No. 84884

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IN THE
MISSOURI SUPREME COURT

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JOHN SMITH,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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Appeal from the Circuit Court of Audrain County, Missouri
12th Judicial Circuit, Division I
The Honorable Edward D. Hodge, Judge

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RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the dismissal of appellant's Rule 29.15 motion for post-conviction relief, obtained in the Circuit Court of Audrain County, the Honorable Edward D. Hodge presiding. In that motion, appellant sought to vacate convictions of two counts of murder in the first degree, § 565.020, RSMo 2000, and two counts of armed criminal action, § 571.015, RSMo 2000. For each count of murder in the first degree, appellant was sentenced to death. For each count of armed criminal action, appellant was sentenced to serve twenty years in the Missouri Department of Corrections. Because appellant was sentenced to death, this Court has jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, John Smith, was convicted of two counts of murder in the first degree, § 565.020, RSMo 2000, and two counts of armed criminal action, § 571.015, RSMo 2000. State v. Smith, 32 S.W.3d 532, 539 (Mo. banc 2000). For each count of murder he was sentenced to death, and for each count of armed criminal action he was sentenced to serve twenty years in the Missouri Department of Corrections. Id. This Court summarized the facts of appellant's offenses as follows:

> Appellant began dating Brandie Kearnes, one of the two victims in this case, in 1995. At that time, Brandie lived near Canton with her mother, Yvonne Kurz, and her step-father, Wayne Hoewing, the other victim. While they were dating, Brandie and appellant made plans to live together. Appellant borrowed $ 30,000 to buy a house for himself and Brandie. Around June 1, 1997, however, Brandie terminated the relationship with appellant, after which she chose to continue living with Yvonne Kurz and Wayne Hoewing.
>
> Later that month, appellant contacted his former wife, Mary Smith, about visiting his children. Appellant had not visited his children for a year and a half prior to that time. Appellant visited with his children several times during June, once giving Smith some savings bonds and coin collections that he wanted the children to have.
>
> At about 7:30 a.m. on the morning of July 4, 1997, appellant drove by O.C.'s Tavern in Canton and looked at Kearnes's car, which had been parked in the lot next to the tavern since the night before. Approximately fifteen minutes later, appellant telephoned Smith and asked what she planned to do with the children that day. Appellant was upset. When Smith asked why, appellant replied, "Everything." When Smith asked appellant if

he was having difficulties with Brandie, he said, “Just everything. I can't talk about it now. I gotta go,” and

hung up. Sometime later during the same morning, appellant telephoned Yvonne Kurz and asked whether Brandie had come home the night before. Kurz responded that Brandie had not come home. Appellant then asked, “She is seeing someone else, isn't she?”

Later that afternoon, appellant, after seeing Brandie driving on the highway, followed her to Brian Brooks's house and pulled up behind her in the driveway. Brandie got out of her car and spoke to appellant for about three minutes. Appellant then left.

At 11:05 p.m., appellant purchased a twelve-pack of beer at a convenience store in Canton. The store clerk noticed that appellant was preoccupied and appeared to be in a "weird mood." Appellant left the convenience store and, sometime after 1:48 a.m. on July 5, 1997, drove to the residence where Brandie Kearnes and Wayne Hoewing resided. Appellant parked his truck approximately thirty yards from the residence. Taking some of the beers with him, but not any of the three guns he had in the truck, appellant walked around a large pond on the property and approached the residence. Appellant entered the residence through the basement door, took off his shoes, and went upstairs.

Appellant located Kearnes and began to scuffle with her in the living room and kitchen area of the house. Appellant stabbed or cut Brandie eight times during the scuffle. The wounds did not immediately cause Brandie's death; she had time to write "It was Joh-" "I Y Tatu-" and "--andi s-v- T-tum" on the kitchen floor with her own blood. The last two messages referred to Tatum, Brandie's infant daughter, who was found unharmed at the

feet of Brandie's body.

Appellant then entered the Hoewing's bedroom and attacked Wayne, who had been awakened by the sounds of scuffling coming from the living room. Appellant got on top of Wayne on the bed and began stabbing him, inflicting eleven stab or cut wounds. Yvonne Kurz attempted to push appellant off Wayne, but appellant slashed her arm. She retreated into the bathroom and closed the door. While appellant was at the door of the bedroom, Wayne was able to gain possession of a loaded gun he kept in the house. Appellant, seeing the gun, said, "Shoot me. Go ahead and shoot me." No shots were fired, however, and appellant left the bedroom. Kurz was eventually able to call for help from the bathroom.

Appellant then went back downstairs and left the house through the basement door after putting on his shoes. Appellant walked from the Hoewing residence to the nearby farm of Bill Lloyd, where he hid his knife under some tin and attempted to steal a tractor. After crashing the tractor into a flatbed trailer on the property, appellant fled on foot. He eventually traveled to another nearby residence, where he stole a truck and drove away. Soon thereafter appellant was apprehended after crashing the truck.

When medical personnel reached the Hoewing residence, Brandie was already dead. She had been partially stripped of her clothing. She was lying face up on the kitchen floor. Eight cut or stab wounds had been inflicted on her neck, chest, abdomen, arm, and thigh. The stab wounds to the chest punctured Brandie's lung, and the wounds to her abdomen cut her liver and one kidney. The medical personnel treated Wayne Hoewing

briefly, but soon pronounced him dead. He received eleven cut or stab wounds to the chest, arms, leg, hand, and hip. He bled to death from those wounds.

Police found several pieces of evidence at the scene of the crime. Police noticed a trail of blood left by appellant as he left the house. One of appellant's socks was recovered from under the body of Wayne Hoewing. Police found three beer cans outside of the residence and also found the keys used by appellant to break into the house. After being apprised several days after the murders of the messages written with blood on the kitchen floor, police seized the linoleum bearing those messages. The police did not find any weapons. Later in July, however, a worker at the farm where appellant had attempted to steal

the tractor found a knife hidden under some tin. The original owner of the knife identified it as the knife she had given to appellant.

At trial, appellant did not contest his identity as the killer, but he offered the testimony of Dr. Michael Stacy, who testified that appellant's capacity to deliberate before the killings was substantially impaired. The state offered expert testimony to rebut Dr. Stacy's diagnosis and findings. The jury found appellant guilty on both counts of murder in the first degree and both counts of armed criminal action.

State v. Smith, 32 S.W.3d at 539-540.

On December 5, 2000, this Court affirmed appellant's convictions and sentences. Id. at 539. This Court issued its mandate on January 4, 2001.

On April 2, 2001, appellant filed a pro se motion for post-conviction relief (PC R L.F. 6). And,

on July 11, 2001, appointed counsel filed an amended Rule 29.15 motion to vacate judgment and sentence (PCR L.F. 263).

Two weeks later, on July 25, 2001, appellant sent a letter, pro se, to Judge Hodge regarding a "WAIVER of any and all further appeals" (PCR L.F. 545). Appellant expressed his remorse, admitted his guilt, and stated his belief that "the punishment of death is suitable" (PCR L.F. 545).

On July 30, 2001, appellant filed a pro se "Petition to Dismiss" his Rule 29.15 motion (PCR L.F. 547). The motion was accompanied by an affidavit wherein appellant stated that he was of "sound mind," that he was not being "forced or pressured" to dismiss his case, that he was "guilty of the crime," that he did not want to pursue any appeals, and that he wanted his sentence "carried out without further delay" (PCR L.F. 548).

After receiving appellant's pro se filings, the state moved, on September 5, 2001, to dismiss appellant's Rule 29.15 motion (PCR L.F. 549). On September 7, 2001, appellant's counsel filed a "Verified Motion to Allow the Opportunity to Have a Mental Evaluation of Mr. Smith Conducted and to Present Evidence he is Incompetent to Waive his 29.15 Rights and Suggestions in Opposition to Motion to Dismiss" (PCR L.F. 558).

On January 7, 2002, appellant filed a pro se "Motion to Compel," asking the motion court to rule on his motion to dismiss within ten working days (L.F. 722-723). Then, on January 29, appellant filed a pro se "Writ of Mandam[u]s" in this Court (PCR Ex. 22).[1] In that "writ," which this court treated as a pro

[1] Appellant's "writ" was filed in this Court's Case No. 82000 (appellant's direct appeal file). On January 2, 2003, for the purposes of this appeal, this Court took judicial notice of the file in that case.

se motion to set execution date, appellant stated that he "wa[i]ves all pending and further appeals" and requested that this Court "set a date for his sentence to be carried out without further delay" (PCR Ex. 22).

On February 5, 2002, appellant's counsel opposed appellant's pro se motion to set execution date and requested that this Court order a mental evaluation of appellant. This Court requested suggestions in response to appellant's pro se motion, and, on February 19, 2002, respondent suggested that this Court should defer its ruling until the motion court had ruled upon the motion for a mental examination and the motions to dismiss appellant's Rule 29.15 motion. This Court, on February 26, 2002, deferred its ruling.

On July 31, 2002, an evidentiary hearing was held (PCR L.F. 752; PCR Tr. 51). Appellant's counsel called three witnesses in support of his motion for a mental examination (PCR Tr. 63, 69, 130). Appellant testified in support of his motion to dismiss (PCR Tr. 189). At the conclusion of the evidence, the motion court took the motions under advisement (PCR L.F. 752; PCR Tr. 51, 196).

On September 19, 2002, the motion court issued findings of fact and conclusions of law (PCR L.F. 755-758). The motion court denied appellant's counsel's request for a mental examination, and granted appellant's pro se motion to dismiss his Rule 29.15 motion (PCR L.F. 758). This appeal, brought by appellant's counsel, followed.

ARGUMENT

I. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S COUNSEL'S MOTION FOR A MENTAL EXAMINATION TO DETERMINE WHETHER APPELLANT WAS COMPETENT TO WAIVE HIS POST-CONVICTION REMEDIES, BECAUSE THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING SHOWED THAT APPELLANT WAS COMPETENT.

Appellant's counsel contends that the motion court clearly erred in denying his request for a mental examination of appellant (App.Br. 23). Counsel claims that there is "new evidence" of appellant's incompetence that "calls into question [appellant's] competence," and that the evidence required the motion court to order a mental evaluation (App.Br. 23-24).

A. The Standard of Review

Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusion of law of the motion court are clearly erroneous. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. Id.

B. Factual Background

1. Pre-trial

Prior to trial, the trial court received information from appellant's trial counsel that appellant had "previous psychiatric problems and a blackout which prevents him from recalling the events involved in these charges" (L.F. 11). Accordingly, on September 4, 1997, the court ordered a comprehensive mental

examination (L.F. 11-12). This order was subsequently withdrawn on October 21, 1997, upon defense counsel's motion and by agreement of the parties (L.F. 11, 22).

About a year later, on October 16, 1998, appellant wrote a letter to the judge, pro se, and requested that the judge allow him to "plead guilty ~~to the~~ and Receive the Death Penalty" (L.F. 89-90). In that letter, appellant expressed his guilt and remorse and asked for the judge's "cooperation" "[a]s soon as possible" (L.F. 90). Appellant explained that he thought his attorneys were doing a good job, but that he did not "want a trial" (L.F. 90). He said that everyone had "been through enough," and that he did not want his former wife to have to testify against him because "She's got our 2 kids to raise [and] she doesn't need this on her conscious [sic]" (L.F. 90).

After receiving notice of the letter, the state, on October 20, 1998, filed a "Motion Accepting the Defendant's Written Offer to Plead Guilty and Receive the Death Penalty" (L.F. 224). That same day, recognizing that appellant's mental capacity had to be clearly established before appellant could waive his rights and enter a guilty plea, the state filed a "Motion for Second Psychiatric Examination of Defendant" (L.F. 228; Add.Tr. 31-32). In that motion, the state pointed out that the defense had, without a court order, already had appellant examined by Dr. Michael Stacy, and that Dr. Stacy had indicated in his report that appellant was competent, but that appellant, "at times, lacks the capacity to assist in his own defense" (L.F. 228-229, 260-261; see Stacy's report at L.F. 234-265).[2]

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[2] Dr. Stacy diagnosed appellant with "Major Depression, Recurrent Type" and "Mixed Personality Disorder, Alcohol Dependence, With Physiological Dependence" (L.F. 265). Additional details of appellant's pre-trial psychiatric history will be discussed below.

On October 26, 1998, recognizing that there was some question about appellant's mental capacity, the trial court ordered appellant to submit to a second mental examination performed by Dr. John Rabun (L.F. 231-233; Add.Tr. 34-35). Then, on March 16, 1999, the court again ordered the second mental evaluation, after allowing the state to substitute Doctors Jerome Peters and Jeff Kline for Doctor Rabun (L.F. 283-285).

On April 14, 1999, Drs. Peters and Kline submitted their report to the court (L.F. 292-309). As to appellant's competence, they concluded that appellant "has the capacity to understand the proceedings against him and the nature of the judicial process and is able to assist his attorneys in his own defense" (L.F. 309).[3] They also submitted an addendum to their report on May 5, 1999, which included additional information supporting some of their previous observations (L.F. 313-315). Thus, three experts concluded that appellant was competent to proceed with trial. Thereafter, appellant's pro se motion to plead guilty apparently was not again addressed.

2. Post-trial — Before Filing of 29.15 Motion

After trial, which was held May 10 through May 15, 1999, appellant was delivered to Potosi Correctional Center on or about July 26, 1999 (PCR Tr. 132; PCR Ex. 6 at 3). While there, he received psychiatric care, including medication, from several people for his continuing psychiatric needs (PCR Tr.137-138).

a. Appellant's Initial Assessment

[3] Drs. Peters and Kline diagnosed appellant with "Alcohol Dependence" and "Narcissistic Personality Disorder With Obssessive Compulsive Traits" (L.F. 303).

On July 27, 1999, Dr. Gary Selbert, the Chief of Mental Health Services at Potosi, performed a baseline assessment (PCR Tr. 138; PCR Ex. 5 at 196). Dr. Selbert observed that appellant was somewhat unstable emotionally, irrational, tearful, perplexed, and agitated (PCR Tr. 140-141). Dr. Selbert accepted Dr. Stacy's previous diagnoses of major depression, recurrent type, mixed personality disorder, and alcohol dependence as a "working diagnosis" and referred appellant to a psychiatrist (PCR Tr. 138, 141; PCR Ex. 5 at 196). Dr. M. Reddy evaluated appellant on July 29, 1999, and initially assessed "Major Depression reoccurring" and "History of Dystherminia [sic]" (PCR Ex. 5 at 194-195).

A few days later, on August 1, 1999, appellant was found on the floor of his housing unit (PCR Tr. 142). Appellant was unresponsive, and there was a "large red mass" (presumably blood) on the floor by his skull (PCR Tr. 142). Appellant was treated at St. John's Hospital and placed on suicide watch as a precautionary measure (PCR Tr. 142-143, 182). Dr. Selbert never ascertained exactly how appellant injured himself, but reports indicated that appellant injured himself when he fell off a toilet while trying to pull the door off of his cell (PCR Tr. 145, 181-182; PCR Ex. 5 at 114, 133, 140, 191). Appellant, who did not seem suicidal during a follow-up visit, was returned to his housing unit on or about August 6, 1999 (PCR Tr. 145).

On August 5, 1999, Dr. Reddy met with appellant, received reports of hallucinations, and diagnosed appellant with psychotic disorder not otherwise specified, active psychosis, and depressive disorder (PCR Ex. 5 at 191). One week later, on August 12, 1999, appellant reported that the hallucinations had stopped: Reddy diagnosed appellant with major depression recurring with psychotic features (PCR Ex. 5 at 188).

b. Appellant's Condition Improves

On August 26, 1999, appellant was alert and oriented and "no longer experienc[ing] psychotic symptoms" (PCR Ex. 5 at 185). Appellant was not suicidal or homicidal (PCR Ex. 5 at 185). Dr. Reddy gave the same diagnosis but noted the need to rule out "Bi-Polar Disorder" (PCR Ex. 5 at 185). On September 9, 1999, appellant's diagnosis remained unchanged, except that Dr. Reddy noted "possible" bipolar disorder (PCR Ex. 5 at 183).

On September 14, 1999, Dr. Meinershagen gave the same diagnosis and included an Axis II diagnosis of personality disorder not otherwise specified (PCR Ex. 5 at 181). This diagnosis remained essentially unchanged until November 24, 1999 (PCR Ex. 5 at 158, 161, 179-180).[4] On November 24, 1999, Dr. Reddy diagnosed appellant with bipolar disorder and major depression, recurring, with psychotic features (PCR Ex. 5 at 158).

On January 27, 2000, Dr. Reddy diagnosed appellant with bipolar disorder with psychotic features (PCR Ex. 5 at 154). And, on April 20, 2000, Dr. Reddy diagnosed appellant with bipolar disorder (PCR Ex. 5 at 151). Approximately five months later, on September 19, 2000, appellant's diagnosis was "Bipolar Disorder, Mixed" (PCR Ex. 5 at 148). This diagnosis remained essentially unchanged throughout the remainder of appellant's treatment at Potosi (PCR Tr. 159; PCR Ex. 5 at 143; PCR Ex. 7 at 50; PCR

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[4] On October 21, 1999, Drs. Selbert and Meinershagen offered the following, full diagnosis: Axis I, major depressive disorder, recurrent, severe with psychotic features and possible bipolar disorder; Axis I, alcohol dependence, with physiological dependence, in sustained full remission in a controlled environment; Axis II, personality disorder, not otherwise specified (mixed with borderline, paranoid, antisocial and psychotic features) (PCR Ex. 5 at 163-173).

Ex. 9 at 31; PCR Ex. 12 at 19, 30; PCR Ex. 16 at 11-12).[5]

3. Post-trial — After Filing of 29.15 Motion

On April 2, 2001, after a March 29 meeting with counsel and Dr. Stacy, where counsel talked to appellant about signing his pro se motion, appellant filed a pro se motion for post-conviction relief (PC R L.F. 6; PCR Tr. 116). On July 11, 2001, appointed counsel filed an amended Rule 29.15 motion to vacate judgment and sentence (PCR L.F. 263).

On June 25, 2001, Dr. Selbert observed that appellant was struggling with distorted thinking about himself, including pessimism and hopelessness (PCR Ex. 7 at 50). He and appellant set goals to develop new thinking patterns to replace distorted ones and to improve his self-esteem with new coping skills (PCR Ex. 7 at 50).

a. Appellant Decides to Forego Further Appeals

About two weeks later, on July 12, 2001, appellant "asked his attorneys to stop making any appeal to forego execution" (PCR Ex. 7 at 46). At that time, despite some "difficulty concentrating" (caused by appellant's Lithium medication), Dr. Jones reported that appellant had "derived marked benefit" from his medication, and the doctor recommended "continued treatment with Risperdal, as it is effective aned [sic] to this point in time well tolerated by this p[atient]" (PCR Ex. 7 at 42, 46). Appellant's Lithium-induced "distractibility" had cause Dr. Jones to worry that appellant would not be able to "effectively participate in the preparation of his legal defense" (PCR Ex. 9 at 28).

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[5] At the evidentiary hearing, Dr. Selbert commented upon the changing diagnosis by pointing out that such diagnoses are "[n]ot an exact science" (PCR Tr. 158).

At a brief meeting with appellant on July 12, 2001, appellant's counsel tried to discuss appellant's case with appellant (PCR Tr. 65-66, 68). Appellant told his attorney that he did not want to talk to him, and that his attorney should not call or bother him (PCR Tr. 65-66). Appellant became agitated and upset (PCR Tr. 66-68). Appellant asked why his attorney did not understand his saying "no," stated that he did not want to talk to his attorney, and said that "even his kids understood no" (PCR Tr. 66). Appellant then walked out and slammed the door behind himself (PCR Tr. 66).

About two weeks later, on July 25, 2001, appellant sent a letter, pro se, to Judge Hodge regarding a "WAIVER of any and all further appeals" (PCR L.F. 545). Appellant expressed his remorse, admitted his guilt, and stated his belief that "the punishment of death is suitable" (PCR L.F. 545).

On July 30, 2001, appellant filed a pro se "Petition to Dismiss" his Rule 29.15 motion (PCR L.F. 547). The motion was accompanied by an affidavit wherein appellant stated that he was of "sound mind," that he was not being "forced or pressured" to dismiss his case, that he was "guilty of the crime," that he did not want to pursue any appeals, and that he wanted his sentence "carried out without further delay" (PCR L.F. 548).[6]

b. Appellant's Condition Improves Further

On October 2, 2001, Dr. Jones reported that appellant's inability to concentrate had "improved

[6] On September 5, 2001, the state moved to dismiss appellant's Rule 29.15 motion (PCR L.F. 549). On September 7, 2001, appellant's counsel filed a "Verified Motion to Allow the Opportunity to Have a Mental Evaluation of Mr. Smith Conducted and to Present Evidence he is Incompetent to Waive his 29.15 Rights and Suggestions in Opposition to Motion to Dismiss" (PCR L.F. 558).

significantly" since his Lithium dosage was lowered (PCR Ex. 9 at 26). He noted, however, that appellant felt more irritable and short tempered (PCR Ex. 9 at 26). On October 5, 2001, in "building a case" for a Neurontin prescription, a nonformulary medication not generally available at Potosi, Dr. Jones again noted that appellant had previously had difficulty concentrating, and that appellant needed to be able to concentrate to participate in his defense (PCR Tr. 165; PCR Ex. 10 at 2-6).

On November 27, 2001, appellant reported that his "concentration [was] much better" and that he felt "better now than he has in a long time" (PCR Ex. 12 at 30-33). At that time, appellant was alert, pleasant, and cooperative (PCR Ex. 12 at 30).

On January 3, 2002, it was noted that appellant had done "very well" on his medication regimen (PCR Ex. 12 at 27). On January 24, 2002, it was noted that appellant was "intermittently agitated" at bedtime and could not sleep well (PCR Ex. 12 at 19, 22).

On January 7, 2002, appellant filed a pro se "Motion to Compel," asking the motion court to rule on his motion to dismiss within ten working days (L.F. 722-723). Then, on January 29, appellant filed a pro se "Writ of Mandam[u]s" in this Court (PCR Ex. 22). In that "writ," which this court treated as a pro se motion to set execution date, appellant stated that he "wa[i]ves all pending and further appeals" and requested that this Court "set a date for his sentence to be carried out without further delay" (PCR Ex. 22). This Court deferred ruling on appellant's motion until a hearing could be held in the circuit court.

On March 19, 2002, appellant reported that he had not been receiving one of his medications (PCR Ex. 14 at 44). On March 26, 2002, appellant reported that he felt more agitated, but that he had not experienced any loss of control (PCR Ex. 14 at 39). Appellant was coherent, pleasant, and cooperative (PCR Ex. 14 at 39).

Over time, appellant began to take a more active role in his treatment. On April 25, 2002, appellant wrote a note to Dr. Jones and asked him to increase his Risperdal prescription (PCR Ex. 14 at 35). Appellant noted that he was "feeling agitated lately as my case and family problems have me pretty uptight" (PCR Ex. 14 at 35).

On May 23, 2002, appellant reported feeling "down" and more anxious (PCR Ex. 16 at 11-12). He was sleeping "pretty good, but not sleeping as well," and he had no other adverse effects from his medication (PCR Ex. 16 at 11).

Sometime after June 6, 2002, appellant wrote another note to Dr. Jones about his medication (PCR Tr. 172; PCR Ex. 16 at 17). In that note, appellant said that he was feeling anxiety (his heart was "in [his] throat") and depression (PCR Ex. 16 at 17). Appellant noted that the increase in his Risperdal medication had helped with his anger but also noted that "it could also use a little help" (PCR Ex. 16 at 17). A progress report on June 6, 2002, did not note any problems (PCR Ex. 16 at 9).

4. The Evidentiary Hearing

a. Appellant's Counsel's Witnesses

On July 31, 2002, at an evidentiary hearing, appellant's counsel called three witnesses in support of his motion for a mental examination of appellant: Janet Diemler, an investigator for the public defender; Dr. Michael Stacy, a certified forensic psychologist; and Dr. Gary Selbert, a licensed professional counselor who served as the Chief of Mental Health Services at Potosi Correctional Center (PCR Tr. 63, 69, 130). None of these witnesses testified that appellant was incompetent to waive his Rule 29.15 motion.

Ms. Diemler testified that she and appellant's counsel had met with appellant, and that appellant had become upset and told them that he did not want to meet with them or talk to them (PCR Tr. 64, 66).

Using medical records, Drs. Stacy and Selbert outlined appellant's recent psychiatric treatment at Potosi, which is detailed above (PCR Tr. 69-109, 130-173).

Dr. Stacy did not testify that appellant's psychiatric history indicated that he was incompetent; to the contrary, Dr. Stacy testified that appellant's diagnosis of bipolar did not equate to incompetence, and that appellant's recent communications with his doctor indicated that appellant had the ability to recognize his own emotional or mental state (PCR Tr. 69-109, 113, 118). However, due to appellant's wavering desire to "assist counsel," Dr. Stacy recommended that the motion court should consider ordering a competency examination (PCR Tr. 83, 109).

Dr. Selbert, who was not qualified to make diagnoses, also did not testify that appellant was incompetent (PCR Tr. 130-173, 178). He described appellant as "a man of his word" when it came to reporting his condition (PCR Tr. 173). He also stated that appellant had been very cooperative in working out his treatment plan, and that appellant was a "model offender" in terms of his behavior (PCR Tr. 179-180).

With regard to appellant's mental health, Dr. Selbert testified that it was as good as he had ever seen it (PCR Tr. 180-181). He also reported that Dr. Jones had indicated that appellant was presently "stable," i.e., that they seemed to have found the right course of treatment (PCR Tr. 181, 183-184). Dr. Selbert further testified that appellant's current behavior gave him no reason to be concerned about appellant's safety or the safety of others around him (PCR Tr. 181). And, finally, Dr. Selbert stated that appellant had consistently told him that he did not want to pursue any appeal (PCR Tr. 186-187).

b. Appellant's Testimony

Appellant also testified at the evidentiary hearing (PCR Tr. 189). Appellant identified himself, and

told the court that he wanted to dismiss his Rule 29.15 motion (PCR Tr. 189-190). He indicated that he understood that the Supreme Court would set an execution date if his 29.15 motion was dismissed (PCR Tr. 190). He assured the court that no one had coerced him or talked him into dismissing his case (PCR Tr. 190).

When asked why he wanted to dismiss his case, appellant said, "Well, it all starts back in my trial attorneys. They way they tried to manipulate me. They weren't straight up with me" (PCR Tr. 191). Then, when the court stated that dismissing the case would not affect his trial attorneys, and that they were talking about his life, appellant said, "I know it is. But it all goes to that — I see no reason to carry on a new trial and numerous — numerous other things like that. I don't want it" (PCR Tr. 191).

Appellant again stated that he wanted an execution date set, and when asked why, appellant said, "There's — I don't see a real life in prison. I can do it. I can live there. It's no problem. I just don't want to" (PCR Tr. 191). Appellant then indicated that he would prefer to be executed than spend the rest of his life in prison (PCR Tr. 191).

Upon further questioning, appellant indicated that he understood the proceedings and that he understood the consequences of dismissing his motion (PCR Tr. 192-193). Appellant understood that he was giving up the possibility of a lesser punishment, a new trial, and acquittal (PCR Tr. 192-193). He further assured the court that he had not been coerced or threatened, and that he had not been promised anything in return for dismissing his case (PCR Tr. 193-194). And, finally, appellant stated that he was not under the influence of alcohol or any illegal drug, and that he was thinking clearly (PCR Tr. 194-195).

5. The Motion Court's Findings and Conclusions

In denying appellant's counsel's request for a mental examination, the motion court stated:

1. Movant's counsel at the hearing of July 31, 2002, called three witnesses in support of the motion to have Movant's mental condition evaluated. Movant testified in support of his pro se motion to dismiss his 29.15 motion.

2. Ms. Janet Diemler, an investigator with the Public Defender's office, testified that she visited with Movant on July 12, 2001, and that Movant, having prior to that date requested that his post-conviction motion be dismissed, appeared angry and refused to discuss the matter with counsel or Ms. Diemler.

3. Dr. Michael Stacy, who had testified at Movant's trial, testified from Department of Corrections records which indicated that Movant had been diagnosed as having a bipolar disorder.

4. Dr. Stacy did not express an opinion as to Movant's competency to dismiss his post-conviction motion.

5. Dr. Gary Selbert, Chief of Medical Services at Potosi Correctional Center, testified that Movant's mental health has been stabilized. He acknowledged that Movant continues to insist that he does not wish to pursue his appeal on his post-conviction motion.

6. The Court finds from the evidence offered by Movant's counsel that, notwithstanding Movant's prior diagnosis as bipolar, he presently is quite capable of making decisions and is competent to waive his rights of appeal.

7. Movant chose to testify in support of his request to dismiss his 29.15 Motion.

8. Movant clearly understood the consequences of abandoning his 29.15 Motion. He testified that he preferred to have his sentences executed rather than spend the rest of

his life in prison. The Court found Movant to be rational and coherent.

9. The Court finds that Movant is competent to waive his appeals and to dismiss his 29.15 Motion.

10. That he knowingly, intelligently and voluntarily waives his post-conviction rights.

11. That he does not presently suffer from a mental disease or defect that affects his capacity to understand the consequences of his waiver of his post-conviction rights.

12. That Movant's decision to waive his rights is made of his own free will and is not coerced.

(PCR L.F. 755-758).

C. Appellant Was Competent to Waive His 29.15 Motion

The question now before this Court is whether the motion court clearly erred in concluding that appellant was competent and in denying appellant's counsel's request for a mental examination. The motion court did not clearly err.

Based upon the evidence offered at the evidentiary hearing, there was ample evidence that appellant was competent to waive his post-conviction motion. Generally, "[a] defendant is competent when he has sufficient present 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. Johns, 34 S.W.3d 93, 104 (Mo. banc 2000), cert. denied, 532 U.S. 1012 (2001).

Additionally, "[a] defendant is competent to waive post-conviction remedies if he is not suffering from a mental disease, disorder, or defect that may substantially affect his capacity to appreciate his position

and make a rational choice with respect to continuing or abandoning further litigation." Anderson v. White, 32 F.3d 320, 321 (8th Cir. 1994) (citing Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 1506, 16 L.Ed.2d 583 (1966)). "A showing that [the defendant] suffers from a mental disorder, 'without more, is wholly insufficient to meet the legal standard that the Supreme Court has laid down' for determining a defendant's competence to pursue post-conviction relief." Id. (quoting Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir. 1988)).

In the case at bar, as the record shows, at appellant's evidentiary hearing, there was substantial evidence presented which indicated that appellant suffers from a mental disease or defect, namely, bipolar disorder (PCR Exs. 5, 7, 9, 10, 12, 14, 16). However, there was absolutely no evidence that, at the time of his hearing, appellant could not "appreciate his position" and make a rational decision whether to abandon further litigation.

As the motion court stated, Dr. Stacy, who had not seen or talked to appellant since March 2001, did not opine that appellant was incompetent to waive his post-conviction remedies. Dr. Stacy reiterated his belief that appellant had been competent to stand trial and, while he also reiterated his belief that appellant's competency needed to be monitored, and while he recited appellant's recent psychiatric history, he never indicated any belief that appellant was, at that time, incompetent to understand his position and make a rational choice.

To the contrary, Dr. Stacy testified that appellant's diagnosis of bipolar disorder does not equate to incompetence, and he expressly testified that appellant's recent communications with his doctor regarding his treatment (in April and June 2002) indicated appellant's ability to recognize his own emotional or mental state (PCR Tr. 113, 118). In fact, Dr. Stacy went so far as to say that in April and June 2002

(when appellant wrote notes to his doctor), he had no doubt that appellant was able to recognize his own emotional or mental state (PCR Tr. 118). Dr. Stacy also testified that appellant's notes showed that appellant understood his symptoms and the relationship between symptoms and his diagnosis and medication (PCR Tr. 121). The notes showed, in other words, that appellant had awareness of, and insight into, his condition (PCR Tr. 122).

Dr. Stacy did express concern over appellant's reported decreased ability to concentrate, which was observed by Dr. Jones in July 2001, about a year before the evidentiary hearing (PCR Tr. 123; PCR Exs. 7, 9, 10). However, by October 2, 2001, Dr. Jones reported that appellant's inability to concentrate had already "improved significantly" since his Lithium dosage was lowered (PCR Ex. 9 at 26). Thus, the cause for Stacy's concern had long since been alleviated.

In addition to Dr. Stacy, Dr. Selbert did not testify that appellant was incompetent to waive his post-conviction motion. To the contrary, after describing appellant's recent psychiatric treatment, Dr. Selbert testified that appellant's mental health was good, and that his treating physician had indicated that appellant was "stable," i.e. that they had found the correct course of treatment for appellant's condition (PCR Tr. 180-181). Dr. Selbert also testified that appellant had been cooperative in working out his treatment plan, that appellant had been a "model offender," and that appellant was not currently a safety concern to himself or others (PCR Tr. 179-181).

Perhaps most significant, however, was appellant's own testimony at the evidentiary hearing. The motion court found that appellant clearly understood the consequences of dismissing his motion, and that appellant was "rational and coherent" (PCR L.F. 757). That finding is supported by the record, which reveals that appellant consistently answered every question put him in a coherent and rational manner (PCR

Tr. 189-195). The motion court, of course, was in the best position to observe appellant's demeanor and gauge his responses.

Appellant's counsel faults the motion court for relying upon appellant's testimony at the hearing, and claims that such reliance was "inconsistent with what this Court did in State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987)" (App.Br. 38). However, relying upon in-court observations of the defendant was perfectly proper, see Woods v. State, 994 S.W.2d 32, 38 (Mo.App. W.D. 1999), and it was not at all inconsistent with what this Court did in State v. Wilkins. In fact, in Wilkins, in finding that the defendant was competent to waive his rights, this Court specifically stated: "This Court has observed the defendant, his demeanor, and listened to him, and the trial judge had over a period of months observed the defendant for prolonged sessions of hearings." State v. Wilkins, 736 S.W.2d at 415. This Court then concluded that there was overwhelming and uncontroverted evidence that the defendant was competent. Id.

In sum, while there was evidence that appellant suffered from a mental disease or defect, there was no evidence that appellant's mental condition affected his ability to "understand his position or make a rational decision." See Anderson v. White, 32 F.3d at 321-322. Further, there was ample evidence that appellant was competent, and the motion court's conclusions in that regard were not clearly erroneous. In particular, appellant's own testimony showed that appellant understood the proceedings, understood the consequences of dismissing his Rule 29.15 motion, and made a rational decision to forego further appeals. This point should be denied.

D. A Mental Examination Was Not Necessary

Because appellant was competent, the motion court did not need to order a mental examination. Appellant's counsel insists, however, that he presented "new evidence" which suggested incompetence,

and that the "new evidence" necessitated the ordering of a mental examination (App.Br. 28).

In fact, appellant's counsel's claim is simply a request that this Court ignore the factual findings of the motion court and re-weigh the evidence in his favor. This Court should decline appellant's counsel's request. The motion court has already reviewed the evidence and determined that appellant was competent (PCR L.F. 755-758).

1. No "Reasonable Cause" To Doubt Appellant's Competence

In any event, there was no "new evidence" of incompetence that necessitated a mental examination. Appellant's counsel cites State v. Messenheimer, 817 S.W.2d 273, 278 (Mo.App. S.D. 1991), and Drope v. Missouri 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), for the general proposition that a "criminal proceeding" may not continue if the judge has "reasonable cause" to believe that the accused lacks the capacity to understand the proceedings or to assist his defense (App.Br. 25). See also Woods v. State, 994 S.W.2d at 37.

In such cases, whether there was "reasonable cause" to order a mental examination is reviewed by determining if a reasonable judge in the same situation, should have experienced doubt as to the accused's competency. Id. And, while there is a certain amount of discretion in determining whether to grant such a motion, once the trial court is presented with sufficient facts to form "reasonable cause" to believe that the accused is incompetent, the trial court must order a § 552.020 examination. State v. Tilden, 988 S.W.2d 568, 576 (Mo.App. W.D. 1999).

In the case at bar, appellant's counsel failed to present any evidence that appellant was incompetent. As discussed above, not one of appellant's counsel's witnesses opined that appellant was incapable of understanding his position and making a rational decision. To the contrary, as outlined above,

despite presenting evidence of a mental disease or defect, Drs. Stacy and Selbert gave testimony indicating that appellant was competent and in good mental health at the time of his hearing. Such testimony, especially in light of appellant's own testimony, did not give the motion court "reasonable cause" to believe that appellant was incompetent.

In addition, it must be noted that a Rule 29.15 motion is not a "criminal proceeding," and that, unlike initial criminal proceedings, a Rule 29.15 proceeding often takes place after the defendant has already been found competent to stand trial. See generally Smith v. Armontrout, 865 F.2d 1502, 1505 (8th Cir. 1988) ("It is important to remember that the issue of legal decision-making capacity . . . is not before us now for the first time."). In other words, in considering the fact that appellant currently suffers from a mental disease or defect, one cannot overlook the fact that appellant, who had substantial psychiatric problems prior to trial, was found competent to stand trial by three experts (L.F. 309; PCR Tr. 111).

As the court stated in Smith v. Armontrout: "we must take the prior determination of competence as a given, a sort of benchmark, the correctness of which we are entitled to presume unless some substantial reason to the contrary appears." Id. In other words, once a finding as to mental condition has been fairly and properly made, the State may properly presume that a movant remains competent to waive his post-conviction remedies and may require a substantial threshold showing of incompetence merely to trigger the hearing process. Id. (citing Ford v. Wainwright, 477 U.S. 399, 426, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). See also Woods v. State, 994 S.W.2d at 38; State v. Hampton, 10 S.W.3d 515, 516-517 (Mo. banc 2000) (absent new evidence of incompetence, defendant who was found competent to stand trial was still competent when he sought to waive his post-conviction remedies); Garrett v. Groose, 99 F.3d 283, 286 (8th Cir. 1996) ("Criminal law presumes that individuals are competent, and a finding

of competence, once made, continues to be presumptively correct until some good reason to doubt it is presented.").

2. Appellant's Counsel's Alleged "New Evidence" Of Incompetence

To this end, appellant's counsel argues that he did present substantial evidence of incompetence, and he points to three things: (a) a litany of observations, emotions, and diagnoses revealed by appellant's recent psychiatric history (App.Br. 28-34); (b) appellant's changing his mind about seeking post-conviction relief (App.Br. 35-36); and (c) appellant's allegedly irrational reason for seeking to dismiss his 29.15 motion (App.Br. 36).

a. Appellant's Recent Psychiatric History

With regard to appellant's recent psychiatric history, appellant's counsel makes particular mention of an alleged suicide attempt in August 1999; a psychotic episode in August 1999; a new diagnosis of bipolar disorder in November 1999 (with psychotic features in January 2000); some difficulty concentrating around July 2001 (due to medication); and complaints of agitation, irritability, anxiety, and depression, which continued in varying degrees throughout appellant's treatment at Potosi (App.Br. 28-34).

Significantly, however, the only symptoms appellant reported experiencing at or near the time of his evidentiary hearing in July 2002, were anxiety, depression, and decreased anger (PCR Ex. 16 at 17). The other, more serious symptoms highlighted by appellant's counsel all occurred immediately after appellant was delivered to the Department of Corrections and during the first or second year of appellant's treatment, when appellant and his doctor were attempting to find the correct levels and types of medication to treat appellant's condition. However, by the time appellant testified at his evidentiary hearing, and as confirmed by Dr. Selbert, appellant's condition had stabilized (PCR Tr. 181).

Appellant's counsel notes that Dr. Stacy, based upon his review of appellant's recent psychiatric history, recommended that the court order a mental examination (App.Br. 32).[7] However, while Dr. Stacy did recommend that the court order an examination (PCR Tr. 109), he did not present any substantial evidence that appellant was, in fact, incompetent.

As discussed more fully above, Dr. Stacy did not opine that appellant was incompetent. To the contrary, Dr. Stacy admitted that appellant's diagnosis of bipolar disorder did not equate to incompetence, and he admitted that appellant clearly recognized his own emotional or mental state in April and June 2002 (PCR Tr. 113, 118, 121-122).

In short, his recitation of appellant's psychiatric history, without more, simply did not provide "reasonable cause" for the court to believe that appellant, who had previously been found competent, had become incompetent. See Smith v. Armontrout, 865 F.2d at 1505-1506 (recommendation of three psychiatrists, without testimony that the defendant was in fact incompetent, was not legally sufficient to warrant a new competency hearing); see also Reynolds v. Norris, 86 F.3d 796, 800 (8th Cir. 1996) (while the trial court can consider doubts expressed by the accused's attorney in determining whether to order a competency evaluation, "such doubt alone is not enough to establish sufficient doubt").

Additionally, appellant's counsel overlooks the fact that appellant's recent psychiatric history at

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[7] Appellant's counsel also points out that Dr. Selby also recommended a mental examination (App.Br. 24, 37-38). However, Dr. Selby's recommendation was not admitted into evidence because he was not qualified to make the recommendation (PCR Tr. 175-177). The propriety of the court's ruling as to Dr. Selby's testimony is discussed in Point II.

Potosi is very similar to, if not indistinguishable from, his pre-trial psychiatric history. Pre-trial, Dr. Stacy reported that appellant had suffered from symptoms of depression during childhood, beginning when appellant was eight years old; that appellant exhibited an "extremely labile mood" during his marriage, which lasted from August 1987 until November 1990 (ending in divorce in 1991); that appellant had a lot of "nervous energy," could not sit still, and suffered periods of depression; and that appellant had a history of alcoholism, beginning at the age of fourteen or fifteen (L.F. 240, 242-243).

Stacy also reported that appellant had a history of psychiatric problems and treatment, beginning in approximately 1989 (L.F. 244). Appellant had been hospitalized and medicated with Prozac, an antidepressant, Xanax, an anxiolytic, and Tranxene, a tranquilizer (L.F. 244).[8] Appellant exhibited depression with tearful affect, feelings of worthlessness and loneliness, suicidal ideation, and some "blocking" thought processes (L.F. 244). Appellant was initially diagnosed with "Major Affective Disorder, Depression, with Suicide Attempt" and possible "Bipolar Affective Disorder," due to "reported mood swings" (L.F. 244). Appellant was also diagnosed with "Self-Defeating Personality" and, later, "Inadequate Personality, Borderline Traits" (L.F. 245). Later, appellant's diagnosis was "Adjustment Disorder with Depressed Mood and Suicidal Ideas and Borderline Traits" (L.F. 245).

Appellant received out-patient treatment in March 1990 after showing "anxiety, violence, and poor ways of communicating" (L.F. 245). Appellant made statements suggesting suicide and, it was noted, appellant "really has almost a paranoid way of looking at things when he becomes emotionally excited"

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[8] At some point in 1990, appellant was also prescribed "amitriptylne, both as an antidepressant and for its sedative side effects" (L.F. 247).

(L.F. 245).

Appellant was again hospitalized in February 1991 after he attempted suicide by overdosing on Clorazepate, Prozac, and Seldane (L.F. 245). At that time, appellant was diagnosed with "Major Depression, Recurrent; Drug Overdoes and Suicide Attempt, and Marital Disorder" (L.F. 245). Appellant was treated with Prozac (L.F. 245-246). Appellant was later diagnosed with "Dysthymia with Suicide Attempt with Drug Overdose and Marital Disorder" (L.F. 246).

In 1994, appellant had "a lot of mood swings," and experienced weight loss, no energy, frequent thirst, frequent urination, and loss of sleep (L.F. 246). He was diagnosed with "Anxiety with Stress, with Depressed Mood" and prescribed Effexor (L.F. 246).

Stacy also reported that one of appellant's "long time friend[s]" indicated that appellant seemed to benefit from medication and that without medication appellant changed from "one minute to the next, like a split personality" (L.F. 247). Others remarked upon appellant's anxiety and depression (L.F. 247-248).

Appellant had an "elevated profile of the 2-6 type" (L.F. 250). The "2" scores indicated that appellant had "very significant personal distress and symptoms of depressed mood, self-deprecation, fatigue, tension, and agitation" (L.F. 250). The "6" scores suggested "frankly psychotic behavior" (L.F. 250). Appellant did not have a high number of "typically psychotic symptoms;" however, appellant "did express suspiciousness, excessive sensitivity, and a degree of self-righteousness" (L.F. 250).

Dr. Stacy ruled out bipolar disorder or cyclothymia, and he offered the following possible diagnoses: "Major Depressive Disorder, Recurrent, Moderate, Apparently Without Full Inter-episode Recovery;" "Dysthymic Disorder (Provisional);" "Alcohol Dependence, with Physiological Dependence, In Sustained Full Remission in a Controlled Environment;" "Personality Disorder, Not Otherwise Specified

(Mixed with Borderline, Paranoid, and Antisocial Traits" (L.F. 257-258, 260). Ultimately, Stacy diagnosed "Major Depression, Recurrent Type" and "Mixed Personality Disorder, Alcohol Dependence, With Physiological Dependence" (L.F. 265).

Also prior to trial, appellant was evaluated by Drs. Peters and Kline (L.F. 292-301). In addition to reciting appellant's psychiatric history, they observed that appellant's "affect ran from short periods of tearfulness, to a generally neutral mood, to periods of irritation and irritability" (L.F. 301). Appellant told them that he was not hearing any auditory hallucinations "today" (L.F. 301). Appellant denied "delusional thoughts, but did admit to ongoing suspiciousness of the motivations of others" (L.F. 301). He also denied a desire to kill himself, but he did remark that "life is not worth living" (L.F. 301). Drs. Peters and Kline diagnosed appellant with "Alcohol Dependence" and "Narcissistic Personality Disorder With Obsessive Compulsive Traits" (L.F. 303).

All of this information was gathered and observed prior to trial; yet, all three experts concluded that appellant was competent to stand trial (L.F. 260-261, 265, 309). Thus, even in light of the "new diagnosis" of bipolar disorder (which is undoubtedly just a new label applied to appellant's ongoing psychiatric condition),[9] it is apparent that appellant's recent psychiatric history at Potosi does not cast substantial doubt upon the pre-trial determination of appellant's competence.

In short, without more, i.e., some evidence that appellant's present condition affected his ability to understand his position and make a rational decision, appellant's recent psychiatric history at Potosi did

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[9] Dr. Selbert testified that a bipolar condition is a hereditary predisposition, and that "it occurred prior to [appellant's] coming to prison" (PCR Tr. 180).

not give the motion court "reasonable cause" to doubt appellant's competence.

b. Appellant's Decision to Dismiss

Appellant's counsel next argues that appellant's decision to dismiss his 29.15 motion is itself evidence of incompetence (App.Br. 35). In fact, appellant's decision is simply evidence that appellant changed his mind. "[C]ompetent people do change their minds, even about very important matters." See Smith v. Armontrout, 865 F.2d at 1504. And, tellingly, with the exception of signing his pro se motion, which was done only after appellant's counsel went to Potosi with Dr. Stacy in tow, appellant has consistently indicated that he does not want to proceed with further appeals (PCR Tr. 116, 186-187).[10]

Appellant's counsel argues that it was this very kind of wavering that originally caused Dr. Stacy to conclude that appellant's competence needed to be monitored (App.Br. 35-36). He argues that this lack of motivation to "assist counsel" equates to incompetence (App.Br. 36). However, appellant's *desire* to proceed should not be confused with his *ability* to proceed. See Smith v. Armontrout, 865 F.2d at 1506 (psychiatrist's conclusion that a mental condition "may" impair relations with counsel does not "come close to establishing" incompetence; a person can "acquiesce" to a lawful judgment of the court).

c. Appellant's Allegedly Irrational Testimony

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[10] Appellant's counsel argues that appellant was not consistent with his care providers as to his desire to continue his appeals because appellant reportedly told Dr. Jones that he was "concerned his inability to concentrate would adversely impact his ability to participate in his defense" (App.Br. 38). However, the phrase "ability to participate in his defense" does not mean that appellant *wanted* to continue his appeal; rather, it simply meant that appellant wanted to be able to participate in his representation.

Finally, appellant's counsel argues that appellant's allegedly irrational testimony at the evidentiary hearing "underscores the need for an evaluation" (App.Br. 36). In particular, appellant's counsel highlights one response, wherein appellant said that his attorneys tried to manipulate him and were not "straight up" with him (App.Br. 36).

However, appellant's counsel does not adequately portray appellant's responses to the court's questions. Appellant testified as follows:

Q. You're waiving your rights you have to have this post-conviction motion heard?

A. Yes, sir.

Q. Why do you wish to do that, sir?

A. Well, it all starts back in my trial attorneys. The way they tried to manipulate me. They weren't straight up with me.

Q. Well, of course that's not going — this won't affect the trial attorneys.

A. I know.

Q. This is your life we're talking about.

A. I know it is. But it all goes to that — I see no reason to carry on a new trial and numerous — numerous other things like that. I don't want it.

Q. You want the Supreme Court to order your execution?

A. Yes, sir.

Q. Why do you want that to happen?

A. There's — I don't see a real life in prison. I can do it. I can live there. It's no problem. I just don't want to.

Q. You prefer to be executed that spend the rest of your life in prison.

A. Yes, sir.

(PCR Tr. 191).

As is evident, appellant did express dissatisfaction with the actions of his trial attorneys (which, perhaps, is not surprising inasmuch as it appears that his attorneys have never heeded his desire to dispense with lengthy legal proceedings); however, he also indicated that he simply did not want a lengthy legal process, and that he did not want to spend the rest of his life in prison (PCR Tr. 191). Such reasoning was not irrational, and it did not indicate that appellant was incompetent to waive his post-conviction motion. In fact, it merely indicated a desire to acquiesce to a lawfully imposed judgment and sentence. See Hampton v. State, 10 S.W.3d at 517 (defendant did not want to spend the rest of his life in prison); Smith v. Armontrout, 865 F.2d at 1506 (because the "watchword of the law is individual responsibility" a person's decision to "acquiesce in a presumptively lawful judgment of a court . . . should be respected").

E. Conclusion

In sum, there was ample evidence to support the motion court's finding that appellant was competent to waive his post-conviction motion, and this Court should decline appellant's request that this Court re-weigh the evidence in his favor. No expert testified that appellant was incompetent, the evidence showed that appellant was competent, and appellant testified rationally and coherently. This point should be denied.

II. THE MOTION COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO CONSIDER DR. GARY SELBERT'S OPINION THAT HE WOULD RECOMMEND THAT THE COURT ORDER A COMPETENCY EVALUATION, BECAUSE DR. SELBERT, WHO WAS A LICENSED PROFESSIONAL COUNSELOR, WAS NOT QUALIFIED TO GIVE AN OPINION AS TO APPELLANT'S COMPETENCE. IN ANY EVENT, DR. SELBERT'S RECOMMENDATION WOULD HAVE CHANGED NOTHING.

Appellant's counsel contends that the motion court clearly erred in refusing to consider Dr. Gary Selbert's opinion that the motion court should order a mental examination (App.Br. 40). He claims that Dr. Selbert was qualified to offer such an opinion because he was a licensed professional counselor and the chief of mental health services responsible for appellant's mental health care (App.Br. 40).

Generally, it is within the trial court's sound discretion to admit or exclude an expert's testimony. Johnson v. State, 58 S.W.3d 496, 499 (Mo. banc 2001). An expert may be qualified on foundations other than the expert's education or license. Id.

"Persons who are licensed medical doctors practicing psychiatry, licensed psychologists, and licensed social workers are permitted by law to evaluate persons and make diagnoses of mental disorders." Id. However, "professional counseling" is not legally defined to include diagnoses of any sort. Id.

In the case at bar, Dr. Selbert, the chief of mental health services at Potosi, was a licensed professional counselor (PCR Tr. 178). He held a masters degree in counseling and a doctorate in biblical counseling (PCR Tr. 178).

At the evidentiary hearing, after Dr. Selbert had described appellant's recent psychiatric treatment

at Potosi, appellant's counsel attempted to elicit Dr. Selbert's opinion that the court should order a mental examination, as follows:

Q. Okay. Do you have an opinion now, based upon the care that all of you have provided to him, as to whether you would recommend to the Court that it order an evaluation of him as to his competency to forego all further appeals at this time, whether that would be something that you would recommend that the Court do?

A. I — I would just have to say that as —

[THE STATE]: I'm sorry. I'm going to object to the — to the answer.

[APPELLANT'S COUNSEL]: Okay.

[THE STATE]: I'm sorry to interrupt. I don't believe a foundation has been laid for this witness to be able to give that opinion in this case.

THE COURT: Overruled. Proceed.

BY [APPELLANT'S COUNSEL]:

Q. Dr. Selbert, have — have you formed an opinion, based upon the care that you provided to Mr. Smith in conjunction with these other mental health care providers, as to a recommendation that you would have for the Court as to whether you would recommend that a comprehensive mental evaluation be done on Mr. Smith to determine his competency to waive his appeals?

A. I would say that providing mental health care in a facility like Potosi is — has a different focus than forensic psychology or psychiatry. And that our concern is not generally with those issues. Our concern is trying to help him to cope with his life

there. And I didn't — It was never my intent to get involved with any thing that would compromise that relationship because it's critical. It's — We're not — our focus is not geared towards determining his guilt or innocence or his competency. It's guilt — It's geared towards providing comfort in times of distress. And I don't feel like myself or the staff that I have are qualified to make forensic determinations.

Q. So you yourself are not qualified to render a forensic opinion about his mental status. Is that something that you would recommend being done at this point in time?

THE COURT: I'm going to have to back up and sustain the last objection. I think he has disqualified himself by his recent testimony. That objection will be sustained. He's indicated he's not qualified to make that recommendation.

(PCR Tr. 174-175).

Despite the motion court's ruling, appellant's counsel immediately tried to elicit the opinion again; however, the court sustained an objection to the question (PCR Tr. 175-176). Accordingly, appellant's counsel made an offer of proof, and Dr. Selbert testified as follows:

Q. Okay. In the process of providing the type of care that you provide to Mr. Smith, have you formed an opinion that you would recommend tot he Court that before Mr. Smith waives his appeals that the Court order an evaluation of him to determine his competency to waive his appeals?

A. Yes. It's my opinion that he should have further evaluation. That the evaluation

that my staff has provided isn't geared towards that end.

(PCR Tr. 177).

As is evident from the record, Dr. Selbert was not qualified to offer an opinion as to whether appellant was competent to waive his post-conviction remedies. Dr. Selbert was not a licensed medical doctor practicing psychiatry, a licensed psychologist, or a licensed social worker; and, consistent with his qualifications, Dr. Selbert expressly testified that he did not feel qualified to offer his opinion in a court of law (PCR Tr. 175). As such, the motion court did not abuse its discretion in excluding Dr. Selbert's opinion. See State v. Johnson, 58 S.W.3d at 499 (an "associate psychologist" in the process of becoming a licensed professional counselor should not have been permitted to testify to his "diagnoses" as "an expert").

Furthermore, while it is true that Dr. Selbert has provided mental health care to appellant and has, in the past, assessed appellant's mental health, such experience did not qualify him to offer opinions as to appellant's competence to waive his post-conviction motion. See Johnson v. State, 58 S.W.3d at 499 ("While [the associate psychologist's] experience treating sex offenders conceivably would qualify him to testify as an expert on many issues, diagnoses of mental disorders is not even arguably within his area of expertise, and his testimony on that point should have been excluded.").

Recognizing this limitation, appellant's counsel argues that "Dr. Selbert was not asked to provide diagnoses, but rather whether he would recommend Mr. Smith be evaluated" (App.Br. 51). True. However, tellingly, in Point I, appellant's counsel specifically relied upon the existence of Dr. Selbert's "recommendation" as "new evidence" that appellant was actually incompetent, i.e., in appellant's counsel's view, Dr. Selbert's "recommendation" was actually an opinion that appellant was, in fact, incompetent

(App.Br. 31, 37-38).

Thus, while it is true that offering such a "recommendation" is not the same as making a forensic or legal determination of competence, such a recommendation only has probative value when it is backed by expertise and evidence to support it. In short, while virtually any person (especially someone who cannot make the determination on her or his own) could have "recommended" that an expert be consulted to determine whether appellant was competent to waive his post-conviction motion, such a recommendation was worthless in the absence of a expert opinion as to competence. And, here, it was never shown that Dr. Selbert knew the legal standard for waiving a post-conviction motion or that Dr. Selbert could make relevant diagnoses. As a consequence, the motion court did not abuse its discretion in excluding Dr. Selbert's recommendation.

Moreover, there is no possibility that admitting Dr. Selbert's recommendation would have altered the outcome of appellant's hearing. At the hearing, Dr. Stacy, a certified forensic psychologist, offered his opinion that the court should order a mental examination (PCR Tr. 109). Nevertheless, despite the recommendation of a qualified expert, the motion court declined to order a mental examination; and, as fully set forth in Point I, the motion court did not clearly err in denying the motion for a mental examination because appellant was competent. This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that denial of appellant's counsel's motion for a mental examination and the dismissal of appellant's 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Court's Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix contains 10,880 words (as determined by WordPerfect 9 software);

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

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of January, 2003, to:

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APPENDIX

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