

No. SC92927

IN THE
SUPREME COURT OF MISSOURI

SHEENA EASTBURN,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

In this post-conviction action pursuant to Rule 29.15, appellant's prior Rule 29.15 action was reopened on March 1, 2011, by agreement between appellant and the state, to address two constitutional claims. One of the constitutional questions advanced in the motion to reopen before the circuit court of McDonald County was whether appellant's conviction and sentence of life without parole for her role as an accomplice to a murder that occurred when she was seventeen years old violated the Eighth Amendment under *Graham v. Florida*, 130 S. Ct. 2011 (2010). After two days of evidentiary hearings were concluded before the motion court, the United States Supreme Court determined that mandatory sentences of life imprisonment without parole for those offenders under the age of eighteen years old at the time they committed a homicide offense violate the Eighth Amendment's prohibition against cruel and unusual punishments in *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

It is undisputed that appellant was seventeen years old when the homicide occurred and, after her conviction after a trial by jury, she received a mandatory sentence of life without parole. Therefore, this appeal of the motion court's judgment declining to address this claim on procedural grounds squarely presents the issue of whether Missouri's first degree statute, § 565.020 R.S.Mo. (2000), is unconstitutional as applied to juvenile offenders because the only two possible

penalties, the death penalty and life without parole, have been found to violate the Eighth Amendment as applied to juvenile defendants in *Miller* and *Roper v. Simmons*, 543 U.S. 551 (2005). Because this appeal presents an issue involving the constitutional validity of a Missouri statute, this Court has original jurisdiction of this appeal under Art. V, Section 3 of the Constitution of Missouri.

STATEMENT OF THE CASE

A. Procedural History

Appellant Sheena Eastburn was charged in the Circuit Court of McDonald County, Missouri by way of information in CR192-12FX with the offense of murder in the first degree as an accomplice in the shooting death of her ex-husband Tim Eastburn, which occurred on November 19, 1992. (L.F. 43; D.A.L.F. 26)¹ Appellant was seventeen (17) years old when this offense occurred. (*Id.*).

District Defender Victor Head of Monett, Missouri was appointed to represent appellant at her trial. Prior to trial, Mr. Head filed a motion for a mental evaluation and appellant was subsequently examined by Dr. Kenneth Burstin of Springfield, Missouri on the issues of competence to proceed and criminal

¹ Citations to the record will be as follows: the Transcript and Legal File in the present 29.15 action will be “Tr.” and “L.F.” The Legal Files from the prior consolidated appeal before the Southern District will be designated as “D.A.L.F.” and “29.15 L.F.” The trial transcript will be designated as “Trial Tr.”

responsibility under Chapter 552 R.S.Mo. (D.A.L.F. 29-31). Dr. Burstin submitted a written report to Mr. Head on December 24, 1993. (See Exh. 1). Although Dr. Burstin's report indicated that appellant was competent to proceed and did not have a viable insanity defense, Dr. Burstin's testing and evaluation indicated that appellant suffered from post-traumatic stress disorder ("PTSD")² and borderline intellectual functioning and that her full scale I.Q. score was 80. (*Id.*).

Appellant's case proceeded to trial in the Circuit Court of McDonald County before a jury and Judge George C. Baldrige on July 17, 1995. (Trial Tr. 70). Appellant was represented at trial by Mr. Head and Frank Yankoviz of the Public Defender's Office in Monett, Missouri. (*Id.*). Mr. Yankoviz, as the trial transcript reveals, took primary responsibility for the trial despite the fact that he was brought into the case by Mr. Head only two weeks before trial commenced. (Tr. 19-20). Mr. Yankoviz conducted the entire *voir dire*, cross-examined the key prosecution witness D.J. Johnson and delivered the bulk of the closing argument on appellant's behalf. (Trial Tr. 243-369; 699-725; 830-840). Defense counsel did not present the testimony of Dr. Burstin or any other mental health evidence to the jury before the jury's guilty verdict was issued on July 20, 1995. (*Id.* 767-848). After

² As set forth in DSM-III and IV, several of the recognized symptoms of PTSD that would have been helpful to appellant's defense are emotional lability and impulsive behavior. (See Exh's 5, 6).

appellant was convicted as charged, Judge Baldrige sentenced appellant to life imprisonment without parole on August 25, 1995. (*Id.* 859-860). (L.F. 44-45; D.A.L.F. 126-127).

Appellant filed a timely notice of appeal and subsequently filed a timely *pro se* motion pursuant to Rule 29.15 before the trial court on November 27, 1995 under Missouri's prior consolidated appellate/post-conviction review system that was abolished in 1996. (29.15 L.F. 4-7). An amended motion was filed by appointed counsel. (*Id.* 14-20). After holding an evidentiary hearing, Judge Timothy W. Perigo denied the motion on June 17, 1996. (*Id.* 23-30). Appellant appealed this decision, which was consolidated with her direct appeal. (*Id.* 32-34). The Missouri Court of Appeals affirmed appellant's convictions on consolidated appeal in *State v. Eastburn*, 950 S.W.2d 595 (Mo. App. S.D. 1997).

Appellant, thereafter, unsuccessfully sought federal habeas corpus relief. After the United States Supreme Court issued its decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), appellant, with the assistance of undersigned counsel, filed a motion to reopen her previous Rule 29.15 proceeding due to abandonment of prior 29.15 appointed counsel and to correct a manifest injustice. (L.F. 5-24). This motion also presented two substantive constitutional claims: 1) whether a mandatory sentence of life without parole, imposed for appellant's role as an accomplice to a homicide committed by another when she was seventeen years old,

violated the Eighth Amendment under *Graham*; and 2) whether appellant received ineffective assistance of counsel due to trial counsel's failure to investigate and present available mental health evidence. (*Id.* 13-24).

After consulting with newly elected McDonald County prosecutor Jonathan Pierce, the undersigned counsel and Mr. Pierce appeared for a pre-trial conference before the Honorable Timothy W. Perigo in the Circuit Court of McDonald County on March 1, 2011. (L.F. 1). At that time, the parties agreed to reopen appellant's Rule 29.15 motion and the case was returned to an active docket for an evidentiary hearing on the merits of appellant's claims. (L.F. 25).

Two days of evidentiary hearings were held on the merits of appellant's ineffective assistance of trial counsel claim on October 6, 2011 and February 28, 2012. (Tr. 2-3). At the time the second day of hearings concluded, the Supreme Court had granted certiorari in *Miller v. Alabama*, 565 U.S. ____ (2011). Because of *Miller's* obvious potential impact on appellant's Eighth Amendment claim, the parties and the court agreed to delay the resolution of the case until July 10, 2012 after the anticipated decision in *Miller* would issue. (L.F. 3, 35; Tr. 142-143). At a July 10, 2012 review conference, the motion court ordered the parties to submit proposed findings of fact and conclusions of law. (L.F. 36).

On September 21, 2012, Judge Perigo issued a two page judgment accompanied by findings of fact and conclusions of law denying appellant's 2010

motion for post-conviction relief on procedural grounds finding that, despite the parties' agreement to reopen appellant's prior Rule 29.15 action, the court lacked the authority to address the merits of appellant's constitutional claims because appellant's 2010 motion to reopen was a successive 29.15 motion. (L.F. 26-27). Appellant, thereafter, filed a timely motion to amend the judgment on October 1, 2012, urging the motion court to amend its judgment and address the merits of the underlying constitutional claims that were advanced by appellant in her 2010 motion. (*Id.* 28-29). On October 5, 2012, Judge Perigo issued amended findings of fact, conclusions of law and judgment. (*Id.* 33-34). This judgment was identical to the prior judgment except for paragraph 14 which took note of the recent decision in *Miller v. Alabama*. (*Id.* 34).

Appellant filed a timely notice of appeal on October 24, 2012. (*Id.* 37-45).

The issues in this post-conviction case are now before this Court for its review.

B. The Trial

The facts surrounding the manner of the shooting death of Tim Eastburn by co-defendants Terry Banks and Matt Myers were not disputed at trial. (Trial Tr. 436-449). The only disputed issue at trial involved whether appellant acted after deliberation and cool reflection, the necessary mental element to convict her of murder in the first degree under Missouri law. See § 565.020 R.S.Mo. (2000).

The other critical issue at trial was whether appellant knew of her co-defendants' murderous intentions before the fatal shots were fired.

Tim Eastburn was shot to death with his own rifle in his McDonald County, Missouri, home on November 19, 1992. (Trial Tr. 480-485, 517-519). Two days earlier, the murder weapon was stolen by Matt Myers, Terry Banks, and D. J. Johnson in a burglary of Mr. Eastburn's home. (*Id.* 693).

Terry Banks and Sheena Eastburn became lovers approximately two weeks before her ex-husband was killed. (*Id.* 785-786). Matt Myers was Mr. Banks' best friend. (*Id.* 786). During the period immediately preceding the murder of Tim Eastburn, Banks, Eastburn and Myers, as well as their circle of friends, were using large quantities of drugs and alcohol. (*Id.* 787-788).

Sheena Pearson and twenty-one (21) year old Tim Eastburn were married in 1990 when Sheena was barely fifteen (15) years old. (*Id.* 779). Appellant and Tim Eastburn were divorced in 1992. (*Id.* 782-783). By all accounts, the divorce was amicable. (*Id.* 767-777). Despite their divorce, they maintained an unusual and ongoing sexual relationship. (*Id.* 783-784). If appellant needed money or drugs, she visited her ex-husband who gave her what she wanted in exchange for sexual favors. (*Id.*).

Appellant met Terry Banks around November 1, 1992, and immediately began a sexual relationship with him. (*Id.* 785-786). Mr. Banks was told by

Sheena of her unusual relationship with her ex-husband, in which she bartered sex for drugs and money. Mr. Banks was an extremely possessive, jealous, and violent person. (*Id.* 791-792).

Banks, Myers, and a man named Denashay “D.J.” Johnson burglarized Tim Eastburn’s home on November 17, 1992. (*Id.* 693). Among the items they took from the house was Tim Eastburn’s AK-47 rifle. Appellant first learned of the burglary the day of the murder. (*Id.* 786-787). According to appellant’s statements to police, the three of them had planned to rob Tim of drugs and money, while at the same time returning his rifle. (*Id.* 728-758, 790). Appellant did not plan or intend that Tim be killed. (*Id.*). When the three of them arrived at Tim Eastburn’s home on the evening of November 19, 1992 and observed that Tim was home, appellant entered the house alone to talk to him. (*Id.* 744). Appellant attempted to get Tim out of the house by asking him to take her for a ride on his motorcycle. Tim refused because it was late. (*Id.* 745). Banks and Myers hid on the front porch while appellant and Tim were inside the house. (*Id.* 746). Tim and appellant went into the kitchen and shortly after Tim kissed her, he was shot by Terry Banks and fell to the floor. (*Id.*). Myers then came into the house with the rifle and shot Tim in the head to “finish him off.” (*Id.*). At the time Myers fired the second shot, appellant and Terry Banks had already exited the house. (*Id.*).

Myers, Banks and appellant were all arrested within days after Tim's murder. (*Id.* 726-763). All three of them gave full confessions to police outlining their roles in the killing. (*Id.*). Each of their statements are consistent regarding the events surrounding the actual shooting. Both the prosecution and the defense agreed that Terry Banks fired the first shot. (*Id.* 436-448). After Terry and appellant left the house, Matt Myers went into the house with the rifle and shot Tim Eastburn in the head. (*Id.* 746). It is undisputed that Sheena Eastburn did not fire either shot. (D.A.L.F. 92-93).

Matt Myers entered into a plea bargain with the prosecution and received a total sentence of sixty-seven (67) years on the reduced charge of second degree murder and other offenses relating to the murder of Tim Eastburn. He is currently eligible for parole. Terry Banks went to trial in Greene County and was convicted of murder in the first degree and received a sentence of life without parole. *See State v. Banks*, 922 S.W.2d 32 (Mo. App. S.D. 1996).

The only evidence presented at appellant's trial suggesting there was a preconceived plan or conspiracy to murder Tim Eastburn was from D.J. Johnson. (Trial Tr. 689-725). Johnson became a prosecution witness in exchange for the state's agreement to give him probation for charges arising from his involvement in the November 17th burglary of Tim Eastburn's residence. (*Id.*). As a result, his credibility was questionable since his testimony was secured by the prosecution's

promise of freedom. Johnson testified at appellant's trial that he overheard a conversation between Myers, Banks and appellant on the day of the murder to the effect that Sheena had been raped by her ex-husband and she wished he was dead. At that point, both Myers and Banks allegedly volunteered to kill him. (*Id.*).

Appellant took the stand in her own defense at trial and testified, consistent with her statement to the authorities, that there was never a plan to harm Tim but, instead the three of them had planned to rob him of drugs and money and return his rifle. The killing likely occurred because Terry Banks flew into a jealous rage upon seeing Tim kiss Sheena and fired the first shot. Matt Myers then shot the victim in the head after appellant and Banks left the house. (Trial Tr. 777-793).

C. The 2011-2012 Post-Conviction Hearings

At the October 6, 2011 evidentiary hearing, Public Defender Frank Yankoviz testified that he was an assistant public defender at the Monett office in 1995 when he was asked by his boss Victor Head to assist him with Sheena Eastburn's first degree murder trial. (Tr. 19-20). Mr. Yankoviz testified that he was brought in the case as first chair approximately two weeks before the trial started. (*Id.*). The trial commenced on July 17, 1995. Mr. Yankoviz conducted the entire voir dire examination of the jury panel, cross-examined the key prosecution witness D.J. Johnson, and delivered the bulk of the closing argument in the case before it was submitted to the jury. (*Id.* 20).

Mr. Yankoviz testified that the theory of defense presented on behalf of Ms. Eastburn was that she did not act with deliberation and cool reflection and, as a result, was guilty of the lesser offense of second degree (felony) murder because there was no preconceived plan to kill her husband hatched by appellant and co-defendants Matt Meyers and Terry Banks. (Tr. 20-25). During the trial, Mr. Yankoviz, because of his eleventh hour involvement in the case, was unaware of the substance of Dr. Burstin's mental evaluation and other mental health evidence regarding appellant's PTSD, Borderline Intellectual Functioning, history of sexual abuse, and her 80 I.Q.³ (*Id.* 25-28). Mr. Yankoviz testified this mental health evidence was helpful and should have been utilized to present a diminished capacity defense and to bolster the defense theory at trial that appellant did not act with the requisite intent of cool deliberation and further demonstrate to the jury that appellant lacked the mental capacity to mastermind the murder of her ex-husband. (Tr. 32-39).

Mr. Yankoviz stated that he believed this mental health evidence would have been effective in convincing the jury that Sheena was under the domination and control of Terry Banks and that she did not mastermind the murder of her ex-

³ Borderline Intellectual Functioning is the label attached to individuals with an I.Q. in the 71-84 range, which is just above the I.Q. threshold for mental retardation. DSM-III pp. 359-360.

husband because she lacked the intellectual capacity to do so. (*Id.* 32). Mr. Yankoviz also stated unequivocally that he did not believe appellant received a fair trial and that he was “in over his head” at the time of trial. (*Id.* 61). This opinion expressed by Mr. Yankoviz is corroborated by his admission that appellant’s trial was his first major felony jury trial. (Tr. 24-25). Mr. Yankoviz also testified that, in his twenty years as a public defender, he “felt worse about this case than any other case” in his career. (*Id.* 61).

At this October 6, 2011 hearing, the motion court also admitted into evidence the aforementioned written report of Dr. Burstin that was provided to Victor Head on December 24, 1993. (*Id.* 43). Also introduced into evidence at this hearing was a CV and sworn affidavit from Dr. Burstin. (*Id.* 93). These documents were designated as exhibits 1 and 2, respectively. (*Id.*). These documents clearly indicate that Dr. Burstin diagnosed appellant as suffering from PTSD and that his I.Q. testing revealed an estimated WAIS-R full scale I.Q. of 80, which was well below average. (*Id.*). After Dr. Burstin forwarded this report to Victor Head, neither Mr. Head nor any other attorney from his office contacted him regarding further testing, evaluations, and did not ask him to testify. (Exh. 2).⁴ Dr. Burstin indicated that he was not aware of the outcome of Ms. Eastburn’s trial

⁴ This is corroborated by Mr. Yankoviz’ testimony that he was unaware of Dr. Burstin’s evaluation before trial. (Tr. 58).

until he was recently contacted by appellant's present counsel. (*Id.*). Dr. Burstin indicated that he would have been available to testify at trial and could have, if asked, expanded the scope of his evaluation for additional mitigating factors regarding appellant's mental conditions. (*Id.*).

At the October 6, 2011 hearing, appellant Sheena Eastburn testified regarding the circumstances surrounding her background, arrest, and 1995 trial. (Tr. 70-92). Ms. Eastburn corroborated the testimony of Mr. Yankoviz regarding his eleventh hour involvement in the case and indicated that she had only a few brief meetings in advance of trial with either Mr. Head or Mr. Yankoviz to discuss trial strategy. (*Id.* 72-76). Ms. Eastburn testified that she informed Dr. Burstin early in the case of her background and history of emotional and mental problems, including the fact that she had been raped by her stepfather at age thirteen and had twice attempted suicide while incarcerated prior to trial at the McDonald County jail. Neither Mr. Head nor Mr. Yankoviz discussed any of this information appellant provided to Dr. Burstin with her prior to trial. (*Id.*). She also was unaware of Dr. Burstin's findings or its potential impact on her defense because she never saw his report until after she was convicted. (Tr. 73-76).

At the February 28, 2012 evidentiary hearing, former public defender Victor Head⁵ testified regarding his recollections of the circumstances surrounding

⁵ Mr. Head is currently an associate circuit judge in Barry County, Missouri.

appellant's trial. (Tr. 100-138). Mr. Head repeatedly stated that he could not recall key details regarding the substance of Ms. Eastburn's mental evaluation and her background and history of emotional problems. (Tr. 121-133). Mr. Head also stated that he did not recall being told of Ms. Eastburn's rape by a McDonald County jailer and could not recall why he did not contact Dr. Burstin or call him as a witness at that trial. (*Id.*). Mr. Head did state, however, that he did not think Dr. Burstin's findings regarding PTSD and appellant's low I.Q. and other evidence of her mental and emotional problems would have been helpful to Ms. Eastburn's defense. (*Id.* 124-133). After reviewing a prior psychological evaluation of appellant at age thirteen in 1989 by Dr. Boyd at St. John's Regional Medical Center in Joplin that revealed that appellant was, among other things, "easily led by others," (See Exh. 3), Mr. Head stated he was "not sure" that these mental health records would have been helpful in convincing the jury that Ms. Eastburn was not the mastermind of a plot to kill her husband and was under the substantial domination and control of Terry Banks. (Tr. 119-120).

Appellant's mother Alicia Blevins also testified at the February 28, 2012 hearing. (Tr. 138-142). Ms. Blevins' testimony corroborated previous testimony and records indicating that appellant was raped as a child by her stepfather and suffered from mental and emotional problems as an adolescent. (*Id.*). She informed Mr. Head of all of these traumatic events. (*Id.* 139). Ms. Blevins also

testified that, after learning that her daughter had been raped prior to trial by jailer Terry Zornes, she immediately contacted Victor Head, accompanied by the victim's father Melvin Eastburn, and told Mr. Head about the rapes. (*Id.* 140-142). Ms. Blevins also testified that she and Mr. Eastburn also told Don Schlessman, who was the Sheriff of McDonald County at the time, about the rapes. (*Id.*).

POINTS RELIED ON

I.

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ON PROCEDURAL GROUNDS BECAUSE THE RECORD CONCLUSIVELY ESTABLISHES THAT APPELLANT'S FIRST DEGREE MURDER CONVICTION AND SENTENCE OF LIFE WITHOUT PAROLE VIOLATE THE EIGHTH AMENDMENT BECAUSE SHE WAS UNDER EIGHTEEN YEARS OF AGE WHEN THE OFFENSE OCCURRED.

Miller v. Alabama, 132 S. Ct. 2455 (2012)

Graham v. Florida, 130 S. Ct. 2011 (2010)

State v. Harper, 510 S.W.2d 749 (Mo. App. W.D. 1974)

State v. Raccagno, 530 S.W.2d 699 (Mo. banc 1975)

II.

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF AND IN DECLINING TO ADDRESS THE MERITS OF THE UNDERLYING CONSTITUTIONAL CLAIMS BECAUSE THESE CLAIMS WERE NOT RAISED IN A SUCCESSIVE MOTION BECAUSE THE PARTIES AND THE MOTION COURT, BY AGREEMENT, REOPENED APPELLANT'S FIRST TIMELY-FILED 29.15 MOTION AND, AS A RESULT, ANY POSSIBLE PROCEDURAL BAR DEFENSES WERE EXPRESSLY WAIVED AND THE MOTION COURT THEREFORE HAD THE AUTHORITY AND DUTY TO ADDRESS ALL OF THE ISSUES PRESENTED IN THE CASE.

Crenshaw v. State, 266 S.W.2d 257 (Mo. banc 2008)

Dorris v. State, 360 S.W.3d 260 (Mo. banc 2012)

McCracken v. Wal-Mart Stores East, L.P., 298 S.W.3d 473 (Mo. banc 2009)

Royster v. Royster, 420 S.W.2d 1 (Mo. App. W.D. 1967)

III.

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF BECAUSE THE RECORD ESTABLISHES THAT TRIAL COUNSEL WAS

INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT AVAILABLE EVIDENCE FROM DR. KENNETH BURSTIN AND OTHER MENTAL HEALTH PROFESSIONALS THAT APPELLANT SUFFERED FROM SEVERAL MENTAL DISEASES AND DEFECTS INCLUDING POST TRAUMATIC STRESS DISORDER AND BORDERLINE INTELLIGENCE WHICH WOULD HAVE PROVIDED HER A VIABLE DEFENSE AT TRIAL BY NEGATING THE PROSECUTION'S THEORY THAT SHE WAS THE MASTERMIND OF A PLOT TO MURDER HER HUSBAND, THE SPECIFIC INTENT OF COOL DELIBERATION REQUIRED TO SUSTAIN A FIRST DEGREE MURDER CONVICTION AND, WOULD HAVE ESTABLISHED THAT APPELLANT WAS UNDER THE DOMINATION OF CO-DEFENDANT TERRY BANKS. HAD COUNSEL PERFORMED EFFECTIVELY, THERE IS A REASONABLE PROBABILITY THAT APPELLANT WOULD HAVE BEEN CONVICTED OF THE LESSER OFFENSE OF SECOND DEGREE (FELONY) MURDER.

Strickland v. Washington, 466 U.S. 668 (1984)

State v. Boyd, 143 S.W.3d 36 (Mo. App. W.D. 2004)

Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998)

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005)

ARGUMENT I

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT’S MOTION FOR POST-CONVICTION RELIEF ON PROCEDURAL GROUNDS BECAUSE THE RECORD CONCLUSIVELY ESTABLISHES THAT APPELLANT’S FIRST DEGREE MURDER CONVICTION AND SENTENCE OF LIFE WITHOUT PAROLE VIOLATE THE EIGHTH AMENDMENT BECAUSE SHE WAS UNDER EIGHTEEN YEARS OF AGE WHEN THE OFFENSE OCCURRED.

A. Standard of Review.

Ordinarily appellate review of a motion court’s judgment denying or granting a Rule 29.15 motion is conducted under a clearly erroneous standard. Rule 29.15(k). However, because this claim of error raises a federal constitutional challenge to a Missouri statute, “this Court reviews a constitutional challenge to a statute *de novo*.” *State v. Mixon*, SC92230 (Mo. banc Nov. 13, 2012).

B. Appellant’s First Degree Murder Conviction and Mandatory Sentence of Life Without Parole Violates the Eighth Amendment.

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court ruled that the Eighth Amendment forbids a sentencing scheme that mandates a sentence of life in prison without the possibility of parole for juvenile homicide offenders. *Id.* at 2463-2475. The court in *Miller* also held that juveniles who were convicted of

homicide offenses are entitled to individualized sentencing in which evidence of their youth, immaturity, and other mitigating factors may be considered by the sentencing judge or jury. *Id.* at 2463-2469.

Since it is undisputed that Ms. Eastburn was convicted and sentenced to life without parole for the crimes of first degree murder as mandated by Missouri statute for an offense committed when she was seventeen (17) years old, she is entitled to some form of post-conviction relief under *Miller*. The more difficult question is the appropriate remedy that the Missouri judiciary is empowered to impose in order to follow the constitutional commands of *Miller* and also comport with Missouri's statutory and constitutional requirements in criminal cases. Appellant contends that the legally appropriate remedy is to vacate her conviction for the offense of first degree murder, enter a judgment of conviction on the lesser offense of second degree murder, and order a resentencing hearing either before the trial court or a jury on the issue of punishment within the statutory range of punishment for the Class A Felony of murder in the second degree.

The State of Missouri has argued in other pending *Miller* litigation that the appropriate remedy this Court should adopt in light of *Miller* is to vacate the juvenile's mandatory unconstitutional sentence of life without parole for the offense of first degree murder and order resentencing where the sentencer can consider the alternative sentence of life with parole for the same offense. *See, e.g.,*

State v. Crawford, ED63950 (State's Resp. filed 11-02-12). This proposed remedy should be rejected for the following reasons.

Missouri's first degree murder statute, apart from setting forth the elements of the offense, provides for only two possible penalties, death or life without parole. § 565.020.2 R.S.Mo. (1986). Since both of these alternative mandatory punishments are unconstitutional as applied to juvenile defendants under *Miller* and *Roper v. Simmons*, 543 U.S. 551 (2005), this statute is unconstitutional as applied to appellant and other juvenile offenders. In such circumstances, Missouri law is well settled. Where a criminal statute is unconstitutional as applied to a particular defendant, the conviction must be reversed. *See, e.g., State v. Molsbee*, 316 S.W.3d 549, 553-554 (Mo. App. W.D. 2010).

In addition, this Court does not have the constitutional authority to order the remedy that the state has suggested because a sentence of life with parole was not authorized for first degree murder by the Missouri General Assembly. As this Court has stated, “[i]t is fundamental that to declare what should constitute a crime and the punishment therefor is a power vested solely in the Legislature and may not be delegated to any other body or agency.” *State v. Raccagno*, 530 S.W.2d 699, 703 (Mo. banc 1975). This Court, therefore, does not have the Constitutional power to rewrite the first degree murder statute and impose a statutorily

unauthorized penalty.⁶ “That is purely a Legislative prerogative.” *State v. Harper*, 510 S.W.2d 749, 752 (Mo. App. W.D. 1974). Because appellant’s conviction was secured under a statute that does not contain a constitutionally valid penalty for juvenile defendants, her first degree murder conviction is null and void. *Id.* at 750.

In light of the foregoing facts and legal authorities, the appropriate judicial remedy authorized by Missouri law is to vacate Sheena Eastburn’s conviction for the offense of first degree murder and enter conviction on the lesser included offense of second degree murder. Because criminal defendants in Missouri have a statutory right to jury sentencing, appellant is entitled to a new sentencing proceeding either before a jury or, if appellant waives his right to jury sentencing, before the trial court. *See* § 557.036 R.S.Mo. Supp. (2003). After hearing the evidence and arguments, either a newly impaneled jury or the trial court will impose a new sentence within the statutory range of punishment for the Class A Felony of murder in the second degree.

⁶ As this Court noted in *Raccagno*, “Art. II, section 1, Mo. Const., provides for the separation of power into three distinct departments – legislative, executive, and judicial – and prohibits the exercise of power properly belonging to one of those departments from being exercised by another.” 530 S.W.2d at 703.

C. The Eighth Amendment Categorically Bars a Non-Paroleable Sentence for Juveniles Convicted as Accomplices.

This Court should also utilize the facts of appellant's case to decide whether the Eighth Amendment imposes a categorical ban on life without parole sentences for juvenile defendants who were convicted as accomplices to first degree murders committed by another. In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Supreme Court held that a sentence of life without parole is unconstitutional when imposed upon juveniles convicted of nonhomicide offenses. The Court's Eighth Amendment analysis in *Graham* relied on the principle that such a severe and irrevocable punishment was not constitutionally appropriate for a juvenile offender who did not "kill or intend to kill." *Id.* at 2027.

In determining the constitutionality of a punishment under the Eighth Amendment, courts must look to the "evolving standards of decency that mark the progress of a maturing society," recognizing the "essential principle" that "the state must respect the human attributes of those who have committed serious crimes." *Id.* at 2021. In doing so, ultimately, a reviewing court must exercise its independent judgment, considering the culpability of the offender and the severity of the punishment. *Id.* at 2026.

In *Miller*, two Justices expressed the view that the Eighth Amendment, as interpreted in *Graham*, categorically forbids a sentence of life without parole for

juvenile homicide defendant who neither “killed nor intended to kill the robbery victim.” *Miller v. Alabama*, 132 S. Ct. 2455, 2475-2477 (2012) (Breyer, J. concurring). The majority opinion in *Miller* also contains language supporting a categorical ban on imposing life without parole for juveniles convicted as accomplices to murder. In this regard, the court, while stopping short of finding a categorical Eighth Amendment bar, stated that sentencing a juvenile to life without parole should be “uncommon...and [limited to] the rare juvenile offender whose crime reflects irreparable corruption.” 132 S. Ct. at 2469. A juvenile “non-triggerman” would clearly not meet this exceptional criteria.

There is no dispute that appellant was not the triggerwoman in this homicide. Everyone involved in this prosecution agreed that Terry Banks and Matt Myers killed Tim Eastburn. In addition, the jury did not have to find, nor did they find, that appellant killed or intended to kill the two victims in order to convict her of first degree murder as an accomplice under § 565.020. (D.A.L.F. 92-93). This case presents an ideal opportunity for this Court to address this important question and impose a categorical Eighth amendment bar to life without parole as a sentencing option for juveniles convicted as accomplices.

A. The *Miller* Decision is Retroactive.

In other pending *Miller* litigation, the State of Missouri has argued that the decision in *Miller* is not retroactive. *See State ex rel. Lotts v. Wallace*, SC92831;

(State's brief in opp., filed December 5, 2012). This argument is meritless in light of the procedural posture and disposition of the case of Kuntrell Jackson, the Arkansas juvenile offender whose case was consolidated with *Miller v. Alabama*. Mr. Jackson's case came before the Supreme Court on a writ of certiorari after the Arkansas Supreme Court had denied his state habeas petition. 132 S. Ct. at 2461-2462. Given the outcome in *Miller/Jackson*, there is no doubt that the Supreme Court intended that its decision be fully retroactive or else Mr. Jackson would have not received any relief. See *Teague v. Lane*, 489 U.S. 288, 316 (1989).

ARGUMENT II

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF AND IN DECLINING TO ADDRESS THE MERITS OF THE UNDERLYING CONSTITUTIONAL CLAIMS BECAUSE THESE CLAIMS WERE NOT RAISED IN A SUCCESSIVE MOTION BECAUSE THE PARTIES AND THE MOTION COURT, BY AGREEMENT, REOPENED APPELLANT'S FIRST TIMELY-FILED 29.15 MOTION AND, AS A RESULT, ANY POSSIBLE PROCEDURAL BAR DEFENSES WERE EXPRESSLY WAIVED AND THE MOTION COURT THEREFORE HAD THE AUTHORITY AND DUTY TO ADDRESS ALL OF THE ISSUES PRESENTED IN THE CASE.

A. Standard of Review.

As noted under Argument I above, Missouri appellate courts normally review a motion court's judgment in a 29.15 action under a clearly erroneous standard. However, the motion court's judgment here involves a purely legal question regarding whether the court had the duty and authority to address the merits of appellant's motion for post-conviction relief and whether it erred in finding this action was a successive motion. Because a trial court's authority and/or jurisdiction to hear a case is a question of law, de novo review on appeal is appropriate. *See, e.g., McCracken v. Wal-Mart Stores East, L.P.*, 298 S.W.3d 473, 476 (Mo. banc 2009).

B. The Present Rule 29.15 Litigation is Not a Successive Motion.

Citing this Court's recent decision in *State v. Dorris*, 360 S.W.3d 260, 267 (Mo. banc 2012), the motion court issued a judgment dismissing appellant's post-conviction motion filed in 2010 on purely procedural grounds because, in his view, the present litigation was a successive motion that is precluded by Rule 29.15(1). (L.F. 33-34). There are two reasons that this procedural bar ruling is erroneous. First, the present motion to reopen, which raised two additional claims for relief, is not a second or successive motion. Second, this Court's holding in *Dorris* only precludes the waiver of procedural defenses by the prosecution in state post-

conviction litigation where a prisoner files an untimely *pro se* motion in violation of Rule 29.15(b). Appellant will address both of these issues in turn.

Rule 29.15(1) provides that circuit courts “shall not entertain successive motions.” However, appellant’s 2010 motion to reopen on grounds of abandonment and manifest injustice to permit appellant to raise two compelling constitutional challenges to her conviction and sentence is not a successive or second motion. Had appellant filed a second post-conviction motion instead of a motion to reopen her first Rule 29.15 motion, the motion court would have had no choice but to dismiss the motion under the plain language of 29.15(1). *See Lilly v. State*, 374 S.W.3d 390, 395 (Mo. App. W.D. 2012).

In this case, however, there was no second or successive 29.15 motion filed. Once the parties and the motion court agreed to reopen appellant’s initial Rule 29.15 motion, the motion court below had the authority and obligation to address the merits of the underlying claims for relief. *Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo. banc 2008). Therefore, after the matter was reopened by agreement based upon allegations of abandonment and manifest injustice, the motion court had jurisdiction, authority, and the duty to consider the merits of appellant’s claims for relief. *See Spencer v. State*, 255 S.W.3d 527, 529 (Mo. App. E.D. 2008); *Daugherty v. State*, 116 S.W.3d 616, 617 (Mo. App. E.D. 2000).

The second reason for reversing the motion court's successive bar ruling is the fact that the motion court erroneously extended this Court's holding in *Dorris* to a situation where it does not apply. The holding in *Dorris* is that the state cannot waive 29.15(b)'s time bar to an untimely *pro se* 29.15 or 24.035 motion. 360 S.W.3d at 270. The result in *Dorris* was dictated by the specific language in Rule 29.15(b) that the failure to timely file a *pro se* motion results in a "complete waiver" of any right to proceed on the motion. *Id.* at 266. Based upon this language, this Court found that the failure to file a timely *pro se* motion "establishes a total, absolute relinquishment of a legal right." *Id.* at 267-268. Thus, the timeliness requirements of 29.15(b) must be strictly enforced and procedurally barred consideration of an untimely *pro se* motion. This bar also cannot be waived by the state in light of the aforementioned "complete waiver" language of 29.15(b). *Id.* at 268-269.

Once a prisoner files a timely *pro se* 29.15 motion, there is no similar "complete waiver" language regarding any subsequent amendments or motions such as the motion to reopen filed by appellant in this case in 2010. Therefore, other possible or potential procedural defenses to subsequent motions or proceedings may be explicitly waived or conceded by the state as occurred here. As a result, it was clear error for the motion court to decline to address the merits of appellant's underlying claims based upon a procedural bar defense that was

either not raised or explicitly waived by the state prior to the judgment being issued. *See McCracken v. Wal-Mart Stores East, L.P.*, 298 S.W.3d 473, 476 (Mo. banc 2009) (“if a matter is not jurisdictional but rather is a procedural matter required by statute or rule or an affirmative defense of the sort listed in Rule 55.08, then it may generally be waived if not raised timely.”)

Unlike the situation confronted by this Court in *Dorris*, there is no reason not to apply the waiver rules of Rule 55 under the provisions of 29.15(a) that provide that post-conviction motions should be governed by the rules of civil procedure “insofar as applicable.” By agreeing to reopen the proceeding on March 1, 2011, the state affirmatively waived any procedural bar defense to merits review of appellant’s underlying constitutional claims. *See Royster v. Royster*, 420 S.W.2d 1, 3 (Mo. App. W.D. 1967). Thus, the court below clearly erred in failing to address appellant’s constitutional claims.⁷

⁷ Because appellant’s *Miller* claim under Argument I involves a purely legal question involving the constitutionality of a statute that is subject to *de novo* review, it is not necessary to remand that issue for findings of fact and conclusions of law. *See, e.g., Edwards v. State*, 200 S.W. 3d 500, 513 (Mo. banc 2006).

ARGUMENT III

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF BECAUSE THE RECORD ESTABLISHES THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT AVAILABLE EVIDENCE FROM DR. KENNETH BURSTIN AND OTHER MENTAL HEALTH PROFESSIONALS THAT APPELLANT SUFFERED FROM SEVERAL MENTAL DISEASES AND DEFECT SINCLUDING POST TRAUMATIC STRESS DISORDER AND BORDERLINE INTELLIGENCE WHICH WOULD HAVE PROVIDED HER A VIABLE DEFENSE AT TRIAL BY NEGATING THE PROSECUTION'S THEORY THAT SHE WAS THE MASTERMIND OF A PLOT TO MURDER HER HUSBAND, THE SPECIFIC INTENT OF COOL DELIBERATION REQUIRED TO SUSTAIN A FIRST DEGREE MURDER CONVICTION, AND WOULD HAVE ESTABLISHED THAT APPELLANT WAS UNDER THE DOMINATION OF CO-DEFENDANT TERRY BANKS. HAD COUNSEL PERFORMED EFFECTIVELY, THERE IS A REASONABLE PROBABILITY THAT APPELLANT WOULD HAVE BEEN CONVICTED OF THE LESSER OFFENSE OF SECOND DEGREE (FELONY) MURDER.

A. Standard of Review.

The motion court's judgment should be reviewed under a clearly erroneous standard under 29.15(k). However, since the court issued no findings of fact or conclusions of law on the merits of this ineffectiveness claim, it will be difficult, if not impossible, for this Court to conduct meaningful appellate review of this claim. *See, e.g., Broom v. State*, 173 S.W.3d 681, 683 (Mo. App. W.D. 2005). Thus, it is necessary for this Court, unless its resolution of Argument I renders this claim of error moot,⁸ to reverse and remand this case for more detailed findings and conclusions.

⁸ If this Court grants appellant the requested relief under Argument I on her *Miller* claim and orders resentencing on the lesser offense of second degree murder, this remedy is probably adequate to provide appellant redress for this claim of ineffectiveness of counsel in light of the strength of the evidence of appellant's guilt of second degree (felony) murder that was submitted to the jury as a lesser included offense. (D.A.L.F. 97-99); *see also State v. O'Brien*, 857 S.W.2d 212, 220 (Mo. banc 1993); *State v. Neal*, 328 S.W.3d 374, 383-385 (Mo. App. W.D. 2010).

B. Appellant Was Denied Effective Assistance of Counsel Due to Trial Counsel's Failure to Investigate and Present Available Mental Health Evidence.

This Court must analyze this claim under the familiar two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under the *Strickland* test, appellant must show that counsel's performance was objectively deficient by establishing that his attorneys failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under substantially similar circumstances. *Id.* at 687. To establish *Strickland* prejudice, appellant must demonstrate that there is a reasonable probability that, but for the errors made by counsel, the outcome at trial would have been different. *Id.* at 694.

The trial record and the testimony and exhibits from the present post-conviction hearings demonstrate that it is not a close question that appellant can establish that trial counsel's performance was objectively deficient. Trial counsel's failure to consult with and present testimony from Dr. Burstin and present other available evidence of appellant's PTSD, low I.Q., and her submissive personality traits was objectively unreasonable. It would have been readily apparent to any reasonably competent lawyer in this case that the only contested issue at trial involved whether appellant had the necessary intent to commit first degree murder. The evidence presented at the evidentiary hearing clearly indicates that Dr.

Burstin's report and findings would have discredited the prosecution's theory that appellant masterminded the murder and would have negated the cool deliberation element necessary to convict appellant as charged of the offense of murder in the first degree.

In assessing trial counsel's performance, the court in *Strickland* indicated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. The key undisputed fact in this case that indicates that Mr. Head's performance was deficient was the fact that he failed to contact or consult with Dr. Burstin in the eighteen month period between the time Dr. Burstin submitted his report to Mr. Head and the commencement of trial. (See Exh. 2). Thus, it would not have been possible for Mr. Head to make any sort of reasonable tactical decision not to present Dr. Burstin's testimony because of his negligent failure to consult with him beforehand. *See Jennings v. Woodford*, 290 F.3d 1006, 1012-1014 (9th Cir. 2002) (finding trial counsel's performance deficient in failing to consult with the psychiatrist who examined the defendant prior to trial). Mr. Head's performance was objectively deficient under *Strickland* because he abandoned the investigation of this viable defense at "an unreasonable juncture." *See Wiggins v. Smith*, 539 U.S. 510, 527-528 (2003).

The facts surrounding appellant's ineffectiveness claim are similar to those addressed in *Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998). In that case, the court overturned a California murder conviction after finding trial counsel ineffective due to counsel's failure to adequately investigate and present evidence of petitioner's PTSD, which would have negated the mental element necessary to convict defendant of murder under California law. *Id.* at 752-753, 757-758. Like Mr. Head in this case, Seidel's attorney was put on notice well in advance of trial that his client suffered from mental problems that supported a viable defense. *Id.* at 755-756. As in *Seidel*, Mr. Head's inexplicable failure to contact Dr. Burstin and present his testimony cannot be labeled reasonable trial strategy, "rather than neglect." *Id.* at 753.

On the issue of *Strickland* prejudice, had evidence of Ms. Eastburn's low I.Q., PTSD, and social and medical history been effectively presented to the jury, there is a reasonable likelihood that the jury would have acquitted her of first degree murder and convicted her of the lesser offense of second degree (felony) murder. *See Deluca v. Lord*, 77 F.3d 578, 588-590 (2nd Cir. 1996). The trial court's exclusion of analogous evidence of another Missouri first degree murder defendant's mental afflictions, which would have undermined the prosecution's theory of the case, was deemed to be prejudicial error in *State v. Boyd*, 143 S.W.3d 36, 46-47 (Mo. App. W.D. 2004). As in *Boyd*, the prosecution's evidence of

deliberation to support a first degree murder conviction was far from overwhelming because it rested upon the testimony of D.J. Johnson, “a highly-suspect witness who had struck [a] plea bargain with the state.” *Id.* at 47. The *Strickland* prejudice test can clearly be met here because there is reasonable probability that the jury would have found that appellant, but for counsel’s failures, “was incapable of forming the requisite intent to commit first degree murder.” *Daniels v. Woodford*, 428 F.3d 1181, 1207 (9th Cir. 2005).

C. A Remand is Necessary Because the Motion Court Failed to Issue Findings of Fact and Conclusions of Law on this Claim.

“Under Rule 29.15(j), a motion court is required to issue findings of fact and conclusions of law on each issue presented, regardless of whether or not an evidentiary hearing is held.” *Taylor v. State*, 269 S.W.3d 42, 44-45 (Mo. App. W.D. 2008) (citing *Franklin v. State*, 24 S.W.3d 686, 692 (Mo. banc 2000)). “This is not an ambiguous requirement, nor is it simply a formality.” *Id.* at 45 (citation omitted). “The motion court is not required to issue itemized findings of fact and conclusions of law, but its findings and conclusions must be specific enough to allow an appellate court to conduct a meaningful review.” *Id.* (citation omitted). “When a motion court’s findings on an issue lack specificity to the point the appellate court cannot make a meaningful review, a remand for specific findings

and conclusions on that issue is required.” *Copeland v. State*, 190 S.W.3d 545, 548 (Mo. App. S.D. 2006).

The logic behind this rule is easily understood. “Meaningful appellate review is premised upon sufficiently specific findings of fact and conclusions of law which are responsive to the appellant’s claims.” *Brown v. State*, 810 S.W.2d 716, 717 (Mo. App. W.D. 1991). “Without such findings and conclusions, [an appellate court is] unable to provide meaningful review of the claims on appeal.” *Broom v. State*, 173 S.W.3d 681, 683 (Mo. App. W.D. 2005). This Court should, therefore, reverse the motion court’s judgment and remand this case with instructions to the motion court to issue findings of fact and conclusions of law. *Taylor*, 269 S.W.3d at 45; *Broom*, 173 S.W.3d at 683; *Copeland*, 190 S.W.3d at 550.

CONCLUSION

For the reasons as set forth under Arguments I and II, the judgment of the motion court below should be reversed and remanded with directions to vacate appellant’s conviction and sentence for the offense of murder in the first degree and conduct a resentencing proceeding on the lesser included offense of murder in the second degree. In addition, and in the alternative, for the reasons set forth under Argument III, the judgment below should be reversed and remanded for

further findings of fact and conclusions of law on the merits of appellant's claim of ineffectiveness of trial counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7,522 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, this certification and the appendix, as determined by WordPerfect X4 software; and,
2. That on the 7th day of January, 2013 I electronically filed Appellant's Brief and Appendix with the Clerk of the Supreme Court of Missouri using the CM/ECF system which sent notification of such filing to Counsel for Respondent, Jonathan Pierce, McDonald County Prosecutor, P.O. Box 566, Pineville, Missouri 64856, Phone 417-223-4142, Fax 417-223-4137, jpierce@mcprosecutor.org.

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