearing on Appellant's postconviction motion, Appellant's direct-appeal counsel testified that she had no reason for not having raised this issue, and that the issue had "some merit." (PCR Tr. 183-84). But she did acknowledge that this issue had not been successfully raised in the past. (PCR Tr. 186). She also admitted that she did argue the different sentences Appellant and Orthel Wilson received in the proportionality section of her brief. (PCR Tr. 183). This Court ultimately rejected Appellant's direct-appeal claim that his sentence was disproportionate based on the fact

that Mr. Wilson received a lesser sentence for the same murder. *Edwards*, 116 S.W.3d at 548-49.

The motion court concluded that direct-appeal counsel was not ineffective. (PCR L.F. 360). It found that direct-appeal counsel knew that evidence of a co-actor's sentence was inadmissible and irrelevant and that she realized that pursuing this claim would have been futile. (PCR L.F. 360-61). It also found that counsel's "testimony that she just overlooked or neglected to brief the issue on appeal [was] not credible." (PCR L.F. 361).

B. Standard applicable to ineffective assistance of counsel claims for appellate counsel.

To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that it was obvious from the record that a competent and effective lawyer would have recognized it and asserted it. *State v. Edwards*, 983 S.W.2d 520, 522 (Mo. banc 1999).

The right to relief . . . due to ineffective assistance of

appellate counsel inevitably tracks the plain error rule; *i.e.*, the error that was not raised on appeal was so substantial as to amount to a manifest injustice or a miscarriage of justice.

Moss v. State, 10 S.W.3d 508, 514-15 (Mo. banc 2000) (quoting *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo. banc 1994)).

Appellate counsel does not have the duty to raise every non-frivolous claim on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). “There is ‘no duty to raise every possible issue asserted in the motion for new trial on appeal.’” *Mallett v. State*, 769 S.W.2d 77, 83-84 (Mo. banc 1989) (quoting *Camillo v. State*, 757 S.W.2d 234, 241 (Mo. App. W.D. 1988)). “[A]ppellate counsel has no duty to present non-frivolous issues where appellate counsel strategically decides to ‘winnow out’ arguments in favor of other arguments.” *Id.*

C. Under Missouri and federal law evidence of an accomplice’s sentence is not relevant to the issue of mitigation.

In *State v. Schneider*, 736 S.W.2d 392 (Mo. banc 1987), the defendant attempted to introduce penalty-phase evidence that an accomplice, who had not testified during trial, had pleaded

guilty to felony-murder charges and received a sentence of thirty years under a plea agreement. *Id.* at 395-96. The defendant sought to introduce this evidence as a “mitigating circumstance” under *Lockett v. Ohio*, 438 U.S. 586 (1976). *Id.* at 396.

This Court held that evidence of the accomplice’s sentence was not relevant under *Lockett*, which held that the sentencer “not be precluded from considering as a *mitigating factor*, any aspect of a *defendant’s character or record* and any of the *circumstances of the offense* that the defendant proffers as a basis for a sentence less than death.” *Id.* (quoting *Lockett*, 438 U.S. at 604) (emphasis in original) (parenthetical omitted). Because evidence of the accomplice’s sentence “did not pertain to [the] defendant’s character or prior record,” and because it was not relevant to show the circumstances of the murders themselves, this Court held that the trial court did not err in refusing to admit evidence of the plea agreement. *Id.* at 397.

The dissent in *Schneider* argued that notwithstanding whether such evidence related to the defendant’s record or the offense itself, Missouri “should insist on more than the minimum compliance with federal standards” and allow jurors

to receive evidence of the sentences accomplices had received.

Id. at 405-06.

The motion court did not clearly err in finding that Appellant's direct-appeal counsel was aware of this law and rejecting on credibility grounds her claim that she simply overlooked this issue. *See Black v. State*, 151 S.W.3d 49, 54 (Mo. banc 2004) (holding that the motion court is not required to accept an attorney's claim that he or she had no trial strategy reasons for not impeaching a witness); *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991) (holding that deference is given to the motion court's superior opportunity to judge the credibility of witnesses). Appellant's claim can be rejected on this basis alone.

Considering that this Court held in *Schneider* that evidence of an accomplice's sentence is inadmissible in a penalty-phase proceeding, appellate counsel cannot be found ineffective for failing to raise this as a separate issue on direct appeal.

D. Appellant's argument is based on a misreading of the United States Supreme Court opinion in *Parker v. Dugger*.

Despite this Court's holding in *Schneider*, Appellant nevertheless argues that appellate counsel was ineffective because *Schneider* predated the United States Supreme Court's decision in *Parker v. Dugger*, 498 U.S. 308 (1991). Appellant suggests that *Parker* holds that a capital defendant has a constitutional right to present evidence of an accomplice's sentence as mitigation evidence in a penalty-phase proceeding. App. Br. 42. He contends that his direct-appeal counsel was ineffective because after *Parker* was decided, the dissenting opinion in *Schneider* "had become the law of the land." App. Br. 44. The actual holding in *Parker*, however, is at odds with Appellant's creative interpretation of it.

In *Parker*, a Florida jury had recommended sentences of life imprisonment for a capital defendant convicted of a double murder. *Parker*, 498 U.S. at 310. The trial judge followed the jury's recommendation for one of the murder convictions, but rejected it for the other and imposed a sentence of death. *Id.* In doing so, the trial judge explicitly found no statutory mitigating

circumstances existed on either count, but he made no mention of any non-statutory mitigating factors. *Id.* at 310-11. Under then existing Florida law, a trial judge could not override a jury's recommended sentence after a finding that the triggerman received a lesser sentence. *Id.* at 315. During the sentencing hearing, the defendant emphasized that none of his accomplices had received a death sentence. *Id.* at 314. On appeal, the Florida Supreme Court found insufficient evidence to support two of the six aggravating circumstances, but in upholding the death sentence it noted that the trial judge had found no mitigating circumstances to balance against the aggravating circumstances; thus the jury override was proper. *Id.* at 311.

The United States Supreme Court reversed because of a constitutional infirmity in the way the Florida Supreme Court reviewed the trial judge's decision. *Id.* at 318. The Court held that the record did not support the Florida Supreme Court's finding that the trial judge had found no mitigating circumstances. *Id.* at 318. It also faulted the Florida Supreme Court's failure to conduct an independent review and

examination of the record. *Id.* at 322. The Court did not set aside the defendant's death sentence or order a new sentencing hearing; it ordered only that the Florida state courts "initiate appropriate proceedings" to reconsider the sentence in light of the entire record. *Id.* at 322-23.

Nowhere in its opinion did the Supreme Court hold that the Eighth and Fourteenth Amendments require that a capital defendant be allowed to present evidence of accomplices' sentences during the penalty phase. That issue was not even raised, much less addressed, by the Court in *Parker*.

Appellant quotes *Parker* for the proposition that evidence an accomplice received a lesser sentence is "mitigation" that had to be considered "under both federal and Florida law." App. Br. 42. But what the Court actually said was that "under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence." *Id.* at 315. It went on to say that under Florida law a more lenient sentence for a triggerman was considered a mitigating circumstance that precluded a trial judge from overriding a jury's sentencing recommendation. *Id.* Thus, the Court's reversal "was based on the Florida Supreme

Court’s failure to reweigh the evidence or conduct a harmless error analysis.” *People v. Mincey*, 827 P.2d 388, 434 (Cal. 1992).

The Court never suggested that an accomplice’s sentence constituted mitigation evidence that a defendant had a constitutional right to present during the penalty phase.

E. Courts in other states have repeatedly rejected the misreading of *Parker* Appellant advances here.

Appellant is not the first defendant to have misread *Parker* in this fashion. Other courts addressing the argument he advances here — that *Parker* holds that a capital defendant has a constitutional right to present evidence of accomplices’ sentences during the penalty phase — have uniformly rejected it. *Morris v. State*, 940 S.W.2d 610, 614 (Tex. Crim. App. 1996) (“*Parker* did not address whether evidence of disparate sentencing is mitigating evidence which must be considered under the standard set out in *Lockett v. Ohio*.”); *State v. Ward*, 449 S.E.2d 709, 737 (N.C. 1994) (rejecting the argument that *Parker* “impliedly held that the sentence received by a co-defendant is relevant mitigation evidence under federal law); *Mincey*, 827 P.2d at 434 (*Parker* “did not hold that evidence of a codefendant’s

sentence must be introduced at trial as mitigating evidence or that a comparison between sentences given codefendants is required.”). *See also State v. Jaynes*, 549 S.E.2d 179 (N.C. 2001) (reaffirming its earlier holding that *Parker* simply interpreted Florida law); *People v. McDermott*, 51 P.3d 874, 912 (Cal. 2002).

Like Missouri, courts in other states have held that evidence of accomplices’ sentences is irrelevant in capital penalty-phase proceedings because “it does not shed any light on the circumstances of the offense or the defendant’s character, background, history or mental condition.” *McDermott*, 51 P.3d at 912 (holding that the trial court did not err in giving a penalty-phase instruction telling jurors that they could not consider the punishments given to accomplices); *Ward*, 449 S.E.2d at 737 (“The accomplices’ punishment is not an aspect of the defendant’s character or record nor a mitigating circumstance of the particular offense.”); *Jaynes*, 549 S.E.2d at 200-01; *People v. Emerson*, 727 N.E.2d 302, 338 (Ill. 2000) (“[E]vidence of a codefendant’s sentence is not a relevant mitigating factor at the aggravation-mitigation stage, where the focus is on the defendant’s character and participation in the offense.”); *Morris*,

940 S.W.2d at 614.

Finding that this type of evidence is irrelevant during penalty-phase proceedings is consistent with the Supreme Court's statement in *Lockett* that the States have "authority to exclude as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12. The Supreme Court recently reaffirmed this principle in *Oregon v. Guzek*, 126 S. Ct. 1226 (2006).

In *Guzek*, a capital defendant had sought to introduce new alibi evidence during the penalty-phase retrial that he had not presented during his original trial. *Id.* at 1229-30. The Oregon Supreme Court held that this evidence was "relevant" under federal law and, thus, the defendant had a constitutional right under the Eighth and Fourteenth Amendments to present his new alibi evidence. *Id.* at 1229.

The Supreme Court unanimously disagreed and held that this evidence was not required to be admitted under *Lockett* because it shed no light on *how* the defendant committed the offense. *Id.* at 1230-31. Rather, it was evidence regarding

whether he committed it, which was inconsistent with the defendant's previous murder conviction. *Id.*

Although the Court acknowledged that the “Eighth Amendment insists upon ‘reliability in the determination that death is the appropriate punishment in a specific case’ [and] that a sentencing jury be able ‘to consider and give effect to mitigating evidence’ about the defendant’s ‘character or record or the circumstances of the offense,’” it nevertheless held that these principles do “not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted.” *Id.* at 1232 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989)). Because evidence of an accomplice’s sentence does not pertain to the individual defendant’s record or the manner in which the particular offense was committed, the States are free to hold that such evidence is irrelevant and inadmissible during capital sentencing proceedings.

In addition, allowing this type of evidence to be presented during the penalty phase would present a host of problems. “[R]equiring the sentencer to examine and compare the relative

culpability of the defendants and the circumstances in aggravation and mitigation applicable to each would unnecessarily complicate an already difficult task.” *Emerson*, 727 N.E.2d at 338 (quoting *People v. Page*, 620 N.E.2d 339, 348 (Ill. 1993)). Penalty phase proceedings in such cases would degenerate into extraneous disputes justifying why each accomplice received the sentence he or she did and why the particular defendant on trial should, or should not, receive a similar sentence. Prosecutors would likely be forced to explain their discretionary charging and plea agreement decisions to the jury. In a worst case, the prosecutor would be saddled with the speculative and nearly impossible task of explaining why a different jury chose not to recommend a death sentence for a particular accomplice. It is easy to see how penalty-phase proceedings could become misdirected and unwieldy in these situations.

Finally, if defendants are allowed to present evidence of the lesser sentences accomplices received, would they also be willing to accept the prosecution’s offer of evidence that other accomplices received death sentences for the same murder?

The motion court did not clearly err in finding that direct-appeal counsel was not ineffective for failing to raise this claim.

II. (Hearsay)

The motion court did not clearly err in overruling, without an evidentiary hearing, Appellant's claim that his conviction was unconstitutionally obtained because hearsay evidence was admitted in violation of the United States Supreme Court's decision in *Crawford v. Washington*, decided after Appellant's trial but which Appellant argues should apply retroactively, because this Court held in Appellant's direct appeal that no hearsay testimony was admitted into evidence; consequently, the decision in *Crawford* is inapposite.

Although acknowledging that this Court rejected his direct-appeal hearsay claim challenging the testimony officers gave regarding their investigation of Appellant's accomplice Orthel Wilson, Appellant nevertheless raises this issue again in this appeal. In his postconviction motion he alleged that this issue should be revisited in light of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), decided after Appellant's trial and which Appellant argues should be retroactively applied to his case.

In making this claim, however, Appellant has put the proverbial cart before the horse. While he focuses nearly

exclusively on why *Crawford* should apply retroactively, he fails to recognize that *Crawford* does not apply to the facts of his case.

A. This Court held on direct appeal that no hearsay evidence was admitted during Appellant's trial.

Orthel Wilson did not testify during Appellant's trial. *See Edwards*, 116 S.W.3d at 532. In Appellant's direct appeal, this Court found that "[b]ecause Mr. Wilson did not testify, police were unable to introduce evidence of Mr. Wilson's statements about [Appellant's] involvement in the crime for their truth." *Id.* To the extent that the investigating officers' testimony referred to any statements Mr. Wilson made to them, it was in the context of explaining the officers' actions during the investigation. *Id.* For the most part, the officers merely testified about their investigations. *Id.*

When testifying about their discussions with Mr. Wilson, they generally would state that they spoke with him, and, then, went to a particular location or talked with a particular witness. They attempted not to directly inform the jury of statements made by Mr. Wilson, and on the few occasions when they spoke more directly about what Mr.

Wilson told them, nothing that they said suggested that [Appellant] was guilty.

Id. at 532-33.

The trial court “did not permit introduction of Mr. Wilson’s statements for their truth, and none of his statements implicating [Appellant] in the crime were admitted at all.” *Id.* at 532. Mr. Wilson’s statements were used for the “limited” purpose of explaining why officers took certain actions, like going to a “deserted house where they found the murder weapon.” *Id.*

This Court found that: (1) “the court and all counsel were very concerned about avoiding . . . improper inferences”; (2) that the court “very carefully” reviewed proposed questions outside the hearing of the jury, approving some questions and disapproving others; (3) that the witnesses were instructed not to repeat any of Orthel Wilson’s statements implicating Appellant; (4) that the witnesses attempted not to directly inform the jury of Orthel’s statements; and (5) that any testimony describing statements Orthel actually made

mentioned nothing suggesting that Appellant was guilty.⁴ *Id.* at 532-33. This Court concluded that no error occurred in “allowing the testimony to be offered in this limited fashion to show the officers’ subsequent conduct and not for the truth of the matters stated.” *Id.* at 533.

This Court’s holding that the police officers’ testimony was not hearsay was entirely consistent with Missouri law. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *State v. Barnett*, 980 S.W.2d 297, 306 (Mo. banc 1998). Although hearsay statements are generally inadmissible, an out-of-court statement not offered for the truth of the matter asserted, but in explanation of conduct, is not inadmissible hearsay. *State v. Baker*, 23 S.W.3d 702, 715 (Mo. App. E.D. 2000). Out-of-court statements that explain subsequent police conduct are admissible as supplying relevant background and continuity. *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991).

⁴These conclusions are consistent with the trial transcript of the detectives’ testimony. Excerpts and descriptions of that testimony, as taken from the State’s direct-appeal brief, are included in the Appendix.

In fact, if the out-of court statement is offered to provide relevant background to the testimony, as opposed to the truth of the matter asserted, it is not hearsay and is admissible. *State v. Jones*, 863 S.W.2d 353, 357 (Mo. App. W.D. 1993).

Here, the State took great pains to avoid presenting testimony about any of Orthel Wilson's out-of-court statements. The record shows that the court, attorneys, and witnesses made great efforts to avoid repeating any statement Mr. Wilson made to them. Instead, they simply testified that when they interviewed Appellant they told him that they had talked to Orthel and had recovered the murder weapon. When describing how they recovered the murder weapon, the detectives said they found it in a vacant building Orthel directed them to. Not once did the detectives testify about any statements Orthel Wilson made that he attributed to Appellant, much less any statements Orthel made implicating Appellant in the crime.

Appellant's claim that the State introduced into evidence Orthel's statements implicating Appellant in the crime cannot be reconciled with this Court's opinion in Appellant's direct appeal. In fact, his claim is directly contrary to the findings

outlined in this Court’s opinion, in which it stated that no such statements were admitted into evidence during Appellant’s trial.

B. *Crawford* has no application to the facts of this case.

Appellant’s reliance on *Crawford* is nothing more than a red herring. In *Crawford*, the prosecution offered into evidence a tape-recorded statement of the defendant’s wife, who did not testify at trial because she invoked the marital privilege.

Crawford, 541 U.S. at 38-40. This statement, obtained during a police interrogation, was offered by the State for the truth of the matters asserted in it to prove charges of assault and attempted murder against the defendant and to disprove his self-defense claim. *Id.* at 40.

Crawford thus dealt with an out-of-court “testimonial” statement offered and used for its truth in proving the defendant’s guilt. The Court’s definition of the word ‘testimony’ demonstrates that it was concerned only with out-of-court statements used to prove some fact: “‘Testimony’ . . . is typically ‘a solemn declaration or affirmation made *for the purpose of establishing or proving some fact.*’” *Id.* at 51 (quoting 1 N. Webster, *An American Dictionary of the English Language* (1828)) (emphasis

added). Statements offered not for the truth of the matters asserted, but to explain subsequent actions and provide continuity are not “testimonial” under *Crawford*. See *State v. Anding*, 689 S.W.2d 745, 752 (Mo. App. W.D. 1985) (holding that “out-of-court declarations tendered not as proof of the matters asserted, but to explain subsequent conduct of the witness” are not hearsay). Indeed, in examining the history behind adoption of the Confrontation Clause, the Court found that its purpose was to prevent introduction of out-of-court examinations or statements against a criminal defendant. *Crawford*, 541 U.S. at 50-52. The detectives’ testimony that they investigated Orthel Wilson, or that they told Appellant Orthel was in custody, do not implicate the concerns that animated the Framers’ adoption of the Confrontation Clause.

Any doubt about the Court’s holding is laid to rest by its explicit statement that the Confrontation “Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Id.* at 59 n.9. In these situations, the States are allowed to establish evidentiary rules allowing for the consideration of such evidence without

running afoul of the Sixth Amendment. “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law” *Id.* at 68. This suggests that even hearsay, as long as it is not “testimonial,” can be admissible under state evidentiary rules. The Court also reaffirmed its previous holding that the Confrontation Clause does not bar the use even of testimonial statements for purposes other than establishing the truth of the matters asserted. *Id.* at 59 n.9.

This Court addressed the Confrontation-Clause issue on direct appeal, finding that the officers offered no testimony about statements Orthel Wilson made to them that in any way implicated Appellant in the crime. If they had attempted to do so, this Court noted that it would have violated Appellant’s Sixth Amendment right to confront his accusers. *Edwards*, 116 S.W.3d at 532. This Court found that the trial court was aware of these restrictions and “did not permit introduction of Mr. Wilson’s statements for their truth, and none of his statements implicating [Appellant] in the crime were admitted at all.” *Id.*

Appellant’s general claim of prejudice is that this testimony

was used to show that he was involved in the crime. In other words, Appellant claims that the officers' testimony implied that Orthel told the police that Appellant was involved in the murder. The major obstacle to this claim, however, is that Appellant himself confessed to the crime. *See State v. Clemons*, 946 S.W.2d 206, 227 (Mo. banc 1997) (holding that it was unnecessary to consider whether indirect testimony of a co-defendant's statement was admitted into because the defendant was not prejudiced because he confessed to police that he was present when the victims were murdered). In any event, nothing in the trial record suggested that the State attempted to elicit testimony from the officers either directly or indirectly to prove any statement Appellant may have made to Orthel Wilson or to prove any statements Orthel made to police that may have implicated Appellant in the crime.

III. (Newly-Discovered Evidence)

The motion court did not clearly err in refusing to take evidence or to consider Appellant's postconviction claim of newly-discovered evidence that Orthel Wilson had recanted his confession to police because a claim of newly-discovered evidence is not cognizable in a Rule 29.15 postconviction proceeding. Moreover, Orthel Wilson's alleged recantation of his confession is not evidence that would completely exonerate Appellant because Orthel did not testify against Appellant at trial and Appellant confessed to police that he hired someone to kill his ex-wife.

Although the jury that found Appellant guilty of arranging his ex-wife's murder heard no evidence that Orthel Wilson implicated Appellant in the crime or that Orthel pleaded guilty to first-degree murder for killing Ms. Cantrell, Appellant alleged in his postconviction motion that newly-discovered evidence that Orthel had recanted his confession to police showed that Appellant was innocent of this crime. (PCR L.F. 21).

Appellant alleged that before Appellant's trial, Orthel confessed to police that he had murdered Ms. Cantrell, (PCR L.F. 255), and that he later entered a guilty plea to a first-

degree murder charge.⁵ Appellant alleged that in March 2004, Orthel told Appellant's postconviction attorneys that he had "recanted" his confession, which he claimed was false and the product of police coercion. (PCR L.F. 255). Appellant further alleged that Orthel signed an affidavit stating that he was not involved in Ms. Cantrell's murder and that Appellant did not hire him to commit the crime. (PCR L.F. 255). Appellant's jury never heard evidence that Orthel confessed to police or that he pleaded guilty to murdering Ms. Cantrell.

A. A claim of newly-discovered evidence is not cognizable in a Rule 29.15 postconviction proceeding.

The motion court did not clearly err in refusing to rule on this issue because a claim of newly-discovered evidence is not

⁵Appellant's motion alleges that Orthel entered his plea on June 2, 2003. (PCR L.F. 255). This is apparently a mistake since Appellant sought to introduce evidence of Orthel's guilty plea and sentence during Appellant's April 2002 trial. (Tr. 1989). Moreover, the State filed a motion in limine just before Appellant's trial began stating that it had entered into a plea agreement with Orthel. (L.F. 403).

cognizable in a Rule 29.15 postconviction proceeding. *See State v. Ferguson*, 20 S.W.3d 485, 505 (Mo. banc 2000); *see also Wilson v. State*, 813 S.W.2d at 834 (same for Rule 24.035 postconviction claims). In *Wilson*, this Court noted that a postconviction proceeding was “not the proper vehicle for relitigating . . . guilt or innocence.” *Wilson*, 813 S.W.2d at 834 (holding that newly-discovered evidence claims should be raised in a state habeas petition or in a request for a gubernatorial pardon).

Consequently, the motion court had no jurisdiction to even consider this claim, much less take evidence on it.

B. The postconviction evidence Appellant claims to have found is insufficient to justify granting him a new trial.

“New trials based on newly discovered evidence are disfavored.” *State v. Smith*, 181 S.W.3d 634, 638 (Mo. App. E.D. 2006); *State v. Clark*, 112 S.W.3d 95, 98 (Mo. App. W.D. 2003).

Even if Appellant’s current claim had been timely included in a motion for new trial, he has failed to make a sufficient showing under the law to warrant a new trial:

To warrant a new trial based on post-trial newly discovered evidence, the defendant must show: (1) the evidence has come

to the knowledge of the defendant since the trial; (2) it was not owing to the want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different result on a new trial; and (4) it is not cumulative only or merely impeaching the credibility of the witness. *State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. banc 1997). Unlike Appellant, the defendant in *Whitfield* timely filed a motion for new trial that included his claim of newly-discovered evidence.

Because Appellant's current claim of newly-discovered evidence was not timely included in a motion for new trial it was not preserved for appeal. *State v. Bradshaw*, 779 S.W.2d 617, 619 (Mo. App. E.D. 1989). Moreover, "[o]nce the time within which to file a motion for new trial has expired, a remedy no longer lies through direct appeal." *State v. Skillicorn*, 944 S.W.2d 877, 896 (Mo. banc 1997); *see also State v. Greathouse*, 694 S.W.2d 903, 911-12 (Mo. App. S.D. 1985). "The only formally authorized means by which a criminal defendant with a late motion can seek relief based on newly-discovered evidence is by application to the governor for executive clemency or pardon." *State v. Young*,

943 S.W.2d 794, 799 (Mo. App. W.D. 1997); *see also Clark*, 112 S.W.2d at 99.

Although it seems clear from *Skillicorn*, *Greathouse*, and *Ferguson* that Appellant has no remedy before the trial court, the motion court, or this Court either on direct or postconviction appeal, the court of appeals has nevertheless recognized that in “extraordinary cases” a case may be remanded on the ground of newly-discovered evidence either as plain error or pursuant to the court’s inherent power to prevent a miscarriage of justice. *See State v. Gray*, 24 S.W.3d 204, 209 (Mo. App. W.D. 2000); *State v. Ramsey*, 874 S.W.2d 414, 417 (Mo. App. W.D. 1994). But “that category has been reserved for those cases involving newly-discovered evidence that ‘would have completely exonerated the defendant of the crime for which he or she was charged.’” *Gray*, 24 S.W.3d at 209 (quoting *State v. Hill*, 884 S.W.2d 69, 76 (Mo. App. S.D. 1994)).

The rare use by the courts of the newly-discovered evidence doctrine to remand a case for new trial was cogently explained in *Gray*, which involved a defendant who sought a new trial based on information he received from a fellow inmate after

trial. The *Gray* court explained why two previous cases in which courts had reversed convictions based on newly-discovered evidence involved “extraordinary circumstances that [were] clearly distinguishable from” the defendant’s case in *Gray*:

In [*State v. Mooney*, 670 S.W.2d 510 (Mo. App. E.D. 1984)], the defendant was convicted of molesting a minor, and the only evidence to support the conviction was that of the minor. After the conviction and sentencing, one of the defendant’s alibi witnesses tape-recorded a conversation with the victim in which the victim admitted his testimony was false and that he made up the entire incident.

In [*State v. Williams*, 673 S.W.2d 847 (Mo. App. E.D. 1984)] both the prosecuting attorney and the Attorney General filed affidavits in the Court of Appeals agreeing that jurisdiction should be returned to the trial court to hold a hearing on the defendant’s motion for new trial based on newly discovered evidence. Due to the agreement, belief and recognition by both parties that the information contained in the defendant’s motion was true and accurate, the court overlooked the time constraints and remanded

the case to the trial court.

Gray, 24 S.W.3d at 209.

The *Gray* court explained that in the other case in which an untimely claim of newly-discovered evidence was made, *State v. Post*, 804 S.W.2d 862 (Mo. App. E.D. 1991), the “case was remanded on the basis of jury misconduct, not ‘newly-discovered evidence.’” *Id.* The *Gray* court held that the trial court did not commit plain error by refusing to grant the defendant a new trial based on newly-discovered evidence. *Id.* at 209-10.

Even since *Gray*, Missouri courts have uniformly rejected defendants’ requests for new trials based on claims that newly-discovered evidence completely exonerated them of the crimes they were convicted of committing. *See State v. Clark*, 112 S.W.3d at 98-99; *State v. Smith*, 181 S.W.3d at 637-38; *State v. Dorsey*, 156 S.W.3d 791, 797-800 (Mo. App. S.D. 2005).

Dorsey is particularly instructive on the high burden defendants must meet to warrant a new trial based on newly-discovered evidence. In that case, the defendant’s accomplice testified for the State at the defendant’s murder trial that the defendant was the person who actually shot the victim. *Dorsey*,

156 S.W.3d at 797. After trial, the accomplice recanted his testimony and said that his confession to police identifying Appellant as the shooter was coerced; he claimed that another accomplice was actually the shooter. *Id.* The court of appeals nevertheless held that this newly-discovered evidence was insufficient to afford the defendant any relief because it did not completely exonerate the defendant of the crime. The defendant participated in planning the murder, knew that according to the plan another accomplice was going to shoot the victim, was present when the murder occurred, and received a portion of the drug proceeds taken from the victim after the murder. *Id.* at 799-800.

Appellant's claim that Orthel Wilson's alleged recantation of his confession to police completely exonerates Appellant of his ex-wife's murder borders on the frivolous. First, Orthel Wilson never testified against Appellant, and as explained in Point II, no evidence was admitted at Appellant's trial of any statements Orthel may have made to the police implicating Appellant in the crime. Second, Appellant gave two written confessions to police admitting that he paid \$1600 to have his wife murdered. Third,

witnesses at Appellant's trial identified Orthel Wilson as the person knocking on the victim's door near the time gunshots were heard coming from inside the victim's apartment. Even if Orthel Wilson recanted his confession and statements to police implicating himself and Appellant in the crime, this does nothing to diminish the overwhelming evidence of Appellant's guilt, which included Appellant's own written confessions to police.

Another problem with Appellant's claim is that it appears that this evidence is not "newly-discovered." Before trial, Appellant reported to his attorneys that he had talked to Orthel Wilson while the two were in the same jail and that Orthel told Appellant that he was "sorry for what he did and that the cops had him in a corner." (Movant's Ex. 9, p. 3041). The context of the statement suggests that Orthel was apologizing for implicating Appellant in the murder. Yet Appellant did not present this evidence during his trial; instead, he waited until this postconviction case to raise the issue.

Appellant's willingness to have this Court believe Mr. Wilson's recent recantation of his confession to police

implicating himself and Appellant in this crime is also curious considering that he alleged in his motion for new trial that he had newly-discovered evidence that Orthel Wilson and his brother Hughie Wilson had a motive to kill the victim separate and independent from Appellant.⁶ (L.F. 563-64). Appellant did not raise this newly-discovered evidence claim in his direct appeal. If at one time Appellant believed that Orthel had a separate motive to kill the victim, why is he now asking this Court to believe that Orthel's recantation shows that neither he nor Appellant had nothing to do with the crime?

Finally, Appellant rhetorically asks "where was Orthel." The record shows that Appellant knew full well where Orthel Wilson was — in jail. Appellant reported to trial counsel that

⁶Appellant's motion for new trial alleged that Appellant had "discovered new evidence" that would "refute the state's theory and prove that [Appellant] was innocent." (L.F. 563). Appellant alleged that this new evidence would show that Orthel and Hughie Wilson "had connections with" and "motive to kill" the victim "that existed regardless and independent of [Appellant]." (L.F. 564).

Orthel contacted him while both were in jail awaiting trial in this case. (Movant's Ex. 9, p. 3084). In fact, Appellant's Rule 29.15 motion alleges that Appellant's attorneys deposed Orthel before trial, but that he refused to answer any questions. (PCR L.F. 260). Counsel apparently knew this before the deposition because they reported to Appellant that Orthel's attorneys would not let him waive his right against self-incrimination by answering deposition questions. (Movant's Ex. 9, p.3084). Appellant also alleges that Orthel refused to testify against Appellant at trial. (PCR L.F. 260).

It is disingenuous for Appellant to imply in his brief that it was the State that kept Orthel away from Appellant's trial when Appellant made no efforts to subpoena him to appear and knew that Orthel did not intend to testify against him.

IV. (Motion Court's Findings)

The motion court's findings of fact and conclusions of law are not inadequate because the issues Appellant claims were not addressed either were addressed, or were not required to be addressed because they involved questions of law or matters not cognizable in a postconviction proceeding.

Appellant complains about the motion court's alleged failure to enter findings of fact and conclusions of law on three specific claims: (1) whether counsel was ineffective for failing to investigate Appellant's social history; (2) whether *Crawford v. Oregon* is retroactive; and (3) whether Orthel Wilson's repudiation of his confession warrants a new trial. App Br. 70. To the extent the motion court failed to make adequate findings on these three issues, it did not clearly err and a remand is unnecessary.

Rule 29.15 requires a motion court to issue "findings of fact and conclusions of law on all issues presented in a postconviction proceeding. Rule 29.15(j). But "the court is not required to individually address every claim brought by the movant." *Franklin v. State*, 24 S.W.3d 686, 692 (Mo. banc 2000). "Generalized findings are sufficient so long as they permit the

appellate court an adequate record for appellate review of movant's claims." *Id.* Moreover, no findings are required if the claim involves only an issue of law. *See White v. State*, 939 S.W.2d 887, 903 (Mo. banc 1997). Finally, "an appellate court will not order a useless remand to direct the motion court to enter a proper conclusion of law on an isolated issue overlooked by the motion court where it is clear that movant is entitled to no relief as a matter of law" *Id.*

Contrary to Appellant's assertion, the motion court's nineteen-page judgment does, in fact, address the issue of whether counsel was ineffective for investigating Appellant's social history. The motion court expressly found that trial counsel did "investigate [Appellant]'s social history." (PCR L.F. 361). This finding was based on trial counsel having met with Appellant numerous times by phone and more than twenty times in person. (PCR L.F. 356). In "preparation for the possibility that [counsel] would have to conduct a penalty phase" proceeding, "counsel met with [Appellant] and his family to devise a strategy that could best save his life." (PCR L.F. 357).

The motion court also found that "[a]fter reviewing

[Appellant]’s life history with [his] family friends and co-workers, and having no good faith basis to present evidence of a mental disease or defect, Trial Counsel and [Appellant] decided to present a defense that [Appellant] was a person who, though he had been convicted of a terrible crime, had done good things in his life and was loved by his family, both immediate and extended, and was respected by friends and co-workers.” (PCR L.F. 358). The motion court further found that trial counsel called numerous witnesses to support this trial strategy. (PCR L.F. 358-59).

Appellant’s complaint that the motion court did not specifically make findings regarding Appellant’s allegedly volatile childhood is also unfounded. The court found that when counsel investigated Appellant’s social history, they “found nothing to suggest the presence of a mental disease or defect, specifically Asperger’s [sic] Disorder.” (PCR L.F. 361-62). (Appellant’s claim on appeal is that this diagnosis was overlooked before trial by three mental health experts because of a lack of information about his allegedly volatile childhood. See Point VII). The motion court also found that portraying

Appellant as a “person disconnected from a dysfunctional family” would have been “completely contradictory” to the defense strategy during the penalty phase. (PCR L.F. 359). Consequently, the court found that it “would have been counterproductive to portray [Appellant’s mother] as a seriously depressed dysfunctional mother who did not protect her children . . . from an abusive father.” (PCR L.F. 362). Portraying the family “as an unlikable, unsympathetic, dysfunctional group of people was contrary to [defense counsel’s] strategy.” (PCR L.F. 362).

No findings or conclusions are necessary on the *Crawford*-retroactivity issue because it is purely a question of law. (The fact that *Crawford* has no application to this case (see Point I) also makes any findings on this issue moot).

Finally, because the issue whether Orthel Wilson’s recantation constituted newly-discovered evidence warranting a new trial is not cognizable in a postconviction action and fails as a matter of law, (See Point III), the motion court was not required to address it.

V. (Right to Testify)

The motion court did not refuse to allow Appellant to testify during the postconviction proceedings, and to the extent that the record can be construed to find that it did, Appellant has failed to demonstrate how he was prejudiced.

The question whether a prisoner has a constitutional right to testify in a postconviction proceeding is not at issue in this case. The record shows that the motion court did not deny Appellant the right to present his testimony. Moreover, to the extent Appellant was prevented from offering his testimony during the hearing, he has not demonstrated that he was prejudiced. Appellant's has neither identified the testimony he wanted to offer, nor explained how that testimony would have supported the claims made in his Rule 29.15 motion.

Although the evidentiary hearing held before the motion court concluded on September 13 and 14, 2004, the case was only "partially heard" at that point. (Tr. 274-75; PCR L.F. 325). Appellant's postconviction attorneys informed the court that they still needed to take at least two depositions before the case would be ready for submission; an order was entered permitting

those depositions to be taken the following month. (PCR Tr. 274-75; PCR L.F. 325). After the court concluded that the submission date would be left open, Appellant asked to address the court:

[Appellant]: 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.

[Appellant]: 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.

[Appellant]: I'd like to let the Court know I would like to testify.

The Court: I suggest you convey that thought to your attorneys.

[Appellant]: I did and they haven't responded in six months.

The Court: I'm sure they'll address that issue with you.

(Tr. 275-76).

On January 4, 2005, almost five months after the evidentiary hearing was recessed, the motion court entered an order accepting additional evidence into the record, including two depositions taken by Appellant's counsel after the September evidentiary hearing. (PCR L.F. 349). Appellant's counsel also filed a notice that day informing the court that the presentation of evidence had concluded. (PCR L.F. 352).

Assuming that a prisoner has a right to offer his own testimony in support of his Rule 29.15 claims, the record in this case does not show that the motion court denied Appellant that right. In response to Appellant's demand that he be allowed to testify that day, the motion court simply told Appellant that he could not hear Appellant's testimony "at this point." The court did not expressly refuse to allow Appellant to testify. It simply told Appellant that he should consult with his attorneys and that the decision whether to present Appellant's testimony was something Appellant and his attorneys, not the motion court, would have to decide.

Appellant's claim is even more curious considering that he

claims in Point IX that his counsel “would not allow [him] to testify and would not discuss it with him.” App. Br. 120.

To the extent that Appellant is claiming he had the right to demand that his testimony be heard on that particular day, the rule does not support him. Rule 29.15 does not give a prisoner the right to present live testimony before the motion court at the evidentiary hearing. In fact, the rule specifically states that a “movant need not be present” at the evidentiary hearing and that the motion court may order that the movant’s testimony be received by deposition.” Rule 29.15(i).

Even after the evidentiary hearing was recessed, several months passed before the case was submitted to the motion court, during which time Appellant and his attorneys had the opportunity to offer Appellant’s testimony by deposition or ask that the evidentiary hearing be reconvened. The record shows that no such request was made by either Appellant or his attorneys. Appellant certainly raised no objection or protest when his attorneys asked that the evidentiary hearing be closed without his testimony having been made part of the record. *Compare Winfield v. State*, 93 S.W.3d 732, 736 (Mo. banc 2002)

(holding that a defendant's failure to protest when counsel rested his case during the penalty phase without presenting the defendant's testimony supported the motion court's finding that the defendant never intended to testify).

To the extent that Appellant is claiming that his postconviction counsel were ineffective for not presenting his testimony to the motion court, such a claim is not cognizable in a postconviction proceeding. *State v. Tinch*, 860 S.W.2d 845, 847 (Mo. App. E.D. 1993) (holding that a claim that postconviction counsel was ineffective for not offering movant's testimony at the evidentiary hearing was not cognizable under Rule 29.15). "Claims of ineffective assistance of post-conviction counsel are categorically unreviewable." *Lyons v. State*, 129 S.W.3d 873, 874 (Mo. banc 2004); *see also Barnett*, 103 S.W.3d at 773; *State v. Wise*, 879 S.W.2d 494, 524 n.13 (Mo. banc 1994). In addition, this Court "has repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel." *Barnett*, 103 S.W.3d at 774; *see also Winfield v. State*, 93 S.W.3d at 739; *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992); *Tinch*, 860 S.W.2d at 847 (holding that

postconviction counsel's failure to present the movant's testimony during the evidentiary hearing did not constitute abandonment).

Even if Appellant could demonstrate that the motion court refused to allow his testimony to be offered, Appellant has made no attempt to show how he was prejudiced. Appellant has not described the testimony he intended to offer and how that testimony would have helped to prove his postconviction claims. In his brief, Appellant simply recites some of the findings the motion court made, but he never suggests how his testimony would have departed from those findings. Even a criminal defendant claiming that he was not allowed to testify during trial must allege and prove prejudice to establish that he received ineffective assistance of counsel. *See State v. Barnaby*, 950 S.W.2d 1, 5 (Mo. App. W.D. 1997) (rejecting a postconviction claim that counsel did not allow the defendant to testify when nothing in record showed "what his testimony would have been if he had been called to testify"). Appellant has made no attempt to do so in this case.

Finally, Appellant's reliance on *State v. Athanasiades*, 857

S.W.2d 337 (Mo. App. E.D. 1993), is misplaced. In that case, the motion court entered an order limiting the movant to calling only one witness — his trial counsel. *Id.* at 339. The motion court specifically refused to allow the movant to present his own testimony to rebut trial counsel’s testimony. *Id.* Because trial counsel’s testimony refuted many of the movant’s postconviction claims, the court of appeals held that the case involved a credibility determination and the motion court’s refusal to permit the movant from presenting his testimony — “either in person or possibly by deposition” — was an abuse of discretion. *Id.* at 341.

VI. (Social History)

The motion court's judgment overruling Appellant's claim that trial counsel were ineffective for not investigating his social history was not clearly erroneous because (1) trial counsel did, in fact, investigate Appellant's social history; (2) the information Appellant now claims should have been discovered was not reasonably available or was withheld and was not revealed until the postconviction case; (3) presenting evidence that Appellant suffered a traumatic childhood was contrary to the penalty-phase strategy of showing that Appellant was a member of a loving family that would suffer if he was executed and a person of value who helped others; and, (4) this evidence would not have changed the result of the trial.

Although the motion court found that Appellant's trial attorneys investigated Appellant's social history, Appellant nonetheless contends that counsel were ineffective for failing to do just that. He claims that if his history had been more thoroughly investigated, counsel would have discovered that he suffered a traumatic childhood and that they would have presented that evidence during the penalty phase. The motion court did not clearly err in rejecting this claim on at least three grounds.

First, the record shows that counsel did, in fact, investigate Appellant's social history, including interviewing everyone they knew or were told about.

Second, the evidence about his traumatic childhood that Appellant claims was not discovered comes primarily from his mother's postconviction testimony. Yet, before Appellant was convicted and sentenced to death, Appellant's mother, who testified for Appellant during the penalty phase, never mentioned anything about her abusive marriage to Appellant's now deceased father or the household turmoil that she now claims existed while Appellant was growing up.

Third, presenting evidence of a traumatic childhood during the penalty phase would have been contrary to, and inconsistent with, counsel's stated strategy of showing that Appellant was a person of value who helped others and a member of a loving and supportive family that would suffer if he were executed.

A. Appellant's trial counsel investigated his social history.

The motion court found that Appellant's trial counsel investigated Appellant's social history. (PCR L.F. 361).

Appellant's trial attorney (Charles Moreland) testified that a

social history was investigated and prepared.⁷ (PCR Tr. 149-50). The attorney responsible for investigating social history and mitigation evidence (Michelle Monahan) testified that everyone they were told about or were aware of was interviewed in preparing the social history. (PCR Tr. 231). Appellant’s mother confirmed that before trial she was interviewed by counsel and that she authorized the release of her medical records.⁸ (PCR Tr. 11, 108, 191). The investigator responsible for compiling Appellant’s social history prepared several memoranda reflecting her investigation, including a chronology of Appellant’s life and summaries of interviews with Appellant, his mother and brother, and other family members. (PCR Tr. 108;

⁷While conceding that social history work was performed, Attorney Moreland claimed that a “composite” social history—meaning that the information was all in one place—was not prepared. (PCR Tr. 149).

⁸In an affidavit filed in the postconviction case, Appellant’s mother confirmed that she talked to Appellant’s penalty-phase attorney and investigator and “gave them all the information they inquired about.” Movant’s Ex. 27.

Movant's Exhibits 31, 34, 37, 38, 46). Appellant did not call the mitigation investigator as a witness during the postconviction evidentiary hearing. *See Middleton v. State*, 80 S.W.3d 799, 809 (Mo. banc 2002) (rejecting the movant's claim that counsel inadequately investigated mitigation evidence when no evidence was presented showing what information counsel and investigators did collect).

Appellant's postconviction claim is that his trial attorneys were ineffective because they did not discover evidence of Appellant's traumatic childhood, which he claims they should have presented through the testimony of his mother, a cousin (Tangalayer Mansaw), and a child development expert. App. Br. 81. But the record shows that despite their efforts in investigating Appellant's social history, no one gave Appellant's attorneys any information that Appellant suffered a "traumatic" childhood or that Appellant grew up in a "violent and chaotic household." App. Br. 81. This information did not surface until after Appellant's conviction and death sentence were upheld on direct appeal and his postconviction attorneys began pursuing claims of ineffective assistance of counsel.

B. Information about Appellant’s “traumatic” childhood was not revealed until after conviction and death sentence.

Nearly all the information Appellant now claims should have been discovered and presented during the penalty phase has come from his mother. Yet the record shows that she never mentioned anything about Appellant’s traumatic childhood or the abusive household in which he was raised until the postconviction case. In addition, information received from other family members — including Appellant himself — belie Appellant’s current postconviction claim that this information was reasonably available to his trial attorneys to discover and present during the penalty phase.

1. Appellant’s mother did not reveal this information until after Appellant’s conviction and sentence.

Proof that information about Appellant’s allegedly traumatic childhood was unavailable to Appellant’s attorneys before trial is most starkly demonstrated by an affidavit Appellant’s mother prepared for the postconviction attorneys.⁹ In the first part of the affidavit she outlines what she told

⁹A copy of this affidavit is included in the Appendix.

Appellant's penalty-phase attorney (Michelle Monahan) and investigator (Terri McGlinn).¹⁰ (Movant's Ex. 27, pp. 2-4).

Although she acknowledged suffering from depression, having had a difficult labor with Appellant, and witnessing Appellant's father discipline Appellant and his brothers by spanking them, nothing whatsoever is mentioned in that part of the affidavit reflecting that Appellant suffered a "traumatic childhood" or that he was raised in an "abusive household."¹¹

In the second part of the affidavit, Appellant's mother

¹⁰In paragraph 22 of the affidavit, Appellant's mother stated that the information contained in paragraphs 3 through 21 were provided to trial attorney Monahan and trial investigator McGlinn. (Movant's Ex. 27, ¶ 22). None of the information in those paragraphs is reflective of an abusive or traumatic childhood.

¹¹Further proof that Appellant's mother's information about a traumatic childhood was not revealed to trial counsel before trial is also confirmed by a pretrial memorandum the mitigation investigator prepared outlining her interview with Appellant's mother. Movant's Ex. 37.

outlines the information that she “provided to postconviction counsel,” the postconviction mitigation specialist (Catherine Luebbering), and “the doctors hired by the postconviction team to evaluate [Appellant].” (Movant’s Ex. 27, p. 4, ¶ 23). It is not until this part of the affidavit that she describes events that Appellant now claims his trial attorneys should have discovered to prove that he suffered a traumatic childhood.

More proof that this information was not made available to Appellant’s trial attorneys is contained in the testimony of psychologist Dr. Donald T. Cross, whom Appellant’s trial attorneys had hired to perform a pretrial evaluation of Appellant’s competency.¹² (Cross Depo. 15-19). Before trial, Appellant’s mother told Dr. Cross that Appellant and his brothers were “normal” and did not have any problems in school. (Cross Depo. 26-27). Dr. Cross said it was only after trial that he and Appellant’s postconviction attorneys learned that Appellant’s mother was in an abusive marriage. (Cross Depo. 28, 35).

¹²Dr. Cross also testified on Appellant’s behalf during the postconviction case.

Further proof that this information was not available before trial was supplied by Appellant's mother when she confirmed to Dr. Cross that since Appellant had now been convicted and sentenced to death she "might as well come clean" about the abusive situation in her home. (Cross Depo. 116). Appellant's mother had to be "encouraged" to give an "honest and truthful" account during the postconviction investigation. (Cross Depo. 116-17). The doctor even stated that before Appellant's trial it would not have been possible to get information about the abusive situation in Appellant's childhood home from Appellant's mother. (Cross Depo. 117). Dr. Cross suggested that with the death of her husband (Appellant's father) and the murder of her daughter-in-law (Appellant's ex-wife), it was too difficult for Appellant's mother to make these disclosures before trial, though he gratuitously added that this information could have "possibly" been uncovered by a social history. (Cross Depo. 117-18).

Finally, Appellant's mother's testimony during the penalty phase further shows that this information was unavailable to Appellant's trial attorneys. She testified that Appellant and his

father had a “good relationship” and were “very close.” (Tr. 1938). She said all of her sons were “very close” to their father. (Tr. 1938). Even during the postconviction evidentiary hearing, she said that Appellant liked helping his father. (PCR Tr. 71). This testimony starkly contradicts her postconviction testimony portraying Appellant’s father as an abusive husband and father.

2. Statements by Appellant and other family members do not show a traumatic childhood.

Statements and testimony given by other family members, including Appellant himself, both before and after Appellant’s trial do not support Appellant’s postconviction claim that he suffered an abusive and traumatic childhood.

During a pretrial interview with a mitigation investigator, Appellant acknowledged that while he was disciplined by spankings, he denied any physical or sexual abuse occurred in his childhood home. (Movant’s Exhibits 31 and 9, p. 3066). His biggest criticism of his parents was that they provided little or no “emotional support.” (Movant’s Ex. 31). He said that he and his father had a normal father-son relationship. (Movant’s Ex. 31).

Moreover, during the evidentiary hearing before the motion court, Appellant interrupted his mother's testimony to tell the motion court that her testimony was not "accurate" or "truthful" (PCR Tr. 61):

I can't testify to what she says before I was born or when I was a very young child. What she is stating happened since, I guess, I was eleven or twelve years old until now, that's not accurate. They [the postconviction attorneys] know it and when she says I asked her not to participate [in the postconviction case], what I ask [sic] her was to not lie to these two [attorneys] and to tell it exactly.

(PCR Tr. 62). The memorandum reflecting the investigator's pretrial interview with Appellant's brother (Stevenson Edwards) mentions nothing about an abusive household; instead Appellant's brother reported that his parents provided for the family and that they received "standard" punishment (spankings) as discipline. (Movant's Ex. 38). The investigator wrote that Appellant's brother "never felt that any discipline administered by his dad was overly abusive." (Movant's Ex. 38).

Appellant also complains about trial counsel's failure to

investigate, or to call as a penalty-phase witness, Appellant's cousin, Tangalayer Mansaw, to support his claim that he suffered a traumatic childhood. App. Br. 91. The motion court rejected this claim by finding that Ms. Mansaw's testimony "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." (PCR L.F. 368). The record supports the trial court's finding.

First, the record does not show that counsel was aware of this witness. Trial counsel testified that every witness they were told about was interviewed. (PCR Tr. 231), and that no one interviewed Ms. Mansaw, (PCR Tr. 219). Moreover, Ms. Mansaw testified before the motion court that Appellant's wife had told her that she should not attend Appellant's trial. (PCR Tr. 99).

Second, Ms. Mansaw's proposed testimony would have done little to support Appellant's current claim that he suffered a traumatic childhood at the hands of an abusive father.

Although the record is not entirely clear, it appears that Ms. Mansaw first visited Appellant's home when she was five- or six-

years-old and Appellant was sixteen- or seventeen-years-old.¹³

Although Ms. Mansaw said that Appellant's mother and father fought, she also said that everyone liked Appellant's father, that he had welcomed her and her mother (Appellant's aunt) into his home, and that he was "good to her." (PCR Tr. 81, 94, 96).

Finally, Appellant complains that counsel were ineffective for failing to call a child development specialist to explain the effects that a traumatic childhood would have had on Appellant. App. Br. 81, 93. Because counsel did not learn about Appellant's allegedly traumatic childhood until after trial, his claim that counsel should have called a child development specialist to testify during the penalty phase is moot. In addition, calling such an expert would have been contrary to Appellant's penalty-phase strategy, as discussed below.

C. Presenting evidence of a "traumatic" childhood would have been inconsistent with the penalty-phase strategy.

¹³Ms. Mansaw testified that there was an eleven year age difference between her and Appellant, (PCR Tr. 76), and that she graduated high school in 1991, (PCR Tr. 80), which made her younger than Appellant, who was born in 1964.

Appellant does not dispute the motion court’s finding that the penalty-phase strategy adopted by Appellant and his attorneys was to show that while Appellant had been found guilty of a terrible crime, he had also “done good things in his life,” was loved by his family, and was respected by friends and coworkers. (PCR L.F. 358). To that end, the court found that Appellant’s attorneys called family members, coworkers, and friends as witnesses to discuss how Appellant “had been a positive, contributing member of society who had displayed acts of kindness to those around him.”¹⁴ (PCR L.F. 358). This strategy, the motion court found, was to portray Appellant as “a person genuinely connected to many people coming from a cross-section of society, not just one or two relatives willing to lie for him.” (PCR L.F. 358).

The motion court found the reasoning behind this strategy was twofold. (PCR L.F. 358). First, it showed Appellant had value as a human being as a father, brother, and son; that he

¹⁴The record shows that during the penalty phase, Appellant called nine witnesses who were family, friends, and coworkers. (Tr. 1936-2030).

had been kind and decent to prisoners as a correctional officer; and that he provided housing and employment to the poor. (PCR L.F. 358). Second, it showed that Appellant had a family of good people that would be hurt by his execution. (PCR L.F. 359). The motion court found that the strategy to save Appellant's life was to tell jurors that even if they thought Appellant deserved a death sentence for the crime he committed, they should nevertheless spare his life because he was a "multidimensional" person who still had value as a human being and because his family would be hurt by his death.¹⁵ (PCR L.F. 359).

Appellant's trial attorneys testified that part of the penalty-phase strategy was to show that Appellant was a person of value, a loving family member, and a positive force in the lives of others. (PCR Tr. 160-61, 211-12, 224, 227). Although Attorney Monahan claimed that she would have presented evidence of Appellant's traumatic childhood if she had known about it, (PCR Tr. 220-21), this assertion strains credulity and is

¹⁵This finding is supported by trial counsel's penalty-phase closing argument. (Tr. 2041-44).

inconsistent with the strategy employed during the penalty phase. The motion court rejected this claim by finding that counsel would not have wanted to portray Appellant as a person “disconnected from a dysfunctional family.” (PCR L.F. 359). This, the motion court found, would have been “completely contrary” to the strategy of showing Appellant as a member of a loving family that would be hurt by his execution. (PCR L.F. 359).

Although not explicitly stated by the motion court, another defense consideration bearing on the penalty-phase strategy was to sow the seed of residual doubt about Appellant’s guilt. As acknowledged in their penalty-phase opening statement, defense counsel had to walk a fine line between respecting the jury’s guilty verdict while demonstrating to them that some residual doubt may exist about Appellant’s guilt. (Tr. 1926). In penalty-phase closing argument, defense counsel told the jurors that they would “have to live with this decision for the rest of [their lives], that their decision should be carefully considered so they would not have to “wonder later if [they] made the wrong decision,” and that they should not vote for death unless they

have “perfect confidence that [Appellant] deserves to die.” (Tr. 2039-40, 2044).

It must also be remembered that Appellant contracted with someone else to have his ex-wife killed. Consequently, there was no eyewitness testimony to prove that Appellant pulled the trigger. The State’s case rested primarily on circumstantial evidence and Appellant’s confessions, which he repudiated at trial. Residual doubt was a viable defense strategy during the penalty phase.

Appellant now suggests that evidence of a traumatic childhood would have helped explain the murder to jurors. App. Br. 82. In other words, by presenting evidence of a traumatic childhood and how it adversely affected him, Appellant could have explained why he took the drastic step of arranging for the contract killing of his ex-wife. But this strategy would have been a tacit admission of guilt and would have confirmed for jurors that they were correct in finding Appellant guilty. This would have relieved jurors of the burden of considering residual doubt in deciding on punishment. Instead the jurors would have had to reconcile the allegations of a traumatic childhood with

the obvious success Appellant enjoyed as an adult.¹⁶ This unexplainable discrepancy would not have portrayed Appellant, who chose to have his ex-wife killed instead of paying child support, in a good light. In fact, it would have likely reinforced the jury's decision to recommend a death sentence.

D. Trial counsel were not ineffective for failing to present evidence of Appellant's allegedly traumatic childhood.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Hutchison v. State*, 150 S.W.3d 292, 302 (Mo. banc 2004) (quoting *Strickland*, 466 U.S. at 690-91). “Prevailing professional standards for capital defense work require counsel to ‘discover all *reasonably available* mitigating evidence’” *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

Counsel made a reasonable investigation into Appellant's

¹⁶The jurors heard evidence that Appellant was employed as a correctional officer, owned rental property, and took vacations to a Missouri resort and to Florida. (Tr. 1011-12, 1195, 1221, 1712, 1803, 1873, 2015, 2020).

background and social history. Appellant does not attack that investigation; he simply contends that counsel should have uncovered information about his traumatic childhood. But how could they, in light of the reports they received from Appellant, his mother, and other family members showing just the opposite? No one mentioned anything about Appellant's father — now deceased — being an abusive husband and father until the postconviction case began. Appellant's mother's postconviction testimony that Appellant suffered a traumatic childhood — testimony that was directly contrary to her penalty-phase testimony — was not “reasonably available” to trial counsel, who heard no such reports or other information that should have prompted them to further investigate this alleged aspect of Appellant's background.

Moreover, counsels' decision to adopt a penalty-phase strategy of showing Appellant as a member of a loving family after they investigated and discovered no contrary information was entirely reasonable and within the realm of competent representation. “Strategic choices made after thorough investigation of law and facts relevant to plausible options are

virtually unchallengable.” *Strickland*, 466 U.S. at 690. “The selection of witnesses and evidence are matters of trial strategy, virtually unchallengable in an ineffective assistance claim.”

Williams v. State, 168 S.W.3d 433, 443 (Mo. banc 2005). Even if they had known about evidence showing Appellant suffered a traumatic childhood, counsel would not have been ineffective in adopting the penalty-phase strategy they ultimately employed.

Appellant cannot demonstrate prejudice because the penalty-phase strategy pursued by Appellant’s trial attorneys was far superior to a strategy showing that Appellant was a product of a dysfunctional and unloving family to explain why he committed this murder. Contrary to Appellant’s argument, it is unreasonable to believe that both strategies could be simultaneously employed. Either Appellant came from a loving, supportive family or he was the product of a dysfunctional family and a traumatic childhood. The two strategies are mutually exclusive and counsel cannot be deemed ineffective for choosing one over the other. *Compare State v. Johnson*, 968 S.W.2d 123, 133 (Mo. banc 1998) (holding that counsel was not ineffective for failing to investigate and present mitigation

evidence that a capital defendant was “the victim of a cold, unloving family” when that evidence would have contradicted the reasonable trial strategy of presenting the defendant “as the product of a good Christian family”).

No reasonable probability exists that the result of the trial would have been different if the traumatic-childhood strategy had been employed. Common sense suggests that the jurors would not have excused Appellant’s actions in arranging for the contract killing of his ex-wife because he did not want to pay her child support simply because he might have had a traumatic childhood. This type of defense would not have explained a contract killing.

E. The cases on which Appellant relies are inapposite.

The cases Appellant relies on to support his claim that counsel were ineffective for not investigating his social history are inapplicable to his case. In those cases, counsel representing capital defendants simply ignored mitigation evidence that they in fact possessed or was reasonably available to them. In none of those cases were counsel deemed ineffective for not having discovered mitigating evidence that was only revealed during

the postconviction proceedings from a source who testified to just the opposite during trial.

In *Williams v. Taylor*, 529 U.S. 362 (2000), counsel did not begin preparing for the sentencing phase until a week before trial; they failed to investigate the defendant's background by obtaining social service and juvenile records because they incorrectly believed state law prevented access to those records; they failed to introduce "available evidence that the defendant was borderline mentally retarded; they failed to obtain the defendant's prison records reporting his commendable behavior; and they failed to return a phone call of a CPA involved in the prison ministry program who said that the defendant "thrived in a more regimented and structured environment." *Id.* at 395-96.

In *Wiggins v. Smith*, although counsel had information that the psychologist counsel they hired to evaluate the capital defendant said that he had a low IQ and personality disorders, that a presentence report noted the defendant's "misery as a youth" and "disgusting" background, including multiple foster care placements in which he suffered from emotional difficulties, that defendant's mother was an alcoholic, and that defendant's

mother had left him and his siblings alone for days without food, they conducted no further investigation into the defendant's background and instead put on a mitigation case limited to the fact that the defendant was not directly responsible for the murder and had no prior convictions. *Wiggins*, 539 U.S. 510 at 535-36.

In *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), counsel failed to obtain the defendant's "readily available" prior conviction file even though they were on notice that the state's case in aggravation rested on the defendant's significant history of prior convictions. *Id.* at 2464.

And, finally, in *Hutchison v. State*, although counsels' own expert told them about the defendant's psychiatric problems, impaired intellectual functioning, and emotional and sexual abuse, counsel never attempted to obtain "readily available" records documenting the defendant's "troubled childhood, mental health problems, drug and alcohol addiction, history of sexual abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems, and social and emotional problems." *Hutchison*, 150 S.W.3d at 304-05.

VII. (Mental Illness)

The motion court did not clearly err in overruling, after an evidentiary hearing, Appellant's claim that trial counsel were ineffective in failing to investigate and present evidence that Appellant suffered from mental problems because the record shows that: (1) before trial three mental health professionals evaluated Appellant and told counsel that he had no mental disease or defect; (2) the motion court found that Appellant's postconviction evidence that he suffered from Asperger's Disorder lacked credibility; and, (3) Appellant was not prejudiced because evidence that he suffered from Asperger's Disorder contradicted the penalty-phase strategy of showing Appellant to be a person of value that helped others and who was good to his family and it would have confirmed his motive to kill his ex-wife and reinforced the jury's decision to recommend a death sentence.

Before trial, trial counsel arranged three separate mental health evaluations for Appellant. None of the doctors — two psychologists and one psychiatrist — that evaluated Appellant found that he suffered from any mental illness. Appellant nevertheless claims that trial counsel were ineffective for not investigating and presenting evidence of his mental problems — specifically that he suffered from Asperger's Disorder — during

the penalty phase. Appellant's claim is simply a regurgitation of his other arguments focusing on counsel's alleged failure to prepare a "thorough" social history. App. Br. 95. He suggests that if counsel would have properly performed a social-history investigation, his experts would have diagnosed Asperger's Disorder. This he claims would have explained why Appellant appeared cold and distant and why he was unable to form appropriate social relationships. App. Br. 95-96. Yet Appellant points to nothing in the record showing that he appeared that way to jurors or that they heard evidence about Appellant's general inability to form such relationships.

Because Appellant's claim centers on trial counsel's failure to provide these doctors with information regarding Appellant's "traumatic" childhood, which, as explained in Point VI, was information not revealed until the postconviction case, counsel cannot be deemed ineffective for not providing these doctors with information of which they were unaware. In addition, the motion court found that the postconviction diagnosis that Appellant suffered from Asperger's Disorder lacked credibility. Finally, showing that Appellant was suffering from a mental

illness that causes one to be narcissistic, self-centered, and unable to form socially meaningful relationships would have been contrary to the penalty-phase strategy of presenting Appellant as a person of value who helped others and as a member of a loving, close family that would be devastated by his loss. This evidence would have also reinforced for jurors Appellant's motive for killing his ex-wife

A. Appellant's attorneys' investigation was reasonable and revealed that Appellant did not suffer from any mental disorders.

The motion court found that before trial Appellant's attorneys arranged for him to be examined by three separate mental health experts. (PCR L.F. 356). All three doctors (John Rabun, M.D., Michael Stacy, PhD., and David Cross, PhD.) "informed trial counsel" that Appellant did not suffer from any mental illness and that no basis existed to pursue a "defense of mental disease or defect." (PCR L.F. 356-57). Specifically, none of these doctors mentioned anything about Appellant suffering from Asperger's Disorder. (PCR Tr. 157-58).

These findings are confirmed by the postconviction testimony of Appellant's trial attorneys and two of the doctors

who performed Appellant's pretrial evaluation. (PCR Tr. 109, 156-58, 209-10; Cross Depo. 167, 198). Dr. Stacy, who, like Dr. Cross, performed both pretrial and postconviction mental evaluations on Appellant, reported after his pretrial evaluation that Appellant was not "suffering from mental disease or defect." (Movant's Ex. 11, p. 3409). Dr. Cross testified that he did not associate any of Appellant's pretrial behaviors with a mental illness. (Cross Depo. 170). A psychiatrist retained by the Appellant's postconviction attorneys to evaluate Appellant testified that before trial no one suspected that Appellant suffered from Asperger's Disorder. (Logan Depo. 71).

None of the experts specifically requested a "social history" from trial counsel, (PCR Tr. 170, 224, 231), and counsel provided them with numerous records before their pretrial evaluations. The motion court found that trial counsel provided Dr. Cross with the police reports and Appellant's school and employment records, and that he was told that birth and medical records would be forwarded when they were received. (PCR L.F. 365). Trial counsel provided Dr. Stacy with discovery from the criminal case, Appellant's academic, employment, birth, and

health records, as well as Appellant's mother's mental health records.¹⁷ (Movant's Ex. 11, p. 3408).

Dr. Cross testified that he performed six to eight hours of testing on Appellant over a two-day period, but found no evidence of any mental illness.¹⁸ (Cross Depo. 53, 198). Drs. Stacy and Rabun conducted a three-and-a-half hour interview with Appellant; and Dr. Stacy spent a total of twelve-and-a-half hours working on Appellant's evaluation. (Movant's Ex. 11, p. 3408-09).

¹⁷The record does not identify the specific records counsel provided to Dr. Rabun, but they were presumably the same ones provided to Dr. Stacy, considering that Drs. Stacy and Rabun conducted a joint pretrial interview with Appellant. (Movant's Ex. 11, p. 3408).

¹⁸Before trial, Dr. Cross gave Appellant the following tests: Wechsler Adult Intelligence Scale-Third Edition; Woodcock-Johnson Tests of Achievement-Revised; Rotter Incomplete Sentence Blank; Traumatic Stress Inventory; Minnesota Multiphasic Personality Inventory-2; and Thematic Apperception Test. (PCR L.F. 366; Movant's Ex. 11, p. 3394).

Despite the fact that they were encouraged to inform counsel if any additional information was required to complete the evaluation, none of the retained experts ever told trial counsel that they needed more information before completing their evaluations of Appellant's mental health. (PCR Tr. 170, 232; Movant's Ex. 39).

For example, even though he claimed to have never received the medical records he was promised, Dr. Cross never contacted counsel to say that he needed them to complete his evaluation, despite the fact that he was instructed to contact counsel if there were other documents that he needed or would find useful in performing his evaluation. (PCR L.F. 365-66). The motion court concluded that it "was obvious . . . that Dr. Cross did not see the necessity for reviewing additional records, because he did not need them in order to diagnose whether or not [Appellant] had Asperger's Disorder." (PCR L.F. 366). Dr. Cross conceded that he neither asked for a "completed" social history, nor for birth and medical records before reaching his conclusions. (Cross Depo. 165, 175, 187).

Appellant's trial attorneys made a reasonable investigation

and discovered all “reasonably available mitigating evidence” regarding Appellant’s mental health. *See Wiggins*, 539 S. Ct. at 524; *Hutchinson*, 150 S.W.3d at 302. Appellant’s trial counsel had Appellant evaluated by three doctors none of whom found that Appellant suffered from any mental disorders. This constituted a reasonable investigation into Appellant’s mental health. *See Winfield*, 93 S.W.3d 732, 740-41 (Mo. banc 2002) (holding that counsel were not ineffective for failing to investigate whether the defendant had a mental illness when counsel had in fact arranged to have Appellant examined by mental health experts who opined that he did not suffer from a mental illness).

Appellant’s claim that counsel’s investigation of Appellant’s mental health was inadequate because they did not ignore these opinions and extend their investigation borders on the frivolous. “Counsel cannot be faulted for failing to shop for a psychiatrist who would testify more favorably.” *State v. Taylor*, 929 S.W.2d 209, 225 (Mo. banc 1996) (holding that counsel was not ineffective for failing to investigate the defendant’s mental illness based in part on the fact that pretrial mental evaluations failed to show that Appellant suffered from disorders first noted

during the postconviction case).

Appellant argues that counsel did not send all available records to his experts for their use in evaluating Appellant. App. Br. 100. But other than Appellant's and his mother's health records, Appellant does not identify any records that the experts would have needed to diagnose Asperger's Disorder. Appellant's claim is also refuted by Dr. Stacy's report, which shows that he did, in fact, receive Appellant's birth and health records, as well as Appellant's mother's mental health records. (Movant's Ex. 11, p. 3408). Although Dr. Cross claimed not to have received these records, the motion court was not obligated to believe this testimony. Moreover, the record shows that it was not the health records that these experts relied to make this post-trial diagnosis, but on the new information provided by Appellant's mother regarding Appellant's allegedly traumatic childhood. (Movant's Ex. 11, pp. 3368-3435).

Dr. Cross focused on the postconviction information Appellant's mother gave regarding Appellant's allegedly abusive father in explaining his Asperger's diagnosis. (Cross Depo. 28, 35, 133; Movant's Ex. 11, pp. 3380-3407). Dr. Logan, who

evaluated Appellant in the postconviction case, and Dr. Stacy also both focused on the postconviction information Appellant's mother provided in reaching their post-trial diagnosis of Asperger's Disorder. (Movant's Ex. 11, pp. 3408-35). Even the child development specialist (Wanda Draper) Appellant called in the postconviction case relied solely on this information in reaching the Asperger's diagnosis, though she admitted that since she was not psychiatrist or psychologist, she could not diagnose Asperger's Disorder. (Draper Depo. 110-11; Movant's Ex. 11, pp. 3368-79). In addition, Dr. Cross said that it was only "possible" that Asperger's Disorder could have been diagnosed before trial if he had been given this information. (Cross. Depo. 118).

The crux of Appellant's claim turns on the postconviction information provided by his mother. But because Appellant's mother failed to reveal this information before trial (See Point VI), it is disingenuous to now claim that trial counsel were ineffective for not discovering it and presenting it to their experts. This information was not "reasonably available" to Appellant's attorneys before trial. Consequently, trial counsel

cannot be found incompetent for failing to provide it to the experts they retained to evaluate Appellant's mental health.

B. The postconviction claim that Appellant suffers from Asperger's Disorder lacks credibility.

The motion court also rejected, on credibility grounds, Appellant's claim that counsel were ineffective for failing to discover and present evidence that Appellant suffered from Asperger's Disorder.

The motion court found that Dr. Cross, by his own admission, did not originally diagnose Asperger's Disorder, but reached this diagnosis only after attending a "group discussion" involving Appellant's child development expert (Wanda Draper) and postconviction counsel. (PCR L.F. 366). The motion court found that "based on the fact that his opinion and conclusions were reached only after meeting with [Appellant's] post-conviction relief counsel . . . the independence of his expert opinion has been so compromised that it carries no weight."¹⁹

¹⁹Further evidence that Dr. Cross's opinion should be discounted came from Dr. Logan's testimony in which he stated that he was asked to "consult" with Dr. Cross before Cross's

(PCR L.F. 367).

During his postconviction testimony, Dr. Cross confirmed that he attended a day-long meeting to discuss Appellant's postconviction case with Appellant's postconviction counsel, a postconviction mitigation specialist, a "developmentalist," and Dr. Stacy. (Cross Depo. 111-12). Although the attendees were still unsure about a diagnosis, they began discussing "theories" about what might be wrong with Appellant. (Cross Depo. 113). He said that Asperger's was mentioned during an "open-table discussion" between the experts and the attorneys, and he admitted that he did not raise this as a diagnosis, but that someone else did. (Cross Depo. 200-01).

Apparently, the child development specialist, Wanda Draper, was the first to suggest a diagnosis of Asperger's Disorder. In her report she states that her evaluation of Appellant "warrant[ed] further evaluation by a psychiatrist to explore the condition of Asperger's syndrome." (Movant's Ex. 11, p. 3378). She then outlined ten "indicators" showing that Appellant may suffer from Asperger's. (Movant's Ex. 11, p.

deposition. (Logan's Depo. 69).

3378). Based on her attendance at the meeting with postconviction counsel and the other experts, the motion court found that her “opinion has been so seriously compromised that it carries no weight.” (PCR L.F. 363-64).

Dr. Stacy’s postconviction report also suggests that it was Wanda Draper who first developed the diagnosis of Asperger’s Disorder or Reactive Attachment Disorder.²⁰ (Movant’s Ex. 11, p. 3420). Dr. Stacy’s report also shows that he was aware of Draper’s suggested diagnosis when he conducted his postconviction evaluation of Appellant. (Movant’s Ex. 11, p. 3410). Interestingly, Dr. Stacy’s report does not contain a specific diagnosis of Asperger’s Disorder, but gives only a “provisional” diagnosis of “Pervasive Developmental Disorder Not Otherwise Specified,” which Dr. Stacy said has “features consistent with a diagnosis of Reactive Attachment Disorder or Asperger’s Disorder.” (Movant’s Ex. 11, pp. 3422, 3424).

Although not specifically mentioned by the motion court, Dr. Logan’s postconviction evaluation of Appellant suffers from

²⁰Dr. Cross said that he and Dr. Draper together conducted a postconviction interview with Appellant. (Cross Depo. 149).

credibility problems as well. Dr. Logan testified that when he became involved in the case, the meeting between the experts and postconviction counsel had already occurred and that a “diagnostic impression” had been formed that Appellant suffered from Asperger’s Disorder. (Logan Depo. 18). When he was retained by postconviction counsel, Dr. Logan was told that Draper and Cross had already diagnosed Asperger’s Disorder and he was asked to evaluate Appellant to see if he agreed with that diagnosis. (Logan Depo. 18, 67). He also said that before his postconviction deposition was taken, he had been given a videotape of Dr. Cross’s postconviction testimony. (Logan Depo. 80).

Finally, the credibility of the diagnosis of Asperger’s Disorder must be considered in light of the unreliability of the information on which it was based. This diagnosis was primarily based on the postconviction assertions of Appellant’s mother, who claimed that she and her children suffered at the hands of an abusive husband and father. Not only was Appellant’s father already deceased when the postconviction case began, Appellant’s mother’s postconviction testimony

stands in stark contrast to her penalty-phase testimony that painted just the opposite picture of Appellant's childhood.

“The motion court was not required to believe these doctors’ diagnoses, which were not otherwise supported by prior medical opinions” *Worthington v. State*, 166 S.W.3d 566, 574 (Mo. banc 2005). The motion court did not clearly err in rejecting, on credibility grounds, Appellant’s postconviction claims that he suffered from Asperger’s Disorder.

C. Offering evidence during the penalty-phase that Appellant suffered from Asperger’s Disorder would not have been competent trial strategy.

Appellant was not prejudiced by his counsel’s failure to present evidence of his Asperger’s Disorder during the penalty phase. Evidence of this diagnosis was inconsistent with the penalty-phase strategy of showing Appellant to be a cherished member of a loving family and a person of value who helped others. Moreover, the testimony the doctors would have offered only confirmed Appellant’s motive to see his ex-wife dead and would have portrayed him as an egocentric, narrow-minded, and controlling, individual, not as a person suffering through life with a mental illness.

The motion court expressly discounted Appellant's claim that had trial counsel known of this diagnosis, they would have presented this evidence during the penalty phase. The motion court found that the penalty-phase strategy was to portray Appellant as a "connected, interacting and functioning member of society," and "not as a disconnected, socially impaired loner lacking in social reciprocity who no one would really miss if he was sentenced to death." (PCR L.F. 362). The motion court also found that calling mental health experts to testify that Appellant suffered from Asperger's Disorder and Severe Reactive Attachment Disorder "would have been counterproductive to the trial strategy of showing [Appellant] to be a person who had deep and meaningful relationships" with his family and friends. (PCR L.F. 364).

The motion court found that presenting evidence that Appellant was raised in a dysfunctional and abusive home and that his mother's severe depression caused her to be remote, uncaring, and unprotective, "would have only served to make [Appellant's mother] an unsympathetic mother who the jury could have reasonably concluded would not have been harmed

by the execution of her son,” neither of whom had bonded with the other because of their mental illnesses. (PCR L.F. 364).

Testimony that Appellant suffered from a disorder that made him appear socially disconnected would have also been contrary to the penalty-phase strategy of portraying Appellant as an engaged member of a loving family that would be hurt if Appellant was executed. (PCR L.F. 365).

The testimony and reports of the doctors who evaluated Appellant demonstrates just how contradictory the Asperger’s evidence would have been to the chosen penalty-phase strategy, and how damaging it would have been to his effort to avoid a death sentence.

Dr. Cross testified that because of Appellant’s disease he lacked empathy for others, was “too controlling,” had no emotional connection with anyone, and was narcissistic. (Cross Depo. 47-48, 78, 127, 133-34). Dr. Cross also said that Appellant had an “unyielding desire” to have custody of the daughter he fathered with his murdered ex-wife, and that he would do anything necessary to accomplish this task.²¹ (Cross Depo. 105,

²¹In his report, Cross described this as Appellant’s

141). This was confirmed by Dr. Cross's observation that Appellant attempted to impose a "sick form" of control over his second wife (Jada). (Cross Depo. 124). In Dr. Cross's opinion, Appellant refused to pay child support not because he did not have it, but because he simply chose not to. (Cross Depo. 151-52).

Other testimony by Dr. Cross showed Appellant to be well-adjusted, not someone who was suffering from a severe mental disorder. Dr. Cross conceded that Appellant had no adjustment problem in school, had an IQ of 115, and good verbal skills. (Cross Depo. 47, 115). He explained Appellant's "normal appearance" as an attempt to hide his Asperger's Disorder. (Cross Depo. 183).

Dr. Logan testified that Appellant's Asperger's Disorder caused him to not recognize "social cues" and to have a preoccupation with narrow interests. (Logan Depo. 22). Dr. Logan's report said that Appellant valued money to the exclusion of human relationships, and that he "had no

"relentless 13 year pursuit of child custody of his oldest daughter." (Movant's Ex. 11, p. 3402).

awareness” on how his custody disputes with his ex-wife affected his daughter, (Movant’s Ex. 11, p. 3428).

Dr. Stacy’s report said that although Appellant was successful in his own narrowly defined “material world,” he was dysfunctional in the broader “interpersonal world.” (Movant’s Ex. 11, p. 3421). He described Appellant as having an “exaggerated, grandiose sense of self-importance,” that he is “self-absorbed and preoccupied with material success and his need to control others,” that he views himself as “superior,” that he shows no true empathy and takes “advantage of others” to meet his own needs, and that he has “egocentric, inconsiderate, and exploitative attitudes.” (Movant’s Ex. 11, p. 3422). Dr. Stacy also said that the potential of Appellant being labeled as a felon based on his failure to pay child support would have been “a severe blow to his identity.” (Movant’s Ex. 11, p. 3423). In Dr. Stacy’s opinion, Appellant was experiencing a “narcissistic crisis” in August 2000 — the month his wife was murdered. (Movant’s Ex. 11, p. 3424).

Common sense dictates that this is not information any rational defense counsel would want to put before the jury in a

capital penalty-phase proceeding. Nothing contained in the reports and testimonies of these doctors makes Appellant look like a sympathetic person suffering from a debilitating mental disorder. Instead it paints a picture of a man who is self-centered and concerned only with his own interests at the expense of the feelings and needs of anyone else, including his own family.

Even if the jury had been told that Appellant suffered from Asperger's Disorder, it is not reasonably probable that they would have discounted Appellant's actions simply as symptoms of this disorder, which appears to be nothing other than an excuse to justify a pattern of narcissistic and self-centered behaviors. This testimony would have been entirely inconsistent with the strategy of showing that Appellant was a well-adjusted, generous person who was part of a loving family. Appellant was not prejudiced, but was, in fact, fortunate that his trial counsel failed to discover and present evidence of his alleged mental illness.

VIII. (Trial Competency)

The motion court did not clearly err in overruling Appellant's claim that trial counsel were ineffective for not investigating Appellant's competency to stand trial because the record shows that (1) they did make such an investigation by arranging to have Appellant examined by three doctors, all of whom told counsel that Appellant was not suffering from any mental disease or defect and that he was competent to stand trial; and, (2) the record shows that while Appellant had the capacity to assist in his own defense, and did so on many occasions, he sometimes became uncooperative if his attorneys were not following his instructions.

The record shows that three different doctors told Appellant's trial counsel that Appellant did not suffer from a mental disease or defect and that no reason existed to pursue an examination to determine if Appellant was incompetent to proceed with trial. Appellant nevertheless insists that his trial counsel were ineffective for not investigating his competency.

The record, however, supports the motion court's findings that counsel investigated Appellant's competency and found nothing indicating that he suffered from a mental disease or defect, much less that he was incompetent to stand trial. Trial

counsels' difficulties in controlling and communicating with Appellant resulted from differences of opinion or personality clashes, not from any mental illness on Appellant's part.

A. The record supports the motion court's findings that trial counsel investigated Appellant's competency to stand trial and found nothing proving that he was.

The motion court found that before Appellant's trial began, his trial counsel investigated whether Appellant suffered from a mental disease or defect and whether there was a "legal and factual basis" to request an examination to determine whether Appellant was competent to stand trial under § 552.020, RSMo 2000, or whether he could be held criminally responsible for his conduct under § 552.030, RSMo 2000. (PCR L.F. 356). Trial counsel "retained the services of three separate mental healthcare professionals to interview and examine" Appellant in making these determinations. (PCR L.F. 356). All three doctors (John Rabun, Michael Stacy, and David Cross) who examined Appellant "informed trial counsel" that they did not find that Appellant suffered from any mental disease or defect. (PCR L.F. 356-57). Based on this information, trial counsel decided that

they did not have a good faith basis to request an examination under Chapter 552, RSMo. (PCR L.F. 357).

These findings are not clearly erroneous and are supported by the record. Appellant's trial counsel testified that they consulted these three doctors to see if a Chapter 552, RSMo, petition should be filed and that none of the doctors mentioned Asperger's Disorder.²² (PCR Tr. 109, 156-57, 209-10). Although the attorneys had concerns about Appellant's ability to assist them during trial based on communication and control problems they were having with him, (PCR Tr. 108-09, 121, 199), none of the doctors expressed an opinion that Appellant was not competent to stand trial or assist in his own defense. (PCR Tr. 166-68). Counsel also said that another purpose of these evaluations was to get the doctors' advice on how they could better communicate with Appellant. (PCR Tr. 109, 209-10).

Trial counsel testified that Appellant would get upset when

²²Attorney Moreland said that he would not have directed the experts' attention to Asperger's Disorder even if he had heard about it because this would have been unethical. (PCR Tr. 157).

he learned that his attorneys were not working on his case, (PCR Tr. 120), and that Appellant made numerous attempts to direct the activities of counsel and investigators, (PCR Tr. 123-24, 129, 131, 155). Dr. Cross opined that Appellant wanted control because his life was at stake. (Cross Depo. 63).

Appellant's trial counsel testified that Appellant would get irate if his attorneys were not working on his case, that he gave counsel a list of tasks in preparing for trial and instructed that they be completed, and that he would "bargain" with counsel for his cooperation on their requests of him in exchange for their following his instructions. (PCR Tr. 120, 129, 206-07).

Appellant even asked that his counsel be replaced because they did not always follow his instructions. (PCR Tr. 132-33).

Counsel testified that Appellant had his own ideas of how the case should be tried and that Appellant tried to control the attorneys instead of the attorneys controlling him. (PCR Tr. 155).

On the other hand, trial counsel testified that no "special concerns" were noted in Appellant's academic records, that he had never been held back in school for mental illness, and that

he had never been referred to a psychiatrist. (PCR Tr. 152). They admitted that Appellant did give them “good information.” (PCR Tr. 209). This is reflected in the memoranda postconviction counsel filed with the motion court showing that Appellant cooperated with counsel and gave them information more often than not. (Movant’s Ex. 9). Counsel also admitted that Dr. Cross did not have the same communication problems with Appellant that the defense team was having, and that Dr. Cross genuinely liked Appellant. (PCR Tr. 233-34).

Dr. Cross testified that Appellant had good verbal skills and that no “adjustment problems” were noted in his academic records. (Cross Depo. 47). According to Dr. Cross, Appellant was aware of the charges (capital murder) and possible sentence, knew the respective roles of his attorneys and the prosecutors, and had a basic understanding of what happened in court. (Cross Depo. 167, 212-13). Appellant was not psychotic and he was responsible for his actions, though Dr. Cross now believes Asperger’s contributed to them. (Cross Depo. 172-73).

Appellant told attorneys about witnesses and was capable of answering direct questions. (Cross Depo. 180-81). Before

trial, Dr. Cross told counsel that the difficulties counsel were having with Appellant could be explained by the fact that Appellant was in a “traumatic situation,” that he was “going through some turmoil,” and that he was simply “fighting to find a way to deal with it.” (PCR Tr. 233-34).

Dr. Stacy told trial counsel that Appellant’s “dysfunctional personality” contributed to the attorneys’ difficulties in working with Appellant, but that he did not suffer from a mental disease or defect. (Movant’s Ex. 11, p. 3409). In describing his pretrial interview with Appellant, Dr. Stacy wrote that Appellant was “alert and oriented,” “highly verbal,” and “logical and goal oriented.” (Movant’s Ex. 11, p. 3419). Dr. Stacy noted that Appellant’s “intellect appeared to be average or slightly above” and that “there was no evidence of significant cognitive deterioration in his conversation.” (Movant’s Ex. 11, p. 3419).

Even the motion court judge (the same judge who presided over Appellant’s trial) stated that “at no time did this Court observe any difficulty in communication occurring between [Appellant] and his Trial Counsel.” (PCR L.F. 368). The court noted that on occasion it addressed Appellant personally and

that Appellant never appeared confused, unresponsive, or disconnected. (PCR L.F. 368-69).

The court also observed Appellant testifying and noted that his answers to counsels' questions were "appropriate" and that Appellant never appeared "confused" or "unable to understand." (PCR L.F. 369). Appellant's postconviction claim of disabilities "were never observed by the Court, which spent untold hours over the course of weeks in close proximity to" Appellant. (PCR L.F. 369). If the court had observed that Appellant was not understanding the proceedings or was unable to communicate with counsel, it said it would have *sua sponte* stopped the case before trial began and would have ordered a competency evaluation under § 552.020, RSMo. (PCR L.F. 369).

B. Counsel was not ineffective in failing to pursue a pretrial motion to declare Appellant incompetent because no grounds existed to support such a claim.

A defendant cannot be tried for an offense if “as a result of mental disease or defect” he “lacks capacity to understand the proceedings against him or to assist in his own defense.” Section 553.020.1, RSMo 2000. “A defendant is competent when he ‘has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.’” *State v. Baumruk*, 85 S.W.3d 644, 648 (Mo. banc 2002) (quoting *State v. Johns*, 34 S.W.3d 93, 94 (Mo. banc 2000)). “In Missouri a defendant is presumed competent, and has the burden of proving incompetence by a preponderance of the evidence.” *State v. Anderson*, 79 S.W.3d 420, 432-33 (Mo. banc 2002).

Counsel did not act incompetently in failing to request a mental evaluation under § 552.020 to determine if Appellant was competent to stand trial. First, none of the doctors retained by counsel who evaluated Appellant before trial said that he had

a mental disease or defect. Counsel had no reason to believe the result would be any different if they had initiated a formal request under § 552.020. “Failing to discover a psychiatrist that would find [the defendant] incompetent to stand trial . . . does not constitute ineffective assistance.” *State v. Smith*, 944 S.W.2d 901, 923 (Mo. banc 1997). In fact, counsel likely had trial strategy considerations for not making such a request after being unequivocally informed that Appellant did not have a mental disease or defect. *See State v. Richardson*, 923 S.W.2d 301 (Mo. banc 1996) (noting that counsel may have strategic reasons for not requesting a mental examination under § 552.020 because of a lack of control over the examination and report of the results).

Second, the postconviction evidence proves, at most, not that Appellant lacked the capacity to assist in his own defense, but that he simply chose on occasion not to be cooperative. The doctors who evaluated Appellant, and even trial counsel, conceded that he not only had the ability to assist in his defense, but that he often did so as long as counsel followed his case preparation instructions. Appellant undeniably had his own

views on how his case should be tried and what investigations and strategies his counsel should be pursuing. Appellant's refusal to alter those views and compromise with counsel resulted in his uncooperativeness. In other words, the record shows that Appellant was uncooperative because he wanted to be, not because any mental disorder compelled him to do so. Even if Appellant suffered from a mental disease such as Asperger's Disorder, a highly dubious proposition on this record, this disorder did not prevent him from understanding the proceedings against him or deprive him of the ability to assist counsel.

Like his claims in Points VI and VII, the crux of Appellant's claim here is that counsel were deficient in their investigation of Appellant's social history. The adequacy of that investigation is discussed in those points and will not be repeated here. Suffice it to say, however, that the information Appellant claims his attorneys should have discovered was not revealed until the postconviction case, is not credible, and would not have altered the doctors' pretrial findings that Appellant did not suffer from any mental disease or defect.

IX. (Postconviction Competency)

The motion court did not clearly err in deciding Appellant's postconviction case without *sua sponte* making an inquiry into whether Appellant was competent to proceed with his postconviction case because Appellant never made a motion alleging incompetency or seeking a competency determination by the motion court; and the record shows that Appellant's postconviction claim of incompetency is without basis in the record and is not credible.

Relying on self-serving allegations contained in his postconviction motion and the opinions of doctors he alone hired to perform mental evaluations, the credibility of which has been questioned by the motion court, Appellant contends the motion court erred in proceeding to adjudicate his postconviction claims without making a determination that Appellant was competent to proceed. Contrary to Appellant's argument, this case does not require this Court to address the issue whether postconviction defendants have the right to be competent during their postconviction proceeding because the record contains no credible evidence that Appellant is incompetent. The record shows simply that any difficulties that his postconviction

attorneys have encountered are the result of Appellant's willful decision not to cooperate with counsel when he disagrees with their approach.

A. Appellant's postconviction motion does not sufficiently allege a postconviction competency claim.

Appellant's postconviction attorneys alleged in the amended Rule 29.15 motion that Appellant is incompetent to proceed with his postconviction case. They claim that Appellant is "narrowly focused" on obtaining a new guilt-phase trial and that this has resulted in a "breakdown in communication." (PCR L.F. 65). The motion alleged that Appellant has interfered with postconviction efforts to explore his family background by instructing family members not to testify in any postconviction proceedings. (PCR L.F. 65).

These allegations fall well short of establishing grounds to question Appellant's competency. They do not demonstrate that Appellant was incapable of understanding the proceedings or that he lacked the capacity to assist postconviction counsel. Appellant's amended motion contains no separately identified section alleging postconviction incompetency.

“A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment.” *White v. State*, 939 S.W.2d at 893. “As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief.” *Morrow*, 21 S.W.3d at 822.

These requirements are designed “to provide the motion court with allegations sufficient to enable [it] to decide whether relief is warranted.” *Id.* at 824. Without timely pleadings containing reasonably precise factual allegations, “scarce public resources would be expended to investigate vague and often illusory claims, followed by unwarranted hearings.” *White*, 939 S.W.2d at 893. These “pleading requirements are not merely technicalities.” *Morrow*, 21 S.W.3d at 824. Finally, Appellant cannot use the evidentiary hearing as a vehicle to adduce facts not alleged in his post-conviction motion. *See State v. Brooks*, 960 S.W.2d 479, 497 (Mo. banc 1997) (“[A]n evidentiary hearing is not a means by which to provide [a] movant with an opportunity to produce facts not alleged in the motion.”).

Appellant's allegations do not meet these postconviction pleading standards. They failed to apprise the motion court of grounds to believe that Appellant was truly incompetent to proceed with his postconviction case. This Court can reject Appellant's claim of postconviction incompetency on this ground alone.

B. The record does not support Appellant's claim of postconviction incompetency.

Setting aside his pleading deficiencies, Appellant primarily relies on the postconviction opinion and testimony of Dr. Logan to establish that he is incompetent to proceed with his postconviction case. Dr. Logan testified that he was retained by postconviction counsel after the other experts (Dr. Cross and Wanda Draper) had already met with the postconviction attorneys and "formed a diagnostic impression" that Appellant suffered from Asperger's Disorder. (Logan Depo. 14, 18). Dr. Logan was told about this and was informed that he was being retained to determine whether he agreed with that diagnosis and to opine on how that diagnosis "might have affected various aspects of [Appellant's] participation in the legal system in this

case. (Logan Depo. 18, 67). Dr. Logan's opinion was that Appellant is not now competent and was not competent during his trial. (Logan Depo. 58).

Undercutting Dr. Logan's opinion on Appellant's competency is his testimony on Appellant's mental abilities. Dr. Logan described Appellant as having an IQ of 115, making him "really quite bright." (Logan Depo. 37). As far as understanding the legal process, Dr. Logan was of the opinion that Appellant was competent, and that he understood legal concepts like the Miranda warnings. (Logan Depo. 45-46). He conceded that Appellant was not inept, but Dr. Logan questioned Appellant's "decisional competence." (Logan Depo. 58). He said that Appellant had difficulty working with counsel and that he refused to incorporate counsel's advice. (Logan Depo. 46-48). Dr. Logan insisted that Appellant was not just being difficult, but that he suffered from Asperger's Disorder. (Logan Depo. 49, 58). Asperger's Disorder, which the doctor said was uncommon, causes deficiency in social interactions, including the failure to recognize social cues, inability to problem solve, and a preoccupation with narrow interests. (Logan Depo. 21-22). Dr.

Logan claimed that Asperger's is difficult to recognize by clinical evaluation alone. (Logan Depo. 60-61).

Dr. Logan conceded that he had come into the case late and that he did not perform his own social history, but relied on the social history compiled by others, including Appellant's postconviction attorneys. (Logan Depo 69-70). Dr. Logan conceded that most defendants are difficult for attorneys to represent. (Logan Depo. 70). He suggested that this diagnosis was not made before trial because there was not a social history that would have alerted the evaluators to the presence of Asperger's. (Logan Depo. 72). Finally, Dr. Logan admitted that Appellant would provide information to his attorneys if he agreed with their approach or if they performed tasks he had requested. (Logan Depo. 78). The problems occurred because Appellant's attorneys did not always follow his instructions. (Logan Depo. 79).

Although he gave a pretrial opinion that Appellant did not suffer from any mental disease or defect, Dr. Cross testified in the postconviction case that he now believes Appellant suffers from Asperger's Disorder. (Cross Depo. 129, 144-45). Dr. Cross

believed that Appellant was and is incompetent to assist counsel with his defense and even went so far to say that Appellant “should never stand trial.” (Cross Depo. 179, 211-12).

But Dr. Cross conceded that Appellant would give names of witnesses to his attorneys and that he has the ability to answer questions put to him by counsel. (Cross Depo. 180-81).

According to Dr. Cross, Appellant understood the charges he was facing, the possible sentence, the respective roles of his attorneys and the prosecutors, and a basic understanding of what happens in court. (Cross Depo. 212-13). Nothing in Dr. Cross’s testimony suggested that this was not still the situation in the postconviction case.

As explained in Point VIII, the postconviction testimony of these doctors does not establish that Appellant is incompetent. Their opinions demonstrate that Appellant has the capability to cooperate with counsel and provide information to them. Instead, he chooses to be uncooperative when he disagrees with counsels’ strategy decisions. Appellant’s postconviction attorneys base their opinion on Appellant’s competency in part on the fact that he is focused solely on guilt phase issues. But

considering that Appellant still maintains his innocence, (Logan Depo. 81-81), this makes perfect sense. If Appellant adopted his postconviction attorneys' strategy of faulting trial counsel for not presenting a psychological defense during the penalty phase to explain why Appellant arranged to have his ex-wife murdered, his claim of actual innocence would be rendered moot.

As further evidence of his inability to communicate with counsel, Appellant relies on the fact that in preparing the amended Rule 29.15 motion, postconviction counsel dropped many of Appellant's pro se claims. App. Br. 113. In addition, he alleges that counsel moved to amend by interlineation claims appearing in the pro se motion. App. Br. 113. Neither of these provides any basis for questioning Appellant's competency, much less demonstrates that Appellant is incompetent. Further evidence casting doubt on Appellant's postconviction competency claim is that neither Appellant nor his counsel ever asked the motion court for a formal competency evaluation.

In his brief, Appellant claims that counsel refused to allow Appellant to testify during the postconviction evidentiary

hearing. App. Br. 113. No objective evidence in the record supports his claim that his counsel refused to allow him to testify. Appellant had already filed one pro se motion with the motion court attempting to get a continuance. (PCR L.F. 311-13). Surely, if Appellant believed postconviction counsel were preventing him from testifying, Appellant would have filed another pro se motion alerting the motion court of that effort.

Section 552.020, RSMo, provides criminal defendants with a pretrial mechanism to determine whether they suffer from a mental disease or defect and whether that infirmity prevents them from being competent to stand trial. But Missouri courts have held that this section does not apply to postconviction proceedings. In *Brown v. State*, 485 S.W.2d 424 (Mo. 1972), the court held that this section only prevents an incompetent defendant from being “tried, convicted or sentenced,” and that a motion seeking application of the procedures available in that section must be made before sentencing. *Id.* at 428 (“Since section 552.020 is concerned with pretrial or presentence proceedings to determine an accused’s fitness to proceed, it does not apply to post-trial procedures.”); *see also Shaw v. State*, 686

S.W.2d 513, 514-15 (Mo. App. E.D. 1985) (rejecting a postconviction movant's claim that the motion court clearly erred in denying his postconviction request for a mental evaluation when he had been evaluated before trial and declared competent to proceed). In *Smith v. State*, 100 S.W.3d 805 (Mo. banc 2003), this Court considered only whether the movant in that case was competent to waive his postconviction remedies. It did not suggest that a postconviction movant has a constitutional right to seek a determination whether he is competent to proceed with his postconviction case.

In the out-of-state cases on which Appellant relies, postconviction counsel in each case filed motions with the postconviction court alleging grounds showing that the postconviction defendant was incompetent and seeking a competency examination. See *Carter v. State*, 706 So.2d 873, 874 (Fla. 1998); *State v. Debra A.E.*, 523 N.W.2d 727, 730 (Wisc. 1994); *People v. Owens*, 564 N.E.2d 1184, 1185 (Ill. 1990); see also *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 805-06 (9th Cir. 2003) (determination of incompetency already made by federal district court). Appellant raises his competency claim in the self-serving

allegations buried in his 306-page postconviction motion and in this appeal. Appellant cites to nothing in the record showing that this issue was specifically brought to the motion court's attention. Neither Appellant nor his postconviction counsel raised this issue before the motion court and no competency evaluation was sought.

In addition, these cases hold that a defendant's postconviction competency is relevant only to the extent it affects that defendant's ability to assist with specific factual issues requiring the defendant's input. For example, in *Carter v. State*, the Florida Supreme Court held that a postconviction competency proceeding is required only if a capital defendant shows there are "specific factual matters at issue requiring the defendant to competently consult with counsel." *Carter*, 706 So.2d at 875; *see also Debra A.E.* 523 N.W.2d at 735. Appellant has not identified any "specific factual" matters that were necessary for him to consult with counsel about during his postconviction proceeding. "[C]laims raising purely legal issues that are of record and claims that do not otherwise require the defendant's input must proceed" despite a finding of incompetency. *Carter*,

706 So.2d at 876.

To the extent that Appellant is complaining about his postconviction counsels' decision to proceed even though they allegedly believed he was incompetent, this is nothing but a claim of ineffective assistance of postconviction counsel which is not cognizable in a Rule 29.15 proceeding. Finally, to the extent that Appellant is arguing abandonment by post-conviction counsel on the ground that they refused to follow his directions, this Court has already rejected that argument. *See Winfield*, 93 S.W.3d at 739 (refusing to extend the concept of abandonment to include the alleged failure on the part of post-conviction counsel to raise claims).

C. The record does not support Appellant's claim of a conflict of interest based on "irreconcilable differences."

Apparently realizing the weakness of his competency claim, Appellant alternatively suggests that his postconviction counsel had a conflict of interest because of the "irreconcilable differences" between them and Appellant. This claim has no merit on the record in this case.

To establish a claim of conflict of interest, the defendant

must show “that an actual conflict adversely affected his lawyer’s performance.” *State v. Parker*, 886 S.W.2d 908, 929 (Mo. banc 1994). “Conflict of interest normally arises where one attorney represents multiple defendants whose interests diverge.” *Id.*; see also *State v. Roll*, 942 S.W.2d 370, 377 (Mo. banc 1997). A conflict of interest does not arise in individual representation, or, in other words, when counsel represents the defendant alone. *Parker*, 886 S.W.2d at 929. “To prevail on a claim of irreconcilable differences with counsel, the defendant must produce objective evidence of a ‘total breakdown in communication’ between the defendant and counsel.” *Id.*; see also *State v. Smith*, 586 S.W.2d 399, 401 (Mo. App. W.D. 1979) (holding that an irreconcilable conflict exists only when “there is a total breakdown of communication between attorney and client”).

Appellant has failed to carry his burden of showing that he and his postconviction counsel have irreconcilable differences. He has failed to show a “total breakdown” of communications to make that showing. What the record reveals is that Appellant cooperates with his attorneys when they pursue strategies and objectives he agrees with, but that he does not cooperate when

they do not. Appellant “cannot generate an “irreconcilable conflict” through his own misconduct. *See State v. Owsley*, 959 S.W.2d 789, 793 (Mo. banc 1997) (holding that no “irreconcilable conflict” existed when the record showed that it was based on the defendant’s “own uncooperativeness with his lawyer”).

X. (Disqualification Motion)

The overruling of Appellant’s motion to disqualify the postconviction judge (Judge Siegel) was not an abuse of discretion because Judge Siegel’s alleged disagreement with a different public defender office than the one representing Appellant would not cause a reasonable person to doubt his impartiality.

Just before the postconviction evidentiary hearing began, Appellant filed a motion to disqualify the motion court judge for cause. (PCR L.F. 2, 314-22). That motion alleged that Judge Siegel had “intentionally” made statements to the press “designed to embarrass the Missouri State Public Defender System and its attorneys’ efforts to follow the statutory procedure for determining indigence and eligibility for Public Defender services.” (PCR L.F. 315). In those statements, made in an unrelated case, Appellant alleged that Judge Siegel said

that:

“The Public Defender’s Office is trying to do anything they can do to not represent somebody.”

“If they [the public defender system] want to declare war on me, they’ve got it.”

(PCR L.F. 315). Appellant further alleged that “an onlooker would reasonably question whether Judge Seigel can fairly and impartially” judge his case because his attorneys are public defenders. (PCR L.F. 316). The motion was verified only by the affidavit of Appellant’s postconviction attorneys. (PCR L.F. 320-21).

Judge Siegel recessed the evidentiary hearing and sent the parties to Division 19 (Judge Melvyn W. Wiesman) for a hearing on their motion. (PCR Tr. 5-6). Judge Wiesman held a hearing on the motion and overruled it. (PCR L.F. 324; Supp. PCR Tr. 1-4). During the hearing, the prosecutor argued that Judge Siegel’s alleged comments were directed at the Public Defender’s Office St. Louis County trial division, which had nothing to do either with Appellant or with the Public Defender’s capital division, which was the division representing Appellant. (Supp.

PCR Tr. 3). Judge Wiesman ruled that even if Judge Siegel made those statements, they involved only a dispute between Judge Siegel and the local Public Defender's Office regarding who qualified for representation by that office. But the mere fact that statements were made, Judge Wiesman said, did not disqualify Judge Siegel from hearing all cases in which a defendant is represented by the public defender system. (Supp. PCR Tr. 4).

It is "presumed" that a judge will not hear a case if that judge cannot be impartial. *B.R.M. v. State*, 111 S.W.3d 460, 462 (Mo. App. S.D. 2003). Absent an abuse of discretion, appellate courts defer to the trial judge's discretion on these types of questions. *Id.* This presumption can be overcome, and disqualification of the judge required, only if "a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court." *Id.* (quoting *State v. Kinder*, 942 S.W.2d 313, 321 (Mo. banc 1996)). Nevertheless, a "trial judge has an affirmative duty not to disqualify himself from hearing a case unnecessarily." *Id.*

"The test is not whether actual bias and prejudice exist, but

whether a reasonable person would have found factual grounds to doubt the impartiality of the court.” *Id.* “A reasonable person is not one who is ignorant of what has gone on in the courtroom before the judge, rather, the reasonable person knows all that has been said and done in the presence of the judge.” *Id.*

A reasonable person would not have doubted Judge Siegel’s impartiality based on the comments he allegedly made in this case. The comments, which had nothing to do with Appellant or his postconviction counsel, merely reflect a disagreement on which defendants were eligible for public defender representation. Appellant has failed to show that Judge Wiesman abused his discretion in overruling the motion to disqualify.

CONCLUSION

The motion court did not clearly err in overruling and dismissing Appellant's Rule 29.15 motion. Its decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 24,381 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

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

(3) That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed on April 17, 2006, to:

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