IN THE
MISSOURI SUPREME COURT

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

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

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL AND FACT STATEMENTS

Appellant, Kimber Edwards, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

POINTS RELIED ON

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

This Court applies the *Strickland* standard of review for assessing appellate counsel's ineffectiveness, not the plain error standard urged by the State; appellate counsel has a duty to follow ABA standards and raise all arguably meritorious issues, including the trial court's exclusion of relevant mitigating evidence, his accomplice's sentence of life imprisonment; Supreme Court precedent - providing for admission of any circumstance of the offense proffered as a basis for a sentence less than death - supported this claim; and while the state courts' interpretation of *Parker v. Dugger* was split on whether an accomplice's sentence must be admitted at a sentencing phase, the law was not settled against admitting this evidence.

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

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

Richmond v. Lewis; 506 U.S. 40, 44 (1992); and

Bradshaw v. Stumpf, 125 S.Ct. 2398 (2005).

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

Trial courts must instruct jurors that accomplices' statements to police are being offered to show officers' subsequent conduct, not for the truth, in order for the jury not to consider the statements for their truth; and a codefendant's statements are prejudicial in a case where the defendant has confessed, especially where he is challenging the accuracy of his confession.

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

Tennessee v. Street, 471 U.S. 409 (1985);

Cruz v. New York, 481 U.S. 186 (1987);

Bruton v. United States, 391 U.S. 123 (1968).

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

Due process claims of actual innocence should be raised at the earliest opportunity and are cognizable in 29.15 proceedings; Orthell's testimony that Mr. Edward never hired him to kill the victim cannot be evaluated for credibility without a hearing; exculpatory evidence can come from witnesses who did not testify at trial; and the State should be concerned about justice not simply affirming a conviction and death sentence.

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

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

Ferguson v. State, 20 S.W.3d 485 (Mo. banc 2000); and

Wilson v. State, 813 S.W.2d 833 (Mo. banc 1991).

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

Mr. Edwards informed the court that he wanted to testify the one and only time that he was present in court, thereby doing everything he could to raise the issue.

Winfield v. State, 93 S.W.3d 732 (Mo. banc 2002).

VI. Mr. Edwards' Traumatic Childhood

The State ignores that:

1) counsel has a duty to conduct a reasonable investigation, even when the client and his family tell counsel he had a "normal" childhood;

2) Mr. Edwards' troubled, chaotic childhood is mitigating evidence, unlike residual doubt; and

3) mitigating evidence, such as a troubled childhood, does not have to be connected to the crime or introduced to prove why the crime happened.

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

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

Tennard v. Dretke, 124 S.Ct. 2562 (2004); and

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

ARGUMENT

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

This Court applies the *Strickland* standard of review for assessing appellate counsel's ineffectiveness, not the plain error standard urged by the State; appellate counsel has a duty to follow ABA standards and raise all arguably meritorious issues, including the trial court's exclusion of relevant mitigating evidence, his accomplice's sentence of life imprisonment; Supreme Court precedent - providing for admission of any circumstance of the offense proffered as a basis for a sentence less than death - supported this claim; and while the state courts' interpretation of *Parker v. Dugger* was split on whether an accomplice's sentence must be admitted at a sentencing phase, the law was not settled against admitting this evidence.

Strickland Standard Governs Appellate Counsel's Ineffectiveness Claims

The State argues that to prove ineffective assistance of appellate counsel, a movant must show plain error, "the error that was not raised on appeal was so substantial as to amount to a manifest injustice or a miscarriage of justice." (Resp. Br. at 27, *quoting Moss v. State*, 10 S.W.3d 508, 514-15 (Mo. banc 2000) and *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo. banc 1994). The State ignores that this Court rejected this standard in *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005). There, this Court ruled that *Moss* did not provide the proper standard. *Id.* Rather, under *Smith v. Robbins*, 528 U.S. 259, 285 (2000), the proper standard

for evaluating a movant's claim of ineffective assistance of appellate counsel is *Strickland v. Washington*, 466 U.S. 668 (1984).

Thus, Mr. Edwards need not show that appellate counsel's error was so substantial as to amount to a manifest injustice. Rather, he must show that counsel acted unreasonably in failing to raise the exclusion of mitigating evidence issue and that there is a reasonable probability that had it been raised, the outcome would have been different. He must prove that this Court likely would have given relief and ultimately, the jury could have considered Orthell's life sentence as a basis for a sentence less than death.

ABA Standards Provide Standards for Reasonableness

The State argues that "[a]ppellate counsel does not have the duty to raise every non-frivolous claim on appeal." (Resp. Br. at 27), *citing, Jones v. Barnes*, 463 U.S. 745 (1983). The State ignores that in *Barnes*, appellate counsel was appealing a robbery and assault conviction. *Id.* The Supreme Court has recognized the difference in appellate review in death cases. "Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence *mandates careful scrutiny in the review of every colorable claim of error*." *Zant v. Stephens*, 462 U.S. 862, 885(1983)(emphasis added). "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785(1987).

Since *Barnes*, the Supreme Court has repeatedly ruled that the ABA standards provide guidelines or standards for what is reasonable performance by counsel in a death penalty case. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor," quoting, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)); *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (finding counsel's decision to argue consistent theories in guilt and penalty phase was reasonable, because, when the evidence is overwhelming and the crime heinous, "avoiding execution [may be] the best and only realistic result possible," quoting, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003)); and *Rompilla v. Beard*, 125 S.Ct. 2456, 2466 (2005) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction," quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)).

Accordingly, in evaluating appellate counsel's reasonableness in not raising the exclusion of mitigating evidence, Orthell's life sentence, this Court should look to the ABA guidelines, which require counsel to raise "all arguably

meritorious issues." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, §11.9.2D 1989. The Commentary regarding direct appellate counsel's duty reveals the danger of "winnowing" claims:

> "Winnowing" issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. *When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited*.

Id. (Emphasis added).

Here, counsel admitted that she was not trying to winnow claims, but rather she simply missed the issue regarding the exclusion of Orthell's life sentence, and wished that she had raised it (H.Tr. 184-85, 188). Since the claim had arguable merit, counsel had a duty to raise it. She knew the claim was preserved for review (H.Tr. 181-82). She was familiar with *Parker*, and believed it supported this claim (H.Tr. 180). Thus, her conduct fell below the objective standards of reasonableness provided by the ABA guidelines and Supreme Court precedent.

Supreme Court Precedent Supports Admission of Accomplice's Sentence as Mitigation

The State argues that Mr. Edwards has misread *Parker*,[1] and would limit its holding to an interpretation of Florida law (Resp. Br. at 30-32). According to the State, the Supreme Court was merely deciding that since Florida law allowed the admission of an accomplice's sentence, the reviewing court must consider this as mitigating evidence (Resp. Br. at 30-31). It then concludes that "the Court never suggested that an accomplice's sentence constituted mitigation evidence that a defendant had a constitutional right to present." (Resp. Br. at 32).

The State never explains why the Supreme Court would decide a state law issue. The State does not explain why an accomplice's sentence is nonstatutory mitigation properly considered in Florida, but not in Missouri. The State ignores that in Florida, the standard for nonstatutory mitigation is "[a]ny other aspect of the defendant's character or record, and any other circumstances from the crime." *Parker*, 498 U.S. at 315. This standard is identical to what is required under the Eighth Amendment. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

The State's reading of *Parker* also does not square with Supreme Court precedent. In *McCleskey v. Kemp,* 481 U.S. 279, 306 (1987), the Court ruled that "states cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty".

[1] *Parker v. Dugger,* 498 U.S. 308 (1991).

In *Richmond v. Lewis*, 506 U.S. 40, 44 (1992), two accomplices, Corella and Erwin were "involved in the offense but never charged with any crime". *Id.* The Court found the accomplices' treatment was a mitigating circumstance the sentencer should consider. But under the State's view, even though the Court's called these circumstances mitigating, it didn't really mean they were mitigating under the federal constitution, but only that Arizona finds accomplices' sentences mitigating.

Most recently, the Court decided *Bradshaw v. Stumpf*, 125 S.Ct. 2398 (2005), holding that a prosecutor's use of two conflicting theories concerning the identity of the shooter to convict and obtain a death sentence warranted a remand on the issue of whether the sentence violated due process. Defense counsel for the accomplice presented Stumpf's sentence of death at his trial, in support of a lesser punishment. *Id.* at 2404. The Court never suggested that an accomplice's sentence should not be admitted at trial. *Id.* Rather, all members of the court recognized that an accomplice's sentence was admissible. *Id.* at 2404, 2408 (Souter, J., concurring), 2410 (Thomas, J., concurring). As Justice Thomas put it, counsel would surely bring the sentence to the jury's attention. *Id.* at 2410. Again, the State would have this Court believe, that the Supreme Court has not ruled that an accomplice's sentence as mitigating, only that it has mitigating effect in Ohio.

The State's reading of *Parker* does not withstand scrutiny. The Supreme Court has repeatedly considered an accomplice's sentence as mitigating evidence that a jury can consider.

Split in State Court Decisions

The State suggests that Mr. Edwards' claim has been ruled against him in the courts deciding the issue, saying: "Courts in other states have repeatedly rejected the misreading of *Parker* Appellant advances here." (Resp. Br. at 32). The State then cites seven decisions from four states (Texas, North Carolina, California, and Illinois) (Resp. Br. at 33-34). If the State wants to provide this Court with other states' decisions, it has a duty to fairly characterize those decisions. A complete and fair review of other state courts' decisions illustrates that there is a split on this issue.[2]

As the Supreme Court decisions indicate, Florida, Arizona, and Ohio allow an accomplice's sentence to be introduced as mitigating evidence. *Parker*, *Richmond*, and *Stumpf, supra*. In addition to *Richmond*, another example from

[2] Unlike the State, Mr. Edwards presents both favorable and unfavorable cases which illustrate a split in authority. Mr. Edwards has included those cases decided after *Parker* in 1991 and before appellate counsel filed Mr. Edwards' brief in 2003, since these are the relevant decisions in determining counsel's effectiveness. The one exception is *Malloy*, decided in 1979. Mr. Edwards includes it because the Supreme Court relied on it in *Parker*.

Arizona is in *State v. Schurz*, 859 P.2d 156 (Az. 1993) where the jury considered an accomplice's sentence, but rejected the argument that the disparity should result in leniency for Schurz, since Schurz set the victim on fire.

In *Malloy v. State*, 382 So.2d 1190 (1979), two accomplices testified against Malloy and received 5-10 years in this execution style murder. The parties disputed who pulled the trigger. *Id.* at 1193. The trial court overrode the jury's decision to give life. *Id.* In reversing, the Court ruled that the jury could properly consider the accomplices' sentences as mitigating evidence warranting leniency. *Id.*

Alabama also considers an accomplice's sentence mitigating evidence that the jury should consider. *Burgess v. State*, 811 So.2d 617, 628 (Ala. S.Ct. 2000) (circuit court should have taken into account in mitigation the fact that all other participants received complete immunity from prosecution). Delaware, too, has ruled such evidence is constitutionally mitigating. *State v. Ferguson*, 642 A.2d 1267 (Del.Super.1992) (co-defendant's 15-year prison sentence for his role in murder as result of plea bargain was mitigating evidence which defendant would be permitted to present to court and jury at penalty hearing in capital murder trial). Indiana also provides that an accomplice's sentence be considered as mitigation. *Holmes v. State*, 671 N.E.2d 841, 850-51 (Ind. 1996).

In addition to these states, Congress has found that an accomplice's sentence is mitigating. 18 U.S.C. § 3592(a)(4). This provision states:

(a) Mitigating Factors. - In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

4) Equally culpable defendants. - Another defendant or defendants, equally culpable in the crime, will not be punished by death.

Federal courts have repeatedly upheld this mitigator. *United States v. Paul*, 217 F.3d 989, 999-1000 (8th Cir. 2000) (jury allowed to consider codefendant's life sentence and could decide relevant culpability of two defendants); *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003) (jury properly considered accomplice's life sentence as a mitigating factor, but found that even though accomplice was the triggerman, Higgs had the dominant role in the murders); *United States v. Beckford*, 962 F.Supp. 804, 812 (E.D.Va. 1997) (mitigator is not limited solely to indicted defendants, but pertains to uncharged co-conspirators as well); *United States v. Bin Laden*, 156 F.Supp.2d 359, 369 (S.D.N.Y. 2001) (the circumstance that others who are equally culpable will not be subject to the death penalty is a comparative factor which reflects a determination by Congress that it is appropriate for jurors to consider questions of proportionality and equity when they are evaluating whether a death sentence is appropriate). This mitigator improves the likelihood that the death penalty will not be administered in an arbitrary or random manner. *Id.*

Contrary to the federal government and these state court decisions, other states have excluded an accomplice's sentence, ruling that it is not mitigating (Resp. Br. at 33-34). However, these states have not consistently applied the exclusion. For example, the State cites to *State v. Jaynes*, 549 S.E.2d 179 (N.C. 2001) and *State v. Ward*, 449 S.E.2d 709, 737 (N.C. 1994) which ruled an accomplice's sentence is not mitigating (Resp. Br. at 33). But in *State v. Roseboro*, 528 S.E.2d 1, 8 (N.C.2000), the court recognized that the jury may consider an accomplice's sentence as a mitigating circumstance under the "catchall" instruction. That instruction tells jurors: "Finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value." *Id.* Similarly, in Missouri, jurors are told:

> You shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment.

MAI-CR: 313.44A.

California, too, has been unclear in its rulings on the admissibility of a codefendant's sentence as mitigation. In *People v. Mincey*, 827 P.2d 388, 433-34 (Cal. 1992), none of Mincey's codefendants received the death penalty. The jury knew this as one of the codefendants, Sandra B. testified, and her expectation of leniency was thoroughly explored. *Id.* at 422-23. The prosecutor had told the jury in his opening statement at the penalty phase that Sandra's case was pending and that in closing said her lawyer "may have some hope of getting something out of this." *Id.* Defense counsel argued that the prosecutor might agree to second

degree murder. *Id.* Thus, this information was before the jury at the penalty phase, even though the Court ruled that the court was not required to admit it as mitigating evidence.

In *People v. McDermott*, 51 P.3d 874, 911-12 (Cal. 2002), the prosecutor told jurors that accomplices Marvin and Dondell Lee had received immunity from prosecution. Accomplice, Luna, agreed to testify at McDermott's trial in exchange for a life sentence. *Id.* The court then instructed the jury that they could not consider this evidence in considering punishment for McDermott. *Id.* This is contrary to Missouri law, where jurors are specifically instructed that they can consider all the evidence in both the guilt and penalty phases in considering aggravation and mitigation. MAI-CR 313.41 and 313.44.

The State also points to Illinois as excluding this evidence in mitigation (Resp. Br. at 33-34). But Illinois does consider the evidence of a codefendant's sentence in its proportionality review. *People v. Kliner*, 705 N.E.2d 850, 897-898 (Ill. 1998). In *Kliner*, the court explained that the codefendant, Rinaldi, who hired Kliner to kill Rinaldi's wife, was less culpable than Kliner, the actual shooter. *Id.* Kliner received death, while Rinaldi got 60 years. *Id.* While Rinaldi planned the murder of his wife and hired others to commit it, Kliner repeatedly shot the victim in cold-blood and chose to fire the fatal shot. *Id.* While the court did not minimize hiring someone to kill their spouse, they found the actual shooter more culpable. *Id.*

In addition to the four states identified in Respondent's Brief, other states have concluded that an accomplice's sentence is not mitigating evidence that must be considered. See, e.g., *Jones v. State*, 539 S.E.2d 154, 161 (Ga. 2000); S*heppard v. Com.*, 464 S.E.2d 131, 138 (Va.1995); *State v. Koskovich*, 776 A.2d 144, 201-03 (N.J.2001);[3] *Guy v. State*, 839 P.2d. 578, 587 (Nev. 1992); *State v. Hughes*, 521 S.E.2d 500, 505 (S.C.1999).

Thus, when appellate counsel filed Mr. Edwards' brief, the state courts were split on whether an accomplice's sentence was relevant mitigating evidence that must be considered. The issue had not been resolved against Mr. Edwards. This Court had not considered the issue in light of *Parker*. Accordingly, reasonable counsel would have raised the issue.

Orthell went to the heart of this case. The complaint relied on Orthell (D.L.F. 12-13). The State's opening relied on Orthell (Tr. 950-51, 955). Police testimony relied on Orthell (Tr. 1268, 1344, 1394, 1470). The State's closing argument relied on Orthell (Tr. 1888-89, 1890-91, 1891-92). And the jurors' deliberations relied on Orthell (Tr. 1922-23). Jurors wanted to know why he

[3] While New Jersey generally does not allow an accomplice's sentence to be admitted as a mitigator, in *Koskovich*, the New Jersey Supreme Court ruled that the trial judge properly told the jury that the codefendant was 17 years old and not subject to the death penalty, so that jurors could properly consider age as mitigation. *Id.*

didn't testify (Tr. 1922). They wanted to examine deposition testimony (Tr. 1922). They wanted to see the police reports of the officers who interviewed Orthell and testified about his statements (Tr. 1923). Surely, the jurors would have wanted to consider his sentence of life imprisonment without probation or parole in deciding whether Mr. Edwards should receive death. Counsel should have raised the exclusion of Orthell's conviction and sentence. A new penalty phase should result.

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

Trial courts must instruct jurors that accomplices' statements to police are being offered to show officers' subsequent conduct, not for the truth, in order for the jury not to consider the statements for their truth; and a codefendant's statements are prejudicial in a case where the defendant has confessed, especially where he is challenging the accuracy of his confession.

Trial Court Gave Jurors No Limiting Instruction

The State suggests that since Orthell Wilson's statements to police were not admitted for their truth, no hearsay was admitted and thus, *Crawford v. Washington*, 541 U.S. 36 (2004) cannot apply (Resp. Br. at 37-42). The State ignores that the trial court refused to give a limiting instruction to jurors (Tr. 1344, 1395, 1472). As a result, jurors were free to consider Orthell's statements for their truth, that he implicated Mr. Edwards in committing the crime with him.

The State never acknowledges *Tennessee v. Street*, 471 U.S. 409, 414 (1985), discussing the necessity of limiting instructions under these circumstances. Nor does the State address the state court decisions requiring trial courts to submit limiting instructions when statements are admitted to show subsequent conduct. *State v. Robinson*, 111 S.W.3d 510, 514 (Mo. App., S.D. 2003); *State v. Shigemura*, 680 S.W.2d 256, 257-58 (Mo. App., E.D. 1984). Additionally, the State ignores that the prosecutor argued the statements for their truth (Tr. 950-51, 955, 1888-89). He argued how Mr. Edwards lied and Orthell told the truth, that

Mr. Edwards had hired Orthell and tried to create a "web of deceit" to cover his tracks (Tr. 1890-91). He said, "I don't think most people think Michael actually exists," rather, Mr. Edwards and Orthell were guilty (Tr. 1891-92).

Orthell's Statements to Police Are Prejudicial Eventhough Mr. Edwards Made a Statement

The State suggests that Mr. Edwards was not prejudiced by police officers' testimony about Orthell's statements, since Mr. Edwards gave a statement implicating himself in the murder (Resp. Br. at 43-44). The Supreme Court has rejected this argument. *Cruz v. New York*, 481 U.S. 186 (1987). In *Cruz*, the Court held that where a non-testifying codefendant's confession was not admissible against the defendant, the confrontation clause barred its admission at a joint trial, even though defendant's own confession was admitted against him. *Id.* A codefendant's statements are devastating to the defendant, and their "credibility is inevitably suspect." *Id.* at 190, *quoting Bruton v. United States*, 391 U.S. 123 (1968). These statements can be just as devastating in a case where the defendant has confessed, especially when he challenges the validity of that confession. *Id.* at 192. That's especially true where the confession is not videotaped and is open to question. *Id.* Accordingly, a codefendant's statements - implicating a defendant - significantly harm the defendant's case. *Id.* 192-93.

As in *Cruz*, Orthell's statements harmed Mr. Edwards. Mr. Edwards maintained his innocence and argued that his confession was coerced as officers had threatened his family. His statements to police were not videotaped or

recorded. Defense counsel challenged the confession and showed that it was not accurate. However, the State assured jurors they could trust the confession, because Orthell had led them to Mr. Edwards and the murder weapon (Tr. 1888-89). The State argued that Orthell was telling the truth, that he and Mr. Edwards committed the crime (Tr. 1890-91). The jurors zeroed in on Orthell's importance, asking why he didn't testify, and whether Orthell gave a deposition they could consider (Tr. 1922). They even wanted to examine the interrogating officers' police report (Tr. 1923). Orthell's statements mattered to jurors, precisely because they were concerned with the accuracy and trustworthiness of Mr. Edwards' confession. Thus, this Court must reject the State's suggestion that Orthell's statements did not prejudice Mr. Edwards.

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

Due process claims of actual innocence should be raised at the earliest opportunity and are cognizable in 29.15 proceedings; Orthell's testimony that Mr. Edward never hired him to kill the victim cannot be evaluated for credibility without a hearing; exculpatory evidence can come from witnesses who did not testify at trial; and the State should be concerned about justice not simply affirming a conviction and death sentence.

Due Process Claims Are Cognizable in 29.15 Proceeding

The State argues that Mr. Edwards' due process claim, that Orthell Wilson has recanted his allegations against Mr. Edwards and will testify that Mr. Edwards never hired him to kill the victim, is not cognizable in this 29.15 proceeding (Resp. Br. at 45-53). However, the State relies on cases where newly discovered evidence was produced after trial and the claim was raised on direct appeal. See, *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); *State v. Gray*, 24 S.W. 3d 204, 209 (Mo. App., W.D. 1994); and *State v. Dorsey*, 156 S.W. 3d 791, 797-800 (Mo. App., S.D. 2006). These cases have no applicability, since they are not post-conviction cases and address the defendants' attempts to present evidence outside the record to the appellate court.

The State does cite two postconviction cases, *Ferguson v. State*, 20 S.W.3d 485, 505 (Mo. banc 2000); and *Wilson v. State*, 813 S.W.2d 833, 834 (Mo. banc 1991). In *Ferguson*, this Court never held that the claims were not cognizable, rather, the claims were not pled with specificity to warrant a hearing and to warrant discovery. *Ferguson, supra* at 503-04. The allegation was general, alleging the "state had in its possession material exculpatory evidence that was not turned over to the defense." *Id.* at 503. The motion never alleged what the exculpatory evidence might be. *Id.* The motion even conceded that Ferguson had no facts to support the claim. *Id.* Such general and conclusory claims are not acceptable. *Id.*

In contast, here, the amended motion pled specific facts, which if true, prejudiced him. This claim specifically outlined Orthell's proposed testimony (L.F. 257-62).[4] Orthell said Mr. Edwards never hired him to kill Ms. Cantrell (L.F. 257). Orthell explained how he knew about information regarding the murder (L.F. 258) and explained why he falsely confessed to the police (L.F. 259). Thus, unlike *Ferguson*, Mr. Edwards claims were factually specific and warrant a hearing.

Wilson, supra, also does not apply. There, this Court found that Wilson was competent to enter a guilty plea and newly discovered evidence did not affect the voluntariness of Wilson's guilty plea. *Id.* at 834. A state habeas, a motion to withdraw his guilty plea under Rule 29.07(d), or a request for a pardon from the

[4] Mr. Edwards' outlined the specifics in greater detail his original brief at 65-66.

Governor were the proper remedies for someone who pled guilty and then later claimed that he was actually innocent. *Id.* at 834-35.

However, the dissent recognized some support for raising actual innocence claims in a postconviction motion. *Id.* at 848 (Blackmar, J. dissenting). Rule 24.035(a) requires that the motion "shall include every ground known to the movant for vacating, setting aside, or correcting the judgment or sentence." *Id.* Thus, if claims of innocence were known at the time of filing the post-conviction motion, it makes sense to have them included at the earliest opportunity. *Id.* The State has an obligation to provide a procedure to hear and dispose of claims that might exonerate a defendant. *Id.*

Unlike *Wilson*, Mr. Edwards never pled guilty, but has always maintained his innocence. He cannot file a motion to withdraw his guilty plea. Furthermore, since *Wilson* was decided, this Court has decided *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547, n.3 (Mo. banc 2003), *citing*, *Herrera v. Collins*, 506 U.S. 390 (1993) (executing an innocent person violates the constitution under the Eighth and Fourteenth Amendments). Rule 29.15(a) provides that all constitutional claims should be included in the motion. This necessarily includes due process claims. Yet, the State ignores *Amrine* and the plain language of the rule. This Court should reject the State's argument and find this claim cognizable in the 29.15 proceeding.

Credibility Determinations Should be Made at Evidentiary Hearing

The State suggests that Orthell's recantation is not believable (Resp. Br. at 51-53). That is a conclusion the motion court should make after an evidentiary hearing in which the court has an opportunity to hear the testimony and observe the witness' demeanor. Credibility determinations must be made at a hearing. *Amrine, supra* at 551 (J. Benton, dissenting) and 552 (J. Price, dissenting).

The State disbelieves this claim, so it argues against a hearing. The State ignores that in deciding whether to grant a hearing, the motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002). The State is putting the cart before the horse. The motion court should have assumed the facts alleged were true when assessing whether to grant a hearing. If the court concluded that Orthell was truthful in saying Mr. Edwards never hired him to kill the victim, it would have destroyed the State's case against Mr. Edwards and established that he is innocent.

Exculpatory Evidence Comes From All Kinds of Witnesses

The State argues that since Orthell did not testify at trial, this evidence would not be exculpatory (Resp. Br. at 51). The weakness in the State's argument can be seen by case after case where DNA evidence exonerates people convicted by eyewitness testimony. In such cases, the evidence of innocence comes from science and a DNA expert, not from a witness who actually testified at trial.

Nevertheless, this evidence calls into doubt those witnesses who did testify at trial. The new evidence calls into question false confessions. Exculpatory evidence comes from all kinds of witnesses. Mr. Edwards would like the evidence to be from someone other than Orthell Wilson, but he is the one who has given the police so many contradictory statements, he is the one who invoked his Fifth Amendment right to not incriminate himself and refused to testify at the deposition by Mr. Edwards' trial counsel before trial. Now that he is willing to finally testify, the State should welcome the opportunity to set the record straight.

State Should Want Claims of Actual Innocence Heard

"[T]he purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent." *Amrine, supra at 547.*[5] The State should want claims of actual innocence heard at the earliest opportunity and decided on their merits. What would the prejudice have been to the State to have a hearing on this claim?

[5] The State also argued against Mr. Amrine raising his claims of actual innocence in this Court. Ursula Bentele, *Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process*? 40 Hous. L. Rev. 1359, 1360 (2004).

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

Mr. Edwards informed the court that he wanted to testify the one and only time that he was present in court, thereby doing everything he could to raise the issue.

Mr. Edwards asked to testify in support of his claims in his postconviction action, the one and only time he appeared in court (H.Tr. 275-76). Yet, the State says that Mr. Edwards should have objected when the evidence closed without his testimony (Resp. Br. at 62).

The State relies on *Winfield v. State*, 93 S.W.3d 732, 736 (Mo. banc 2002). The State's reliance on *Winfield* is misplaced. Winfield claimed that trial counsel was ineffective for failing to allow him to testify in the penalty phase of his trial. *Id.* At trial, however, he was specifically advised of his right to testify and he never objected when the defense rested its case without calling him. *Id.* The motion court credited trial counsel's testimony that Winfield never voiced to counsel a desire to testify in penalty phase. *Id.*

Here, in contrast, Mr. Edwards did object when counsel concluded the evidence at the evidentiary hearing without him testifying (H.Tr. 275-76). Mr. Edwards told the court that he wanted to testify, saying "I'd like to testify here today or some time soon, if I can" and "I'd like to let the Court know I would like to testify." (H.Tr. 275-76).

The State's suggestion that Mr. Edwards had an opportunity to object when the evidence was officially closed, after depositions of experts were submitted (Resp. Br. 62), is contrary to the record. Mr. Edwards informed the court that he tried to tell his attorneys about his desire to testify, but they had not responded in six months (H.Tr. 275-76). Under these circumstances, Mr. Edwards properly voiced his desire to testify and the court should have allowed his testimony, either at the evidentiary hearing or by deposition.

VI. Mr. Edwards' Traumatic Childhood

The State ignores that:

1) counsel has a duty to conduct a reasonable investigation, even when the client and his family tell counsel he had a "normal" childhood;

2) Mr. Edwards' troubled, chaotic childhood is mitigating evidence, unlike residual doubt; and

3) mitigating evidence, such as a troubled childhood, does not have to be connected to the crime or introduced to prove why the crime happened.

Counsel Has Duty to Investigate Independent of the Client and His Family

Throughout the State's Brief it suggests that evidence of Mr. Edward's troubled and chaotic childhood was not reasonably available before trial, since Mr. Edwards, his mother, and siblings did not volunteer this information (Resp. Br. at 65-66, 68-69, 70, 71, 72, 73, 74, 75, 79-80). The State's argument was rejected in *Rompilla v. Beard*, 125 S.Ct. 2456 (2005).

There, counsel, busy public defenders, interviewed Rompilla and members of his family, and hired three mental health experts. *Id.* at 2463. Rompilla was uninterested in counsel's attempts to investigate his life history for mitigation. *Id.* He told counsel that his childhood and schooling were normal. *Id.* At times, Rompilla was actively obstructive, sending counsel off on false leads. *Id.*

Rompilla's counsel interviewed Rompilla's family (his former wife, two brothers, a sister-in-law, and his son). *Id.* Counsel developed a good relationship

with the family. *Id.* at 2463. The family's knowledge of Rompilla had limits because of his time in custody, and the family's belief in his innocence. *Id.*

The three mental health experts and their reports provided nothing useful for Rompilla's case. *Id.* As a result, counsel did not further investigate his mental condition. *Id.*

Postconviction counsel found school records, juvenile and adult incarcerations, and the court file on Rompilla's prior conviction that pointed to mitigation. *Id.* at 2463-64. Counsel's failure to investigate the prior conviction was unreasonable. *Id.* at 2464. Counsel knew the State planned to introduce the conviction for rape and assault, and to introduce the transcript of the victim's rape testimony at the earlier trial. *Id.* Thus, it was incumbent for counsel to investigate this information that was readily available. *Id.* at 2464-67.

Rompilla was prejudiced because the "prison records pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard." *Id.* at 2468. Rompilla was raised in a slum environment, he quit school at 16 and had assaultive priors related to drinking alcohol. *Id.* These records "destroyed the benign conception of Rompilla's upbringing and mental capacity" counsel had formed from interviews with Rompilla and his family. *Id.* Armed with this information, postconviction counsel was able to further investigate and discover Rompilla's turbulent childhood filled with violence and drinking. *Id.* at 2468-69.

Like *Rompilla*, here Mr. Edwards and his family told trial counsel he had a "normal" childhood. Counsel recognized the importance of obtaining medical and mental health records and had Mrs. Edwards sign a release for these records (H.Tr. 11, 108, 191; Exs. 27 and 28). Mrs. Edwards' medical and mental health records should have raised red flags that Mr. Edwards' childhood was anything but normal.

Medical records from Barnes-Jewish Hospital revealed that Mrs. Edwards was hospitalized for depression in 1975, when her son Kimber was only 11 years old (L.F. 3296-97). Mrs. Edwards wanted to get in a car, drive away, take pills and go to sleep (L.F. 3301). Doctors prescribed psychotropic drugs for her (L.F. 3296, 3301, 3313, 3330). Her mental health records were even more revealing of the troubles at home (L.F. 2454-2598, 3353). She wanted her husband to suffer the same way he had made her suffer (L.F. 2457). He was so jealous that it interfered with her work (L.F. 2458). He was unfaithful and his girlfriends harassed Mrs. Edwards (L.F. 2466). She obtained a restraining order due to physical and emotional abuse (L.F. 2459). Mental health records noted his "tyrannical and irrational behavior" (L.F. 2466). The family went without heat for 5 years (L.F. 2459).

Mrs. Edwards' history of major depression and psychosis adversely affected her children (L.F. 2350, 2463, 2598). She transferred her dependency needs to them (L.F. 2463). Their needs were not met (L.F. 3352-55). Her

children were malnourished as babies (H.Tr. 26, 268). A son spilled hot grease on himself, requiring him to go to the hospital (L.F. 2598).

Court records, readily available, confirmed the abusive home life (L.F. 2711; Ex. 30). Emmrie threatened and physically abused Mrs. Edwards (L.F. 2711), shouting, hitting and striking her. He hit his wife, leaving her with bruises and knots on her head (L.F. 2753). The beatings happened on numerous occasions (L.F. 2753).

These records establish that Mr. Edwards claims of a violent, chaotic childhood filled with abuse and neglect are not newly found claims developed for the postconviction action. Rather, the problems were well-documented and had counsel read the records, they would have raised red flags and alerted counsel to the need to investigate Mr. Edwards' troubled childhood.

Reasonable Trial Strategy

The State suggests that even though trial counsel testified she would have raised evidence of Mr. Edwards' troubled childhood (H.Tr. 214-15, 220), that her testimony "strains credulity" and would have been inconsistent with the strategy counsel employed at trial. (Resp. Br. at 77). The State suggests that presenting evidence of his troubled childhood and the mother's mental illness would have been inconsistent with a loving family who would be hurt by his execution (Resp. Br. 77-80). Under the State's theory a strategy of "residual doubt" was better that showing a troubled childhood filled with violence, abuse and neglect (Tr. 77-78).

The State never explains how counsel can formulate a reasonable trial strategy without adequately investigating. The State ignores that courts have repeatedly found a turbulent childhood of violence and abuse as mitigating. *Rompilla, supra*; *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (evidence of a turbulent, chaotic childhood is compelling mitigating evidence); *Williams v. Taylor*, 529 U.S. 362 (2000) (nightmarish childhood is mitigating); *Wiggins v. Smith*, 539 U.S. 510, 532-33 (physical and sexual abuse is mitigating). In contrast, residual doubt is not a valid mitigator. *Oregon v. Guzek*, 126 S.Ct. 1226 (2006).

The State's argument ignores that a family with problems can still be loving. Mrs. Edwards suffered from depression, anxiety and was suicidal when her sons were young. Her husband abused her. This did not mean she didn't love and care about her children. It did establish why it was hard for her to raise them, to adequately clothe and feed them. It impacted Mr. Edwards and his subsequent relationships.

Nexus Argument Must Be Rejected

The State also argues that since evidence of a traumatic childhood would not explain the killing, it would not be mitigating (Resp. Br. at 78). The State's nexus argument has been rejected by the Supreme Court and this Court. *Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004); *Tennard v. Dretke,* 124 S.Ct. 2562, 2573 (2004). A defendant need not show a nexus between his mitigation and the crime to admit such mitigating evidence. *Id.* "Virtually no

limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Hutchison, supra* at 304, quoting, *Tennard*, 124 S.Ct. at 2570.

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

CONCLUSION

Based on his reply and the arguments made in his original brief, Mr. Edwards requests the following relief:

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

Points II and VIII, a new trial;

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

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

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

Point IX, a remand for a competency hearing; and

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

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,677 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

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

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed postage pre-paid this 28th day of April, 2006, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Melinda K. Pendergraph