IN THE
MISSOURI SUPREME COURT

VINCENT McFADDEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC96453**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION VIII
THE HONORABLE TOM W. DePRIEST, JUDGE

APPELLANT'S CORRECTED REPLY BRIEF

William J. Swift, MOBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX: (573) 777-9974
William.Swift@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***RULES*:**

JURISDICTION AND STATEMENT OF FACTS

The Jurisdictional Statement and Statement of Facts from the original brief are incorporated here.

POINTS RELIED ON

I.

GOLDMAN'S TWO JUROR HEARING

The argument briefed is the same claim raised in the 29.15 court and is two pronged.

The Goldman prong challenges Judge Goldman's having limited questioning to Jurors Williams and Elswick at the pre-amended motion hearing on the motion to contact jurors when 29.15 counsel in-court expressly narrowed their motion's request to contacting only the jurors who sat and the alternates.

The DePriest prong challenges Judge DePriest's denying the amended motion claim counsel should have been allowed to contact all the petit jurors and the alternates which is the same as what the amended motion alleged because the petit jurors are a subset and subsumed within the larger venirepanel.

DePriest v. State,510S.W.3d331(Mo.banc2017);

Buchli v. State,242S.W.3d449(Mo.App.,W.D.2007);

Anderson v. State,402S.W.3d86(Mo.banc2013);

U.S. Const. Amends. VIII and XIV.

II.

PROSECUTOR LARNER'S ADMISSIONS - UNFAIR GOLDMAN JUROR HEARING

The argument as briefed to this Court the motion court (Judges Dolan and DePriest) clearly erred in denying the renewed motions to examine all petit jurors is the same as raised in the trial court because at the Goldman hearing 29.15 counsel expressly narrowed the scope of who should testify from the entire venirepanel to only all the jurors who sat and the alternates such that the renewed motions to contact jurors renewed the narrowed version of the original motion Goldman heard.

Judge Goldman was required to disqualify himself because he had discussed with Prosecutor Larner the "highlights" of Vincent's cases. Goldman's Williams and Elswick credibility findings based on Goldman's viewing them in-court could not be adopted by Dolan and DePriest because Dolan and DePriest did not view Williams and Elswick in-court.

Anderson v. State,402S.W.3d86(Mo.banc2013);

Lee v. Hiler,141S.W.3d517(Mo.App., S.D.2004);

U.S. Const. Amends. VIII and XIV.

IV.

DR. WHITE - CULTURAL MITIGATION

The motion court clearly erred denying counsel was ineffective for failing to call Dr. White to testify to all his Pine Lawn specific opinions he relied on to explain the totality of the 1980s and 1990s Pine Lawn cultural conditions Vincent grew-up in because his testimony satisfied the *Frye* test, even though it was not required to do so.

State v. Davis,814 S.W.2d593(Mo.banc1991);

U.S. Const. Amends. VI, VIII, and XIV.

X.

FAILURE TO PRESENT PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Gur, or a similarly qualified expert, in penalty mitigation to present PET scan brain evidence because respondent expressly consented to Dr. Gur being substituted for Dr. Preston in the trial court because Dr. Preston had retired and respondent's having consented to Gur's substitution forecloses respondent from arguing on appeal the claim was unpreserved.

Respondent's assertion the Appellant's Point Relied On was defective for failing to include any mention of a PET scan is simply incorrect as the Point Relied On expressing stated "PET scan."

Public Supply Company, Inc. v. Safety Federal Savings & Loan Association,780S.W.2d673(Mo.App.,W.D.1990);

U.S. Const. Amends. VI, VIII, and XIV.

ARGUMENT

I.

GOLDMAN'S TWO JUROR HEARING

The argument briefed is the same claim raised in the 29.15 court and is two pronged.

The Goldman prong challenges Judge Goldman's having limited questioning to Jurors Williams and Elswick at the pre-amended motion hearing on the motion to contact jurors when 29.15 counsel in-court expressly narrowed their motion's request to contacting only the jurors who sat and the alternates.

The DePriest prong challenges Judge DePriest's denying the amended motion claim counsel should have been allowed to contact all the petit jurors and the alternates which is the same as what the amended motion alleged because the petit jurors are a subset and subsumed within the larger venirepanel.

Vincent Was Denied A Fair Hearing

The investigation into juror misconduct was limited for no legitimate reason. The hearing Judge Goldman held on its face was fundamentally unfair because it was limited to Williams and one other petit juror the St. Louis County Court Administrator "random[ly]" selected(29.15Jur.Hrg.Tr.3). Before this Court is willing to say juror misconduct was not established, Vincent must be given the opportunity to examine all those who sat on the Addison jury and the alternates before a judge who did not have extrajudicial contacts with the prosecutor about Vincent's cases. The proceedings

here were unfair because Goldman had extrajudicial contacts with Prosecutor Larner which resulted in Goldman disqualifying himself on his own motion.

Goldman's finding of no juror misconduct was based on credibility findings premised on his viewing Williams and Elswick in-court. Judges Dolan and DePriest could not simply adopt the findings of a judge required to be disqualified (Goldman) where Dolan and DePriest did not view Williams and Elswick in-court.

Vincent could not get at establishing intentional or unintentional juror misconduct with questioning limited to a "random" juror by a judge who had extrajudicial contacts with the prosecutor about Vincent's trials. This Court should not sanction reliance on factual findings made by a judge required to disqualify himself.

Alternative Pronged Arguments

The appellant's brief contained two alternative pronged arguments for why limiting the juror questioning to Williams and Elswick should be reversed. The claim is dual pronged because both prongs address Goldman's having limited the juror hearing to Williams and Elswick and how Vincent was prejudiced.

First, Judge Goldman clearly erred in denying pre-amended motion filing a hearing where all the petit jurors and alternates were allowed to be called and questioned where at the Goldman hearing counsel narrowed their request to wanting to contact the jurors who sat and the alternates.

Second, and alternatively, was that Judge DePriest denied the separately pled amended motion claim Vincent should have been allowed to examine all the petit jurors and the alternates.

Motion To Contact Addison Jurors - Narrowed

To Only Those On Petit Jury

On August 27, 2013, 29.15 counsel moved to contact jurors and the motion was titled as wanting to contact jurors in case 03CR-2642-02(29.15L.F.29-34), which was the Addison retrial(*See*, 29.15Ex.34 covers to separate volume transcripts).[1]

The motion to contact indicated that it was necessary to contact jurors to determine whether Williams intentionally failed to disclose knowledge of Vincent McFadden based on having been summoned to serve on Vincent's Bryant/Burns assault case and to determine whether Williams contaminated the entire Addison case jury with knowledge of the Bryant/Burns charges(29.15L.F.29). The motion to contact noted that getting to contact jurors timely was critical because: "Movant's Amended Motion is due on September 16, 2013 and time is of the

[1] Parts of the motion to contact mistakenly referenced 04CR-2658, the Bryant/Burns criminal case number (Supp.T.L.F.3-15), when the Addison trial criminal case number 03CR-2642-02 was intended. Respondent has never disputed, and it was clear to everyone, that the request to contact jurors was directed at the Addison case jurors and not the Bryant/Burns jurors.

essence"(29.15L.F.32).[2] The motion to contact asked to contact the entire venirepanel to determine whether Williams committed juror misconduct and whether other jurors were exposed through Williams to other prior bad acts alleged against Vincent(29.15L.F.33).

The same day the motion to contact was filed (August 27th), Judge Goldman ordered the motion was "granted in part at this time."(29.15L.F.35). The order directed "that juror Jimmy L. Williams be contacted and one other member of the jury."(29.15L.F.35). A hearing was set for September 6, 2013(29.15L.F.35). The order continued: "the court will question Jimmy Williams on September 6 & also will question another juror who sat on the case at trial in cause #03CR-2642."

On September 6, 2013, Goldman questioned in-chambers only Williams and Juror Elswick(29.15L.F.35,43,45). Goldman stated Elswick was "random[ly]" selected by the St. Louis County Court Administrator(29.15Jur.Hrg.Tr.3).

At the September 6th hearing, Judge Goldman stated the following:

> He [Williams] was on the jury selection [Bryant/Burns case] and was not selected to be on the jury. So I think that the defendant is trying to find out if at some point Mr. Williams recognized Mr. McFadden from the previous trial, or being on the selection of the previous trial, **which I think is**

[2] The amended motion was actually due September 18, 2013 and it was timely filed on September 18, 2013(*See*, 29.15L.F.1-3,21-25,46).

appropriate to know before they get in their amended post-conviction relief motion.

(29.15Jur.Hrg.Tr.2-3)(emphasis added). Before Williams and Elswick testified, Judge Goldman asked 29.15 counsel if they wanted to make a record on the scope of the hearing(29.15Jur.Hrg.Tr.8). In particular, 29.15 counsel told Goldman the following:

> If I can just add, **to make the record clear**, [29.15 co-counsel who had just spoken] had indicated that we wanted to contact them and talk to them. Our motion did request that we be able to contact or talk with or the Court interview **all the jurors who sat on the jury, even the individuals who were the alternates**, because he could have spoken to them during the time, and then we would have gotten, you know, we would have known that he did remember. So I just wanted to **make the record clear** that our request was to **talk to all of them**, and we object to only getting to speak to Mr. Williams and one other.

(29.15Jur.Hrg.Tr.10-11)(emphasis added). These statements of 29.15 counsel were reproduced at page 47 of the Appellant's original brief.

Rule 29.15 counsel's statements indicated the relief sought under the motion to contact jurors as it was heard by Goldman September 6th was modified and narrowed from wanting to question all people summoned on the venirepanel to a more limited inquiry of only "**all the jurors who sat on the jury, even the individuals who were the alternates.**"(29.15Jur.Hrg.Tr.10-11)(emphasis added). Had 29.15 counsel intended to continue to maintain they wanted to question the entire venirepanel at the

September 6th hearing, then she would not have drawn the line as to those who ought to be questioned at the alternates.

After 29.15 counsel made the noted record, Judge Goldman's comments included: "I'm certainly doing more than the supreme court did."(29.15Jur.Hrg.Tr.11).

After Williams and Elswick testified, Goldman found Williams and Elswick credible and truthful(29.15Jur.Hrg.Tr.19-20). As to Williams, Goldman stated that he concluded that based on Williams' "facial expressions" that Williams did not remember from having been summoned for the Bryant/Burns case that Vincent was the defendant in both the Bryant/Burns and Addison cases(29.15Jur.Hrg.Tr.19-20). Goldman continued:

> But to me he seemed -- **his expressions**, he seemed not having -- he just had a **quizzical expression** about trying to remember the earlier jury selection process. He didn't seem to have a clear memory of that.

(29.15Jur.Hrg.Tr.21)(emphasis added). Goldman then stated that he wanted to put on the record: **I do think he seemed very quizzical**. I want to put that on the record. I probably won't remember that later."(29.15Jur.Hrg.Tr.22)(emphasis added).

29.15 Amended Motion Pleadings

The 29.15 amended motion was filed September 18, 2013(29.15L.F.46). The 29.15 amended motion recited the procedural history of Williams having been summoned in the Bryant/Burns case and served on Vincent's Addison capital case

trial and this Court's handling of the Williams claim on direct appeal(29.15L.F.51-54).

The 29.15 amended motion recited the procedural history that a motion to contact was filed and that the motion had requested to contact the entire venirepanel(29.15L.F.55). The 29.15 amended motion set forth that on August 27th, Goldman conducted a conference on the motion to contact jurors and limited the contact to Williams and one random juror(29.15L.F.55). The 29.15 amended motion recited Williams and Elswick testified on September 6th(29.15L.F.55). Williams' and Elswick's testimony was summarized(29.15L.F.55).

The 29.15 amended motion stated that the Goldman hearing was insufficient to adequately determine whether Williams recalled his prior service or shared any information about his prior service with other members of the venire(29.15L.F.56-57). The 29.15 amended motion stated counsel had requested to speak to other members of the venire who may have had contact with Williams(29.15L.F.56-57).

Renewed Motions To Contact Jurors

When the case was reassigned to Judges Dolan and then DePriest, 29.15 counsel filed motions that renewed the original motion to contact jurors(29.15L.F.294-318,446-53).

The original Goldman motion to contact jurors was filed August 27, 2013(29.15L.F.29-34). Goldman entered the order: "Motion granted in part at this time"(29.15L.F.35). That motion was heard September 6, 2013(29.15Jur.Hrg.Tr.1).

On May 5, 2014, Goldman, on his own motion, disqualified himself(29.15L.F.265).

A renewed motion to contact was filed before Judge Dolan on July 30, 2015(29.15L.F.294-318).

A renewed motion to contact was filed before Judge DePriest on November 28, 2016(29.15L.F.446-53).

The renewed motions to contact tracked the original motion to contact including stating that "Movant's Amended Motion is due on September 16, 2013 and time is of the essence," even though the amended motion was filed long before on September 18, 2013(29.15L.F.46,297,449). The renewed motions repeated language, found in the original motion to contact, seeking to question the entire venirepanel(29.15L.F. 294-318,446-53). The renewed motions set forth that the ruling on the original motion to contact jurors had to be reconsidered because the communications that took place between Goldman and Prosecutor Larner about Vincent's cases rendered Goldman's ruling on the Juror Williams matters a nullity(29.15L.F.299,451).

Judge DePriest's Findings

Judge DePriest's findings on the amended motion recite that the motion to contact jurors requested to contact all potential jurors totaling 170 jurors(29.15L.F.738). DePriest's findings go on to recite Goldman examined Williams and Elswick and found their testimony credible and "denied Movant's motion to contact all jurors"(29.15L.F.740-41).

DePriest's findings recite that renewed motions to contact the entire venirepanel were filed when the case was before Judge Dolan and then with himself and those renewals were denied(29.15L.F.741). DePriest went on to find he reviewed the testimony of the two jurors as they testified before Goldman and concluded Goldman's limitation to the two jurors was "sufficient to investigate possible juror bias on the part of Juror Williams"(29.15L.F.741). DePriest's findings concluded stating that Amended motion claim 8(A) is denied(29.15L.F.741).

Brief's Alternative Two Pronged Argument On

Limiting Juror Contact

The claim briefed was an alternative two pronged argument that alleged errors in how the contacting of the jurors was limited to Williams and Elswick. The First prong was that Judge Goldman erred in only allowing inquiry of two of the petit jurors at the September 6, 2013 hearing he presided over prior to the 29.15 amended motion being filed (App.Br.43) as counsel's request to contact was narrowed in-court to contacting and calling those jurors "who sat" on the jury and the alternates(29.15Jur.Hrg.Tr.10-11,*supra*). The second alternative prong was that Judge DePriest clearly erred in denying the separately pled amended motion claim that 29.15 counsel should have been allowed to contact all the petit jurors(App.Br.43).

The dual pronged alternative challenge was set forth in the Point Relied On:

The motion court (Judge Goldman) clearly erred denying 29.15 counsel the opportunity to fully investigate by examining at the Goldman in-court hearing all the petit jurors about evidence intended to establish Williams was

biased and/or Williams discussed prior knowledge of Vincent's assault case with other jurors and further the motion court (Judge DePriest) clearly erred in denying the separately pled amended motion claim Vincent should have been allowed to examine all the petit jurors for the same purposes because…. (App.Br.43).

This Court should find under the first prong of the two alternative theories briefed that Judge Goldman arbitrarily limited the hearing held. A hearing where all the Addison jurors who sat and the alternates should have been held to determine whether information Williams acquired during the Bryant/Burns voir dire was shared with Addison jurors(App.Br.50-53).

The Goldman hearing prong is separate from the DePriest amended motion 29.15 ruling on Claim 8A. At the Goldman hearing, counsel expressly stated and narrowed that they believed they should have been allowed to question all the jurors who sat and the alternates(29.15Jur.Hrg.Tr.10-11,*supra*). Goldman recognized at the September 6th hearing that 29.15 counsel needed to be able to examine jurors prior to the filing of the amended motion when he observed that it was "appropriate to know before they get in their amended post-conviction relief motion." (29.15Jur.Hrg.Tr.2-3, *supra*). Thus, the Goldman prong alternative should be analyzed separately from the DePriest prong of this claim. Vincent's 29.15 counsel never had access to investigate all the jurors who sat and the alternates, prior to filing the amended motion, and thereby, were precluded from including particularized allegations in the

amended motion about Williams' connection to the Bryant/Burns and Addison cases and the Addison case prejudice to Vincent.

Respondent's Pleading Procedural Argument

Respondent's procedural arguments that counsel could not narrow the focus to the petit jurors and the alternates is illogical and contrary to the record. Respondent's brief only addresses the DePriest second prong arguing that the claim on appeal is different from the one in the amended motion without addressing the first Goldman prong(Resp.Br.25-26). Respondent argues that the claim briefed (that counsel should have been allowed to contact all the petit jurors) is different from the claim pled (that counsel should have been allowed to contact the entire venire), and therefore, any claim on appeal is waived (Resp.Br.25-26).

This Court has required that 29.15 pleadings contain reasonably precise factual allegations demonstrating an injustice. *DePriest v. State*,510S.W.3d331,341(Mo.banc2017). The amended motion allegation that examination of other members of the venire should have been allowed is a reasonably precise factual allegation that examination of the complete petit jury and the alternates also should have been allowed because the petit jury is subsumed within and a subset of the venirepanel. *Cf. DePriest v. State*. For that reason, the Judge De Priest prong as briefed is not different from the claim pled as respondent has urged and falls within the scope of the amended motion. The Judge DePriest portion of the briefed claim as to the ruling on the 29.15 amended motion claim, is an alternative theory for why the Goldman hearing was inadequate and not a new claim on appeal.

The DePriest portion of appellant's brief's alternative argument presents circumstances like those found in *Buchli v. State*,242S.W.3d449(Mo.App.,W.D.2007). In *Buchli*, the 29.15 trial court granted post-conviction relief where it reasoned that Detective Woods' retrieval of a surveillance video with its time stamp would have cast doubt on respondent's alternative timeline theory. *Id.*452. On appeal, respondent complained the amended motion contained no mention of Detective Woods and his confirmation of the time stamp's accuracy when he retrieved the surveillance tape. *Id.*453-54. Respondent's argument was rejected because a 29.15 pleading is not required to allege "*every fact* underlying a claim." *Id.*453 (italics in original). The same is true here the petit jury is merely a subset of the larger venirepanel, such that the petit jury is subsumed under the larger venirepanel and the petit jury did not require separate mention in the amended motion.

This case differs from cases like *Dorsey v. State*,448S.W.3d276(Mo.banc2014)(Resp.Br.25). In *Dorsey*, the amended motion pled a *Brady v. Maryland*,373U.S.83(1963) violation where the state deleted a D.N.A. "peak" that excluded Dorsey. *Dorsey*,448S.W.3d at 283-84. Presented for the first time on appeal in *Dorsey* was a claim of ineffective assistance for failing to investigate electronic D.N.A. evidence. *Id.*283-84. This Court refused to review the failure to investigate electronic D.N.A. because it never appeared in the pleadings. *Id.*283-84. Vincent's amended motion differs from *Dorsey* in that the failure to be allowed to contact the petit jurors is subsumed under the claim that he should have

been allowed to contact the larger venirepanel because the petit jury is simply a subset of the larger venirepanel. Where this Court has found a claim was presented for the first time on appeal, like *Dorsey*, that has been because the amended motion was under-inclusive as to what was alleged. Here as pled, the amended motion allegations were over-inclusive because the petit jury is a subset of the larger venirepanel. *Cf. Buchli, supra*.

Arbitrarily Limiting Contact To Two Jurors

Respondent cites cases for the proposition that Local Rules properly prohibit contacting jurors and courts have discretionary authority to allow juror contact(Resp.Br.25-26). Respondent also asserts courts can limit the scope of inquiry made of jurors(Resp.Br.26). Those cases have no application here because Goldman made the determination that it was "appropriate" for jurors to be contacted to address the issue involving Williams' prior jury service and he recognized it needed to be done so counsel could plead 29.15 amended motion claims(29.15Jur.Hrg.Tr.2-3,*supra*). What Goldman did though was arbitrarily limit the jurors who could be contacted to Williams and "random[ly]" selected Elswick, rather than including all the jurors who sat and the alternates(29.15Jur.Hrg.Tr.10-11). *See, Saffle v. Parks*,494U.S.484,507(1990) and *Furman v. Georgia*,408U.S.238,309-10(1972).

In *State v. Jones*,979S.W.2d171,183(Mo.banc1998), this Court recognized that when access to jurors is granted the 29.15 court can "confin[e] the subjects generally as to matters that are **proper subjects** of inquiry to jurors."(Emphasis added). While this Court has indicated the trial court can limit the subjects of inquiry, this Court has

never held that a trial court can randomly select a number of jurors about whom proper subject of inquiries can be directed to the exclusion of other similarly situated jurors who likely could have knowledge of that same proper subject of inquiries as Goldman did here.

Respondent argues Goldman's random selection of Elswick with Williams and their testimony was sufficient to reject Vincent's claim because Goldman found Williams' testimony credible and Elswick confirmed Williams and this Court defers to trial court credibility findings(Resp.Br.26 citing to September 6th Goldman hearing).

The reason this Court defers to trial court factual findings is because the trial court '"is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record."' *Lee v. Hiler*,141S.W.3d517,525(Mo.App.,S.D.2004)(quoting *In re Adoption of W.B.L.*,681S.W.2d452,455(Mo.banc1984). This case is not the usual case where deference to the trial court, Goldman, is appropriate. After Goldman conducted the juror hearing, he disqualified himself from the case because he "now recalls he may have had discussions about this trial with the prosecuting attorney, Keith Larner, at the time he was in trial in this case."(29.15L.F.265).

Larner testified he tried the two homicide retrials against Vincent and handled the 29.15 arising from Vincent's assault case(29.15L.F.360). Larner testified that because of how long Vincent's three cases were pending that he "probably discussed

the facts of those cases with Judge Goldman"(29.15L.F.361). Goldman told Larner that he recused himself because he had learned some of the facts of Vincent's cases from Larner(29.15L.F.369-70). Larner testified that he talked to Goldman after Vincent's trials about **"some of the highlights"(**29.15L.F.373)(emphasis added).

Deference cannot be given to the findings of a judge who when that judge made factual findings should have disqualified himself. In *Anderson v. State*,402S.W.3d86,89-94(Mo.banc2013), this Court concluded that there was an appearance of impropriety where the 29.15 judge had acquired extrajudicial information and that judge should have been disqualified from serving at the 29.15. The 29.15 findings the *Anderson* judge entered were a nullity and the 29.15 case had to be remanded for a new hearing before a different judge. *Id*.89-94. *See, also, State v. Garner*,760S.W.2d893,902-07(Mo.App.,S.D.1988)(where trial judge should have recused and case was remanded for hearing on motion to suppress a new suppression hearing before replacement judge was required as that judge would not have heard the evidence).

The hearing before Goldman was a nullity not entitled to deference where Goldman disqualified himself and he had bias from an extrajudicial source, Larner, about Vincent's cases not learned from having served on Vincent's case. *See*, *State v. Nicklasson*,967S.W.2d596,605(Mo.banc1998) and Point II. This Court cannot give the customary deference to findings by Goldman about Williams' "expressions" and "quizzical" reactions (29.15Jur.Hrg.Tr.19-22, *supra*) because Goldman disqualified himself after the juror hearing and Larner testified that he talked to Goldman after

Vincent's trials about **"some of the highlights"** of Vincent's trials(29.15L.F.373)(emphasis added). *See*, *Anderson*, *Garner*. It was inappropriate for DePriest to rely on any action Goldman took as to contacting jurors, and in particular to rely on the juror hearing Goldman presided over(29.15L.F.738-41), to deny all relief to Vincent on his claims involving Juror Williams.

Contrary to respondent's assertion, Elswick did not confirm Williams' testimony(Resp.Br.26). Elswick testified that she had no specific recall of Williams, and therefore, she did not confirm Williams' representations(29.15Jur.Hrg.Tr.14). Goldman asked Elswick the following:

> THE COURT: Okay. Did you overhear any juror discussing previous knowledge of Mr. McFadden at any time while you were here during the course of the trial?
>
> MS. ELSWICK: No.

(29.15Jur.Hrg.Tr.14). While Elswick did not hear any such discussions, other jurors who sat, and the alternates, should have been asked the same question because those jurors might have heard such discussions and why all the petit jurors and the alternates had to be examined.

Respondent asserts that calling more jurors would be impeaching the verdict(Resp.Br.26-27). Asking the other jurors who sat the same questions Goldman asked Elswick and any appropriate necessary follow-up would not have been impeaching the verdict since Goldman had determined that inquiry was proper. When this Court rejected Vincent's Williams claim on direct appeal, it did so because of a

lack of evidence that Williams recalled Vincent from the Bryant/Burns case, and thus, this Court effectively endorsed the inquiry Goldman made to Elswick as to all the jurors who sat and the alternates. *See, State v. McFadden*,391S.W.3d408,418-19(Mo.banc2013). All of the jurors who sat and the alternates should have been called for the purposes Goldman allowed - to determine whether Williams intentionally failed to disclose knowledge of Vincent McFadden based on having been summoned to serve on Vincent's Bryant/Burns assault case and to determine whether Williams contaminated the Addison case jurors with knowledge of the assault charges(29.15L.F.29). Goldman just could not limit the inquiry to Williams and randomly selecting one other juror, Elswick.

In *Strong v. State*,263S.W.3d636,643-44(Mo.banc2008), this Court indicated that eliciting testimony about juror misconduct based on conduct that occurred outside the juryroom is an exception to the rule against impeaching a verdict(Resp.Br.26-27). Here, the conduct at issue occurred outside the confines of the Addison trial, Williams having participated in voir dire on the Bryant/Burns case, and therefore, contacting all the Addison jurors who sat does not constitute impermissible impeaching the verdict.

In *State v. Post*,804S.W.2d862,862(Mo.App.,E.D.1991), the defendant was granted a new trial because of juror misconduct during a sequestered jury trial. While Post's appeal was pending in the Eastern District, he filed a motion to remand based on newly discovered evidence of juror misconduct. *Id.*862. The case was remanded where the trial court held a hearing and found juror misconduct warranting a new trial. *Id.*862. In *Post*, the juror misconduct involved deputies not assigned to monitor

the sequestered jurors socializing with the assigned deputies and jurors, deputies partying with the jurors, and deputies having sex with jurors. *Id*.862-63. The Williams issues do not involve impeaching the verdict and the factual premises are even more compelling as to the integrity of Vincent's trial than those in *Post* because Vincent's jurors' may have been exposed to details of the Bryant/Burns charges which was evidence of other offenses.

Respondent asserts that Vincent failed to establish prejudice to obtain a new trial based on unintentional non-disclosure(Resp.Br.27 citing *State v. McFadden*,391S.W.3d at 418). Respondent argues there was no prejudice because the Addison venirepanel learned that Vincent had a prior assault conviction(Resp.Br.27 citing to "VD Tr.-II 21"). The page respondent referenced indicates the jury was generically apprised about Vincent's Bryant/Burns case(V.2Tr.21). In contrast, Williams learned at the Bryant/Burns voir dire much more. Judge Ross (Supp.T.L.F.20), Prosecutor Bishop (Supp.T.L.F.24-25), and defense counsel Chastain (Supp.T.L.F.70,78-79,89) all informed the venire Vincent was charged with three counts of first degree assault, three counts of armed criminal action, and one count of unlawful use of a weapon. The panel learned the alleged victims were Darryl Bryant, Jermaine Burns, and Samuel Simpson (Supp.T.L.F.78-79). The Bryant/Burns voir dire also disclosed that Vincent was alleged to have shot into a Dodge Caravan minivan(Supp.T.L.F.70,78-79). That a minivan was disclosed as involved in Bryant/Burns would have allowed the Addison jurors, if they were informed, to speculate about the minivan's likely occupants. Was the minivan's

occupants parents with their small children inside or senior citizens who use minivans because such vehicles can best accommodate age related circumstances? In the Bryant/Burns case, Williams' learning about the Simpson charges during voir dire and Williams then exposing the Addison jurors to such information would be prejudicial as to the Addison case because Judge Ross found the evidence against Vincent insufficient as to the Simpson charges and ordered Vincent acquitted. *See*, E.D.85858 Trial Tr.205-07.[3] Williams was exposed in the Bryant/Burns voir dire to a more fact detailed rendition of the matters alleged against Vincent in the Bryant/Burns case than Williams and the other Addison jurors got in the Addison voir dire. Thus, it was essential 29.15 counsel have been allowed to question all the Addison jurors who sat and the alternates about exposure to what was disclosed in the Bryant/Burns voir dire about the Bryant/Burns charges against Vincent.

The 29.15 judgment should be reversed for a hearing at which Williams and all the other petit jurors and alternates are examined.

[3] On August 17, 2017, this Court took judicial notice of E.D.85858.

II.

PROSECUTOR LARNER'S ADMISSIONS - UNFAIR GOLDMAN JUROR HEARING

The argument as briefed to this Court the motion court (Judges Dolan and DePriest) clearly erred in denying the renewed motions to examine all petit jurors is the same as raised in the trial court because at the Goldman hearing 29.15 counsel expressly narrowed the scope of who should testify from the entire venirepanel to only all the jurors who sat and the alternates such that the renewed motions to contact jurors renewed the narrowed version of the original motion Goldman heard.

Judge Goldman was required to disqualify himself because he had discussed with Prosecutor Larner the "highlights" of Vincent's cases. Goldman's Williams and Elswick credibility findings based on Goldman's viewing them in-court could not be adopted by Dolan and DePriest because Dolan and DePriest did not view Williams and Elswick in-court.

The claim briefed is the same presented to the trial court that 29.15 counsel should have been allowed to question all the petit jurors and the alternates. Once Goldman disqualified himself, having discussed with Larner the "highlights" of Vincent's cases, the renewed motions to contact should have been granted because Goldman's credibility findings about Williams and Elswick were a nullity and could not be adopted by Judges Dolan and DePriest because Dolan and DePriest did not view Williams and Elswick in-court.

Renewed Motions To Contact Jurors

The original Goldman motion to contact jurors was filed August 27, 2013(29.15L.F.29-34). That motion was heard September 6, 2013(29.15Jur.Hrg.Tr.1).

On May 5, 2014, Goldman, on his own motion, disqualified himself(29.15L.F.265).

A renewed motion to contact was filed before Judge Dolan on July 30, 2015(29.15L.F.294-318).

A renewed motion to contact was filed before Judge DePriest on November 28, 2016(29.15L.F.446-53).

The renewed motions to contact tracked the original motion to contact including stating that "Movant's Amended Motion is due on September 16, 2013 and time is of the essence"(29.15L.F.297,449). The renewed motions repeated language, found in the original motion to contact, seeking to question the entire venirepanel(29.15L.F. 294-318,446-53). The renewed motions set forth that the ruling on the original motion to contact jurors had to be reconsidered because the communications that took place between Goldman and Prosecutor Larner about Vincent's cases rendered Goldman's ruling on the Juror Williams matters a nullity(29.15L.F.299,451).

Respondent argues that the claim presented in the trial court was 29.15 counsel should have been allowed to contact the entire venirepanel while the claim on appeal

is that counsel should have been allowed to contact all the petit jurors, and therefore, the claim briefed is not preserved(Resp.Br.31-32).

As discussed in Point I, Judge Goldman asked 29.15 counsel if they wanted to make a record on the scope of the juror hearing(29.15Jur.Hrg.Tr.8). 29.15 counsel expressly narrowed the scope of their request to contact jurors to all the jurors who sat and the alternates(29.15Jur.Hrg.Tr.10-11). *See*, Point I detailed discussion quoting transcript. Having narrowed the scope of the original hearing to all the jurors who sat and the alternates meant that when counsel filed both renewal motions of the original motion to contact that what was getting renewed was the narrowed scope of the original motion to contact done at the Goldman hearing(29.15Jur.Hrg.Tr.10-11). That narrowed scope of contact was the jurors who sat and the alternates. Because the renewal motions before Judges and Dolan and DePriest were renewing the original motion's narrowed scope, the claim before Judges Dolan and DePriest and briefed here is that juror contact should have been allowed as to all the jurors who sat and the alternates. For that reason, the claim presented in the trial court and on appeal are the same and preserved.

Respondent asserts that it was questionable whether Judge Goldman was required to recuse himself as there was only the possibility that Judge Goldman received extrajudicial information(Resp.Br.31-32). "The test" and standard of review for disqualification is: "whether a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *State v. Smulls*,935S.W.2d9,17(Mo.banc1996); *Aetna Life Co. v.*

Lavoie,475U.S.813,825(1986)("justice must satisfy the appearance of justice"). Bias warranting disqualification must come from an extrajudicial source and not from what a judge learned from serving on the case. *State v. Nicklasson*,967S.W.2d596,605(Mo.banc1998).

The record shows more than the possibility of an extrajudicial source of bias. After the motion to contact jurors was heard, Goldman disqualified himself(29.15L.F.265). Larner testified that he knew Goldman had recused himself here as Goldman had told Larner that he recused himself because he had learned some of the facts of Vincent's cases from Larner(29.15L.F.369-70). Larner testified that he talked to Goldman after Vincent's trials about **"some of the highlights"(**29.15L.F.373)(emphasis added). *See* Point I.

Respondent asserts that it was proper for Judges Dolan and DePriest to rely on Williams' and Elswick answers at the Goldman hearing because no deficiencies in the examination of them were identified and there was no explanation why their answers were unreliable based on Goldman's disqualification(Resp.Br.32).

After Williams and Elswick testified, Goldman found Williams and Elswick credible and truthful(29.15Jur.Hrg.Tr.19-20). As to Williams, Goldman stated that he concluded that based on Williams' "facial expressions" that Williams did not remember from having been summoned for the Bryant/Burns case that Vincent was the defendant in both the Bryant/Burns case and the Addison case(29.15Jur.Hrg.Tr.19-20). Goldman continued:

But to me he seemed -- **his expressions**, he seemed not having -- he just had a **quizzical expression** about trying to remember the earlier jury selection process. He didn't seem to have a clear memory of that.

(29.15Jur.Hrg.Tr.21)(emphasis added). Goldman then stated that he wanted to put on the record: **I do think he seemed very quizzical**. I want to put that on the record. I probably won't remember that later."(29.15Jur.Hrg.Tr.22)(emphasis added).

The reason this Court defers to trial court factual findings is because the trial court '"is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record."' *Lee v. Hiler*,141S.W.3d517,525(Mo.App.,S.D.2004)(quoting *In re Adoption of W.B.L.*,681S.W.2d452,455(Mo.banc1984).

Deference cannot be given to the findings of a judge who when that judge made factual findings should have disqualified himself. *See*, Point I *Anderson v. State*,402S.W.3d86,89-94(Mo.banc2013) and *State v. Garner*,760S.W.2d893,902-07(Mo.App.,S.D.1988).

Goldman's rulings on Williams' and Elswick's testimony were premised on Goldman's having viewed them in-court and then making credibility findings about their in-court presentation(29.15Jur.Hrg.Tr.19-22). Dolan and DePriest could not rely on Williams' and Elswick's Goldman hearing testimony because Dolan and DePriest were relying on Goldman's in-court hearing credibility findings about Williams' and Elswick's testimony when Goldman was required to be disqualified(29.15L.F.414-

15,484,738-41;29.15Jur.Hrg.Tr.19-22). Goldman's credibility findings were a nullity because he disqualified himself and he was required to be disqualified because Larner testified that he talked to Goldman after Vincent's trials about **"some of the highlights"(**29.15L.F.373)(emphasis added). *See, Anderson, Garner*.

Dolan and DePriest did not view Williams and Elswick in-court so they could not make their own credibility findings and they cannot properly adopt as their own (29.15L.F.414-15,738-41) the credibility findings of a judge who disqualified himself (Goldman) and who was required to be disqualified. *See, Anderson, Garner*.[4]

This case should be remanded for a hearing at which all the jurors and alternates who sat are examined.

[4] In Point III, respondent relies on DePriest's adoption of Goldman's findings about Williams(Resp.Br.35) as grounds for rejecting counsel was ineffective for failing to adequately question Williams. The arguments here as to why Dolan and DePriest could not adopt Goldman's findings on Williams and Elswick are equally applicable to Point III.

IV.

DR. WHITE - CULTURAL MITIGATION

The motion court clearly erred denying counsel was ineffective for failing to call Dr. White to testify to all his Pine Lawn specific opinions he relied on to explain the totality of the 1980s and 1990s Pine Lawn cultural conditions Vincent grew-up in because his testimony satisfied the *Frye* test, even though it was not required to do so.

Dr. White's testimony satisfied the *Frye* standard. Moreover, the *Frye* standard has no application to social science based opinions like those Dr. White furnished.

Respondent asserts that the general acceptance standard of *Frye v. United States*,293F.1013(D.C.Cir.1923) for the admission of evidence was not satisfied and cites to *State v. Davis*,814 S.W.2d593(Mo.banc1991)(Resp.Br.44). In *Davis*, this Court found D.N.A. evidence was generally accepted within its scientific community, and therefore, admissible under *Frye*. *Davis*,814S.W.2d at 598-603. In so holding, this Court observed that *Frye* allowed the law to progress with "developments in the natural sciences." *Id*.600.

Dr. White's testimony reflects that his evaluation applying "risk immersion" analysis to Vincent's case is generally accepted within his scientific community, and therefore, *Frye* was satisfied.

Dr. White has Master's and Ph.D. degrees in Criminology(29.15Tr.458). White teaches courses on the theory of crime, race and crime, delinquency, and

juvenile justice(29.15Tr.458-59). White is a "developmental criminologist" whose work addresses how young people become involved in the justice system and factors that influence them(29.15Tr.459). White's expertise has focused on urban at-risk communities and the effects on their children(29.15Tr.459-60). When White testified, he was just preparing to publish a book on homicide and violence in African-American communities(29.15Tr.460).

White applied his Criminology field's "risk immersion," concept which looks at factors that influence people to become involved in criminal behavior from an "ecological framework"(29.15Tr.463-65). The "research" in that field shows that having a problem in one life area places a person at risk for criminal activity and that risk increases as other areas of a person's life are also problematic(29.15Tr.463-65,671-72). Individuals who are at greatest risk for offending are those who have life challenges in many areas of life(29.15Tr.464-65).

White looked at social conditions that Vincent grew-up in and created a profile and likely impact on Vincent of growing-up in Pine Lawn (P.L.) and its adjoining communities in the 1980s and 1990s(29.15Tr.465-67). White applied his education, background, and experiences to provide conclusions about Vincent and the P.L. community(29.15Tr.470,669).

White testified that the conditions that exist in poor black communities are significant predictors as to violence and other social problems(29.15Tr.473). There is a clustering of factors in those communities that have "predictive value for social

sciences"(29.15Tr.473). Environmental factors are highly correlated with crime(29.15Tr.473).

White interviewed Vincent four times and analyzed that information applying the "risk immersion" framework(29.15Tr.484-87).

All the noted matters reflect White applied Criminology's "risk immersion" analysis which is generally accepted within his scientific community, and therefore, his evidence was admissible under *Frye*.

Moreover, *Frye* does not even apply to Dr. White's testimony. In *Davis*, this Court stated that *Frye* applied to "developments in the natural sciences," like D.N.A. technology. *Davis*,814S.W.2d at 600. Dr. White's evaluation applied Criminology, a social science, not a natural science, and therefore, *Frye* has no application.

According to respondent White's testimony had the potential to be more aggravating than mitigating because there was nothing that compelled Vincent to kill Leslie(Resp.Br.45-46). White's testimony was mitigating because his point was that while it is not guaranteed that someone growing-up in P.L. will commit the type of crimes Vincent is alleged to have committed, they are at greater risk for committing such offenses because of having been raised in that environment(29.15Tr.630-32,669).

Respondent asserts that testimony given by Drs. Draper and Gelbort in his prior murder trials did not avoid death, and therefore, Dr. White's testimony would not have avoided death(Resp.Br.46). Draper's and Gelbort's prior testimony simply

did not address the risk issues of being raised in Pine Lawn in the 1980s and 1990s which was the subject of White's testimony.

A new penalty phase is required.

X.

FAILURE TO PRESENT PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Gur, or a similarly qualified expert, in penalty mitigation to present PET scan brain evidence because respondent expressly consented to Dr. Gur being substituted for Dr. Preston in the trial court because Dr. Preston had retired and respondent's having consented to Gur's substitution forecloses respondent from arguing on appeal the claim was unpreserved.

Respondent's assertion the Appellant's Point Relied On was defective for failing to include any mention of a PET scan is simply incorrect as the Point Relied On expressing stated "PET scan."

Respondent asserts that the claim as to Dr. Gur was not preserved because the amended motion alleged Dr. Preston would be called, and not Dr. Gur, and because the Point Relied On did not include as a specification of error that expert testimony should have included a PET scan(Resp.Br.77-78).

Appellant's brief set forth that 29.15 counsel moved to endorse Dr. Gur because Dr. Preston had retired and that the court entered an order that by "consent" Gur was endorsed(App.Br.127). The Court's order read: "Motion to endorse additional witness sustained by consent."(29.15L.F.484). A party will not be heard to complain on appeal to that which it has consented. *See*, *Public Supply Company, Inc. v. Safety Federal Savings & Loan Association*,780S.W.2d673,674(Mo.App.,W.D.1990); *Roberts v.*

Roberts,515S.W.2d805,806(Mo.App.,K.C.D.1974). *Cf. State v. Quick*,334S.W.3d603,609(Mo.App.,W.D.2011)(no objection waives even plain error review). Respondent consented to Gur's substitution and should not be heard to complain now. *See*, *Public Supply Company*, *Roberts*, and *Quick.*

The Appellant's Point Relied On in fact expressly asserted counsel was ineffective for failing to present "PET scan brain evidence," and respondent's brief is simply incorrect(App.Br.38,126). The Point Relied On in relevant part provided:

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Gur, or a similarly qualified expert, in penalty mitigation to present PET scan brain evidence showing Vincent's brain's functional limitations because Vincent was denied his rights to….

(App.Br.38,126).

A new penalty phase is required.

CONCLUSION

For the reasons discussed in the original appellant's brief and this reply brief this Court should order: (1) a new trial - Points III, XI, and XIII; (2) a new penalty phase - Points IV, V, VI, VII, VIII, IX, X, and XII; and (3) a new hearing at which all petit jurors are questioned - Points I and II.

Respectfully submitted,

/s/ William J. Swift
William J. Swift, MOBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX: (573) 777-9974
William.Swift@mspd.mo.gov

CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, 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 2010, 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 7,294 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in January, 2018. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 31st day of January, 2018, on Assistant Attorney General Daniel McPherson at Dan.McPherson@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift