

Supreme Court of Missouri
en banc

MANDATE

SC100307
ED110550

September Session, 2023

Jihad A. Spann,
Appellant,

vs. (TRANSFER)

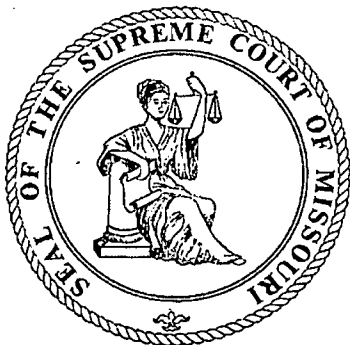
State of Missouri,
Respondent.

Now at this day, on consideration of Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2023, and on the 21st day of November, 2023, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 21st day of November, 2023.



Betsy AuBuchon, Clerk

Christina Lauer, Deputy Clerk



In the Missouri Court of Appeals Eastern District

DIVISION ONE

JIHAD A. SPANN,)	No. ED110550
)	
Appellant,)	Appeal from the Circuit Court
)	of the City of St. Louis
vs.)	2022-CC10450
)	
STATE OF MISSOURI,)	Honorable Steven R. Ohmer
)	
Respondent.)	Filed: September 26, 2023

Jihad A. Spann ("Movant") appeals the judgment denying his Rule 29.15¹ motion for post-conviction relief following an evidentiary hearing. We affirm.

I. BACKGROUND

In August 2016, the State jointly charged Movant and two co-defendants for their involvement in an incident which resulted in Victim's death. Movant was tried by a jury and found guilty of murder in the first degree (Count I) and armed criminal action (Count II). The court sentenced Movant to life without the possibility of parole for Count I and 100 years of imprisonment for Count II, with the sentences to run consecutively. Movant filed a direct appeal, and this Court affirmed Movant's convictions and sentences in *State v. Spann*, 604 S.W.3d 852 (Mo. App. E.D. 2020).

¹ All further references to Rules are to Missouri Supreme Court Rules (2020), which was the version of the rules in effect at the time Movant's *pro se* motion for post-conviction relief was filed on December 1, 2020.

Movant then filed a timely *pro se* Rule 29.15 motion raising thirty-seven claims for post-conviction relief. Appointed counsel later filed a timely amended Rule 29.15 motion containing four claims for relief. The motion court subsequently held an evidentiary hearing on Movant's amended motion, where Movant personally addressed the court and raised the issue of alleged abandonment by post-conviction counsel. Thereafter, the motion court entered a judgment denying Movant's amended motion and issuing findings of fact and conclusions of law. This appeal followed.²

II. DISCUSSION

Movant raises four points on appeal. Movant's first three points on appeal contend the motion court erred in denying his amended motion for post-conviction relief because the court failed to conduct an independent inquiry into Movant's alleged abandonment claim. Movant's fourth point on appeal argues the motion court erred by failing to issue findings of fact and conclusions of law on all claims raised by Movant's *pro se* motion.

A. Standard of Review

Our Court reviews the denial of a Rule 29.15 motion for post-conviction relief only to determine if the findings of fact and conclusions of law of the motion court are clearly erroneous. Rule 29.15(k); *McCoy v. State*, 431 S.W.3d 517, 520 (Mo. App. E.D. 2014). Findings and conclusions are clearly erroneous if, after a review of the entire record, we are left with the definite and firm impression that a mistake has been made. *McCoy*, 431 S.W.3d at 520. This Court presumes the motion court's findings are correct. *Id.*

² To avoid unnecessary repetition, additional facts relevant to each of Movant's points on appeal will be set forth in Sections II.B. and II.C. of this opinion.

B. Movant's First Three Points on Appeal

Movant's first, second, and third points on appeal similarly contend, for various reasons, that the motion court erred in failing to conduct an independent inquiry into the issue of alleged abandonment by post-conviction counsel. The first point on appeal claims post-conviction counsel's alleged failure to "meet with" Movant prior to filing the amended motion raised a presumption of abandonment.³ In his closely related second point on appeal, Movant claims post-conviction counsel failed to comply with the requirements of Rule 29.15(e), which raised a presumption of abandonment. Additionally, Movant's third point on appeal claims the record in this case raised a presumption of abandonment when post-conviction counsel failed to file a motion to amend the motion court's judgment denying post-conviction relief after Movant raised the issue of abandonment.

1. Analysis of Movant's Alleged Abandonment Claim

The Missouri Supreme Court has unambiguously defined the limits of the abandonment doctrine, stating "that while the precise circumstances constituting abandonment naturally may vary, the *categories* of claims of abandonment long have been fixed." *Barton v. State*, 486 S.W.3d 332, 338 (Mo. banc 2016) (emphasis in original). "[T]he claim of abandonment by post-conviction counsel has been limited to two circumstances – when post-conviction counsel: (1) takes *no action* with respect to filing an amended motion or (2) is aware of the need to file an amended motion but fails to do so in a timely manner." *Id.* at 334 (emphasis in original). "[T]he

³ The record in this case is ambiguous as to whether Movant's claim regarding post-conviction counsel's failure to "meet with" him alleges a failure to schedule a specific type of meeting, e.g., an in-person meeting at the Department of Corrections, or whether Movant alleges a failure by counsel to communicate with him entirely. At the evidentiary hearing, Movant stated, "Movant has never met with nor seen [post-conviction counsel] before today, Friday, December 10, 2021. [Post-conviction counsel] was assigned Movant's case on Thursday, December 10, 2020. During that time, post[-]conviction . . . counsel failed to schedule one profession[al] legal visit with [the] client in the Department of Corrections." Additionally, Movant has failed to demonstrate how any changes to the amended motion stemming from a meeting with counsel would have potentially affected the outcome of the evidentiary hearing.

rationale behind the creation of the abandonment doctrine . . . was not a newfound willingness to police the performance of postconviction counsel generally.” *Price v. State*, 422 S.W.3d 292, 298 (Mo. banc 2014). Courts carefully review a claim of abandonment to ensure it is not an impermissible substitute for a claim of ineffective assistance of post-conviction counsel. *Barton*, 486 S.W.3d at 338.

As Movant explicitly acknowledges in his brief on appeal, “appointed counsel timely filed an amended motion” in this case. Therefore, Movant’s claim for relief could only fall within the first category of abandonment recognized in *Barton*, i.e., instances where post-conviction counsel “takes *no action* with respect to filing an amended motion.” *Id.* at 334 (emphasis in original). However, the record on appeal clearly shows post-conviction counsel took *some* action regarding Movant’s amended motion because, as Movant recognizes in his brief on appeal, counsel timely filed the amended motion and significantly reduced the number of claims from the original thirty-seven included in Movant’s *pro se* motion to the four claims counsel set forth in the amended motion. See *Waggoner v. State*, 552 S.W.3d 601, 604-06 (Mo. App. W.D. 2018). Accordingly, Movant’s claim for post-conviction relief does not fall into either recognized category of abandonment, and therefore the motion court did not err in failing to conduct an independent inquiry into abandonment. See *id.* (similarly holding).

2. Movant’s Arguments to Extend the Abandonment Doctrine

Movant advances several arguments contending the abandonment doctrine extends beyond the two explicit categories of claims recognized by the Missouri Supreme Court and thus encompasses a situation, as allegedly occurred in this case, where post-conviction counsel fails to “meet with” a movant. Movant specifically argues that, *inter alia*, the Missouri Supreme

Court has extended the abandonment doctrine through its holdings in *White* and *Vogl*.⁴ For the reasons discussed below, we find these arguments unavailing.

a. Movant's Argument Under *White*

Movant claims “[the] Supreme Court of Missouri has understood [the] specific requirements of appointed counsel” under Rule 29.15(e) to include “meet[ing] with the defendant.” (emphasis omitted). In support of his claim, Movant quotes the Missouri Supreme Court in *White*, where the Court made a statement regarding how, under the facts of that case, counsel had limited time “to meet with the defendant, research all the possible grounds for relief, and draft the amended motion.” *State v. White*, 873 S.W.2d 590, 596 (Mo. banc 1994) (superseded by rule on other grounds).

Even if we assume *arguendo* Movant is correct and the Missouri Supreme Court has interpreted Rule 29.15(e) as requiring appointed counsel “to meet with the defendant,” it does not automatically follow that the Court intended its statement in *White* to expand the abandonment doctrine into situations where counsel fails to do so. See 873 S.W.2d at 596. The Missouri Supreme Court has clarified the abandonment doctrine in multiple holdings after *White*, and has explicitly limited abandonment claims to only two instances, “when counsel fails to act in a timely manner or fails to act at all in filing an amended motion.” *Barton*, 486 S.W.3d at 337; see also *Price*, 422 S.W.3d at 297-300. Under the current state of Missouri law, Movant’s allegation that appointed counsel failed to “meet with” him amounts to “an impermissible claim of ineffective assistance of post-conviction counsel,” not a claim of abandonment within the two

⁴ Movant also argues a holding in *Crenshaw v. State*, 266 S.W.3d 257 (Mo. banc 2008) extended Missouri’s abandonment doctrine. In making this argument, Movant analogizes his situation to *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008) (abrogated by *Price*, 422 S.W.3d 292). However, the Missouri Supreme Court has already addressed and rejected a notably similar argument, including a pertinent discussion of the holdings in both *Crenshaw* and *McFadden*. See *Barton*, 486 S.W.3d at 337-39. Accordingly, Movant’s reliance on the holdings in *Crenshaw* and *McFadden* has no merit.

limited circumstances of the current doctrine, thus making Movant's claim "categorically unreviewable."⁵ *Barton*, 486 S.W.3d at 337, 338 (citation omitted); *see also Waggoner*, 552 S.W.3d at 603-04, 605.

b. Movant's Argument Under *Vogl*

Additionally, Movant argues the Missouri Supreme Court extended the abandonment doctrine with its holding in *Vogl v. State*, 437 S.W.3d 218 (Mo. banc 2014). Specifically, Movant claims:

[A]n abandonment inquiry is required under *Vogl*, which clearly extends the [Missouri Supreme] Court's abandonment doctrine into an evaluation of whether counsel met its 'duty to ascertain' whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to him as a basis for attacking the judgment and sentence.

Movant's reliance on *Vogl* as an extension of the abandonment doctrine is misplaced. Rather than creating an extension of the abandonment doctrine, *Vogl* falls within the first general category of abandonment cases recognized by the Missouri Supreme Court, i.e., cases where post-conviction counsel "takes *no action* with respect to filing an amended motion." *See Barton*, 486 S.W.3d at 334 (emphasis in original). In *Vogl*, appointed post-conviction counsel filed a motion requesting the appointment of counsel be rescinded due to the alleged untimely filing of the movant's *pro se* motion. 437 S.W.3d at 220-21. Appointed counsel never filed an amended motion on the movant's behalf. *Id.* at 227. The Court held that under this specific set of circumstances, there existed a presumption of abandonment and the motion court erred in not conducting an independent inquiry. *Id.* at 230. Specifically, the Court found a presumption of

⁵ On appeal, Movant is essentially arguing post-conviction counsel was ineffective for failing to "meet with" Movant and subsequently raise other, additional claims in his amended motion. The Missouri Supreme Court has held an argument that post-conviction counsel was ineffective for not raising other claims in an amended motion that "were both meritorious and should have been raised" is not cognizable. *Barton*, 486 S.W.3d at 339. Nevertheless, we note that in this case, Movant has failed to demonstrate how any of the claims raised in his *pro se* motion would have been meritorious and changed the outcome of the evidentiary hearing.

abandonment existed “[b]ecause the record in [the movant’s] case show[ed] that no amended motion or statement was filed by appointed counsel.” *Id.* Therefore, contrary to Movant’s argument, *Vogl*’s holding did not extend the abandonment doctrine but rather found the specific facts in that case applied to one of the two pre-existing categories. *See id.*; *see also Barton*, 486 S.W.3d at 334.

3. Conclusion as to Movant’s First Three Points on Appeal

Because appointed post-conviction counsel filed an amended motion on Movant’s behalf and did so in a timely manner, the motion court was not required to conduct an independent inquiry into Movant’s alleged abandonment claim. Accordingly, the motion court did not clearly err in denying Movant’s Rule 29.15 motion for post-conviction relief without first conducting an independent abandonment inquiry. *See Barton*, 486 S.W.3d at 339. Movant’s first three points on appeal are denied.

C. Movant’s Fourth Point on Appeal

In Movant’s fourth and final point on appeal, he argues the motion court erred in failing to issue findings of fact and conclusions of law on all claims raised in his *pro se* motion.

In this case, Movant filed his *pro se* motion for post-conviction relief containing thirty-seven claims, and Movant’s post-conviction counsel then filed a timely amended motion containing four claims. The four claims in Movant’s amended motion were addressed by the motion court in its findings of fact and conclusions of law. Movant argues the motion court violated Rule 29.15(j) because it did not issue findings of fact and conclusions of law for “each and every” claim raised by Movant in his *pro se* motion, i.e., all thirty-seven initial claims. We disagree.

Rule 29.15(j) states, in pertinent part, that “[t]he court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held.” *Id.* However, “[t]he parties and the court should consider only the amended motion, and not [the movant’s] *pro se* motion[,] because the amended motion supersedes [the movant’s] *pro se* motion and renders it a nullity.” *Wills v. State*, 321 S.W.3d 375, 386 (Mo. App. W.D. 2010) (internal quotations and citation omitted) (emphasis in original).⁶ Any claims from a movant’s *pro se* motion which are not included in a subsequent amended motion are not to be considered by the court. *Id.* Accordingly, “[t]he motion court ha[s] no duty to respond to the allegations in [the] movant’s *pro se* motion that were not in the amended motion,” and “[any] reference to those allegations in the motion’s court’s findings is *surplusage*.” *Id.* (emphasis in original) (internal quotations and citation omitted); *see also* Rule 29.15(g) (stating, in relevant part, that “[t]he amended motion shall not incorporate by reference or attachment material contained in any previously filed motion nor attach or incorporate the *pro se* motion,” and “[a]ll claims shall be included within the same body and text of the amended motion”).

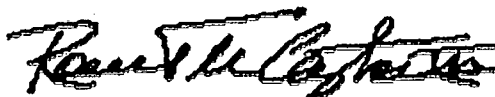
Movant’s amended motion in this case raised a total of four claims, including three claims of ineffective assistance of trial counsel and a fourth claim for ineffective assistance of appellate counsel. The motion court was only required to issue findings of fact and conclusions of law on the claims raised in Movant’s amended motion, and it did so, addressing all four claims in its judgment.

⁶ In *Wills*, the movant filed a post-conviction motion pursuant to Rule 24.035, which is the post-conviction rule applicable to movants who have pleaded guilty. *Wills*, 321 S.W.3d at 386. Rule 24.035 contains certain substantive provisions that are identical to the provisions in Rule 29.15, which is the post-conviction rule applicable to movants convicted of a felony after a trial. *See Vogl*, 437 S.W.3d at 224 n.7. “Accordingly, case law interpreting a provision that is identical in both rules applies equally in proceedings under either rule.” *Id.*

Based on the foregoing, the motion court did not clearly err in failing to issue findings of fact and conclusions of law on all thirty-seven claims raised in Movant's *pro se* motion. Point four is denied.

III. CONCLUSION

The motion court's judgment denying Movant's Rule 29.15 motion for post-conviction relief after a hearing is affirmed.

A handwritten signature in black ink, appearing to read "Robert M. Clayton III", written over a horizontal line.

ROBERT M. CLAYTON III, Presiding Judge

Philip M. Hess, J., and
Cristian M. Stevens, J., concur.



In the Missouri Court Of Appeals
Eastern District

ED110550

JIHAD A. SPANN, APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

ORDER

EMREC

Motion for Recall of Mandate

_____ Sustained

_____ Granted

☒ Denied

_____ Taken with Case _____

_____ Granted Until _____

_____ Other _____

By: _____

Thomas C. Clark II

THOMAS C CLARK II

12/26/2023

Date

"Appendix E."

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

JIHAD A. SPANN

Movant,

vs.

STATE OF MISSOURI,

Respondent,

Cause No.: 2022-CC10450

Division No. 30

FILED
MAR 16 2022

ORDER AND JUDGMENT

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

Cause called. Parties appear by and through counsel. Movant's Motion and Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence under Supreme Court Rule 29.15 and Request for Evidentiary Hearing presented. Cause heard, argued and submitted.

The Court, after careful review and due consideration, finds as follow:

FINDINGS OF FACT

1. Movant was charged in Cause No. 1622-CR03391 with Murder in the 1st Degree and Armed Criminal Action. He had a joint trial with his co-defendant. The jury found Movant guilty of both counts. On December 14, 2018, the Court sentenced Movant to life without parole plus 100 years imprisonment.
2. Movant appealed to the Missouri Court of Appeals, Eastern District, which affirmed this Court's judgment. The appellate mandate issued September 3, 2020.
3. Movant timely filed his pro se Rule 29.15 motion on December 1, 2020. The Court appointed counsel to represent Movant on December 9, 2020, and Movant's

appointed counsel timely filed the amended motion on April 9, 2021. The Amended Motion raised a total of four claims, all alleged ineffective assistance of both trial and appellate counsel; 1) trial counsel's failure to discover co-defendant Harris' intellectual and mental disabilities; 2) trial counsel's failure to make a record regarding ex parte contact with the jury; 3) appellate counsel's failure to file a motion to remand regarding witness Meaghan Holmes; and 4) trial counsel's failure to seek reconsideration of the severance motion after trial for Movant after Movant Harris' testimony at sentencing regarding the murder.

4. An evidentiary hearing was held on December 10, 2021.

5. The Court takes judicial notice of the underlying criminal and appellate files 1622-CR03391, 1622-CR03393, and ED107614.

6. The Court combined the evidentiary hearing with the Movant Hubert L. Harris's, Cause No. 2022-CC10485, PCR motion as well. This combined hearing was done for judicial economy and expediency and by consent of the parties. The Court heard the following witnesses: Stephen Renz, Attorney for Movant; Hubert L. Harris; Appellate Counsel, Gwenda Robinson; Movant Jihad Spann; and Trial Counsel John Washington.

7. As noted in Movant's Amended Motion and by the Court of Appeals:

Defendant (Spann) and Hubert Harris ("Co-defendant") were jointly tried for the murder of Robert Piffins (Victim"). The evidence showed that Co-defendant got into a fist fight with Victim at a gas station parking lot, Defendant was asleep in the passenger seat of his girlfriend's car at the time, which was parked at a gas pump nearby. Defendant Spann heard that codefendant Harris—who was a friend of his—was being stabbed and Defendant Spann grabbed a gun from the car and went to the fight. Victim was on the ground with Co-defendant Harris standing over him. Defendant Spann pointed the gun at Victim, then Co-defendant Harris took the gun and began beating Victim with it, while Defendant Spann repeatedly kicked him. Another man at the gas station, who knew Defendant and Co-defendant Harris, also

got involved, stomping on the stabbing Victim repeatedly. He walked away, and then Defendant Spann and Co-defendant Harris, dragged Victim behind a dumpster and continued the beating. Defendant Spann stepped aside and pulled an empty cigarette pack from his pocket, threw it on the ground and started walking away. At the point, Co-defendant Harris shot Victim. Defendant Spann kept walking to his girlfriend's car—which she had pulled around to the alley near the dumpster—and they drove off. The entire incident was very brief, lasting only a few minutes. At no time after Defendant Spann joined the fight did Victim get off the ground, but the bullet wound is what killed him.

This was a brutal crime and there has been no evidence presented to find otherwise.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the cause.
2. This court takes Judicial notice of the court conviction file, and the criminal file in cause no. 1622-CR03391 and 1622-CR03393, including the trial transcripts and the post-conviction and sentencings file along with the appellate opinion and order ED107615 and the entire record in connection thereto. The Court therefore takes judicial notice of all its files and all the contents therein.
3. Allegations contained in the Movant's Motion and Amended Motion are not self-proving and Movant has the burden of proving his Motion by a preponderance of the evidence. K.C. v. State, 769 S.W. 2nd 829 (Mo. App. S.D. 1989); Loggins v. State, 764 S.W. 2nd 670 (Mo. App. E.D. 1988); Armstrong v. State, 534 S.W. 2nd 547, 548 (Mo. App. 1976).
4. In a post-conviction proceeding the weight and credibility to be accorded any witness testimony is left for the motion court's determination. Fullan v. State, 750 S.W. 2nd 484, 487 (Mo. App. W.D. 1988). The Court is entitled to draw reasonable inferences

from the facts before it. Huffman v. State, 703 S.W. 2nd 566, 569 (Mo. App. S. D. to of 1986).

5. Post-conviction claims of ineffective assistance of counsel are governed by Strickland v. Washington, 104 S.C. 2052 (1984); see also Sanders v. State, 738 S.W. 2nd 856 (Mo. banc 1987); and State v. Du Wany, 782 S.W. 52, 57 (Mo. banc 1989). Movant has the burden of proving by a preponderance of the evidence that (1) counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would display under the same circumstances, and (2) that Movant was thereby prejudiced. Strickland, Id. at 2064. This has been called a "heavy burden" because there is a presumption that trial counsel is competent and deference should be paid to trial counsel's decisions.

Sanders, at pages 857,858. In adjudging the reasonableness of an attorney's performance or exercise of judgment, reliance on the clarity of hindsight should be eschewed even though it reveals mistakes. Rather, the circumstances surrounding counsel's choices should be viewed as they appeared to counsel at the time the decisions were made. Sanders, at page 858.

6. A person establishes prejudice when he or she demonstrates, "there is a reasonable probability that, but for counsel's unprofessional errors, the result from the proceeding would have been different," where there is "a reasonable probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U. S. at 668, 694, 104 S. CT. 2052, 2068, 1984). There is none here and Movant has failed to meet his burden.

7. Necessarily, "[A] Movant must establish both the performance prong and the prejudice prong in order to prevail on an ineffective assistance of counsel claim." State v. Boice, 913 S.W. 2d 425, 429 (Mo. App. E.D. 1996).
8. Where a person claims counsel was ineffective for failing to investigate witnesses, the person must establish 1) the witness could have been located through reasonable investigation; 2) to what he or she would have testified; and 3) the testimony would have established a viable defense. Taylor v. State, 198 S.W. 3d at pg. 642. The evidence presented by Movant does not establish a viable defense.
9. To evaluate a claim of ineffective of assistance of appellate counsel, courts employed a test announced in Strickland v. Washington, 466 US 668, (1984). See, E.G. Dale v. Lockhart, 795 F. 2nd 655-657, (8th Circuit 1986). To prevail on his claim of ineffective of assistance of appellate counsel, Movant must show: 1) appellate counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted; and, 2) the claimed error was substantially serious to create a reasonable probability that, if it were raised, the outcome of the appeal would have been different. Tissius v. State, 183 S.W. 3rd 207, 215 (Mo. banc 2006); State v. Bohlen, 284 S.W. 3rd 714, 717 (Mo. App. E.D. 2009). The standard for an ineffective appellate counsel claim is effectively the same standard applied to an ineffective trial counsel claim. Mallett v State, 769 S.W. 2nd 77, 83-84 (Mo banc 1989). A Movant must show both the deficiency in performance and resulting prejudice. Id. Appellate counsel, however, is not required to raise every type of potential error on appeal. Id. To grant a motion related to ineffective assistance of appellate counsel, "strong grounds must exist should counsel fail to assert a claim of error that would have required a reversal had it

been asserted in which was so obvious from the record that a competent and effective attorney would have recognized it and asserted it." Moss v. State, 10 S.W. 508, 514

(Mo. banc 2000). Rushcer v. State, 887 S.W. 2nd 588, 591 (Mo banc 1994). To prove he suffered ineffective assistance of appellate counsel Movant must show: 1) the action of appellate counsel were outside the wide range of professional competent assistance; 2) counsel's errors were so severe that he was not functioning as "counsel" guaranteed to Movant on the 6th amendment; 3) counsel's deficiency and performance resulted in prejudice. Franklin v. State, 24 S.W. 3rd 686,690-691 (Mo. banc 2000). Furthermore, the record must contain strong grounds that appellate counsel's failure to assert a claim of error that would have required a reversal had it been asserted and it was so obvious from the record that a competent and effective attorney would have recognized it and asserted it. Id. 691; Homen v. State, 88 S.W. 105, 110 (Mo App. E.D. 2002). Here Movant's claim is without merit.

10. First, Movant claims trial counsel failed to discover the co-defendant's intellectual and mental disabilities which could have affected the verdict. Movant Harris testified regarding his mental disabilities. Harris's Exhibit #1, the decision of the Social Security Administration, is an unfavorable decision by Administrative Law Judge Robert J. O'Blennis on December 16, 2009 and finding that the claimant's disability ended May 1, 2008, and the claimant has not become disabled again since that date. Stephen Renz's notes in Movant's Exhibit #2 regarding his failure to investigate the Social Security records and the mental history of the Movant Harris is not credible. In fact, this evidence contradicted the testimony of both the Movant Harris, Movant Spann and attorney Stephen Renz. This evidence would in no way justify a continuance, NGRI, diminished

capacity, or mitigation. While there is an indication of some mental illness at some time, there is no evidence to support a present claim of mental disease or defect or illness or any factual evidence to the contrary.

Movant must show the existence of a factual basis indicating his mental condition was questionable, which should have caused his attorney to initiate an independent investigation of his mental state. Such an investigation is not indicated where the defendant has the present ability to consult with his attorney with rationality and to understand the proceeding against him. Homen v. State, 88 S.W. 3rd 105 (Mo App E.D. 2002); State v. Richardson, 923 S.W. 2nd 301, 323 (Mo banc 1996).

In this case the evidence indicated that Movant Harris's counsel was informed of a possible mental issue at the time of beginning of voir dire. Prior to that time, there was no indication from other sources, or from the Movant Harris, that he may have had pre-existing mental issues, nor did trial counsel indicate that Movant Harris had any issues consulting with counsel or understanding the proceeding. Further, the Movants Harris and Spann have presented this Court with a plethora of correspondence indicating their involvement and which certainly contradicts any issue regarding mental illness. There is no credible evidence to support Movant's claims regarding this alleged mental deficiency of Movant Harris. This claim is denied.

11. Movant further alleges that trial counsel failed to present prosecutorial misconduct regarding the video evidence presented to the jury during deliberations. There is no evidence to support this contention. A seven-hour DVD containing recordings of the incident was admitted into evidence at trial. Three one-minute clips containing footage of the entire incident from the initial confrontation to the fatal shot and getaway were

played for the jury. This Court allowed the jury after a request to view the exhibits that were admitted into evidence including the video. The video in question contains some seven hour of tape and the Court specifically allowed the pertinent video portions which in fact was what was played to the jury at trial and in response to the jury's request during deliberations. There certainly was no misconduct and there is no evidence of misconduct. The prosecutor merely was facilitating the playing of the video for the three one-minute segments for the jury which is what was seen during the trial as opposed to playing the entire seven-hour video. There was no other contact whatsoever and there is no record reflecting otherwise. This claim is therefore denied.

12. Movant next claims appellate counsel's ineffectiveness and failure to a request remand regarding a recantation of witness Holmes testimony, as she admitted to committing perjury at trial. There is no credible evidence in this regard as the witness did not testify at the hearing and the evidence presented is insufficient. Appellate counsel Gwenda Robinson considered this as newly discovered evidence but was unable to support same in the context that this allegedly arose. Ms. Robinson is a very experienced and credible attorney who has appeared before this Court in many post-convictions matters and the Court finds her extremely competent. This witness (Meaghan Holmes) is the mother of Movant Spann's child. This evidence is speculative at best and does not prove itself and the Court finds that there is insufficient evidence to support the claim and the claim is not credible and therefore denied.

13. Finally, Movant claims that trial counsel was ineffective in failing to ask the Court to reconsider the severance motion after trial when the Movant Harris broke his silence and spoke in regard to the crime at the sentencing hearing. This testimony is self-serving and

after the fact at best. There is no basis to believe this testimony due to its timing and self-serving nature of its presentation. This Court finds that Movant Harris to be not credible in this regard and therefore the claim is denied.

14. There is simply no basis in the record to support Movant's claims concerning trial counsel or appellate counsel. These claims of ineffective assistance of counsel are based solely on conjecture and speculation. There has been no factual basis for these claims or any showing that the alleged failure of counsel resulted in any prejudice toward Movant.

15. A trial strategy decision may only serve as basis for ineffective assistance of counsel if the decision is unreasonable and the choice of one reasonable trial strategy over another is not ineffective assistance of counsel. McLaughlin v. State, 378 S.W. 2nd 328, 337 (Mo banc 2012). The Court finds trial counsel to be credible. The Court again finds Movant not credible. John Washington is an experienced defense counsel who has appeared numerous times before this Court in jury trials, plea dispositions and probation violation hearings. The court finds Mr. Washington to be a very credible, experienced, effective trial lawyer with the utmost integrity. Movant's claims have no merit. The claims of Movant are in large part raised in hindsight of the result reached. Mr. Washington made reasonable decisions moving forward in the trial within the context of the trial and any second guessing is speculative at best. There is simply no basis to conclude trial counsel is ineffective in this matter. Mr. Washington testified that he wished to have Movant Harris in the trial for his defense strategy. Movant and Movant Harris were not united in their defense and to the contrary Movant's defense was that he did not act in concert with Movant Harris and was distancing himself from Movant Harris. Mere conclusionary allegations of ineffectiveness has no merit or substance. The bald

assertions by Movant are not credible and are unsubstantiated. Again, the use of hindsight and second guessing is speculative at best and the record clearly does not support Movant in any of his claims. Both Movants have drastically changed their positions after the fact and are contradictory and self-serving. No error exists.

16. The Court has considered every allegation of Movant in his pro se motion and amended motion and finds the record does not support any claims of Movant and hereby denies each and every claim.

ORDER

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that Movant's Motion and Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence pursuant to Supreme Court Rule 29.15 are hereby **Overruled and Denied**.

Date:

SO ORDERED:

March 16, 2022

Steven R. Ohmer
THE HONORABLE STEVEN R. OHMER
22nd CIRCUIT OF MISSOURI

p.c. Lawyers

**Additional material
from this filing is
available in the
Clerk's Office.**