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IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

NICHOLAS P. GODEJOHN,)
)
Appellant,)
)
No. SD37983)
)
STATE OF MISSOURI,)
)
Respondent.)

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APPEAL TO THE MISSOURI COURT OF APPEALS,
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THE HONORABLE DAVID C. JONES, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Nicholas P. Godejohn appeals the denial of his amended Rule 29.15 motion to vacate, set aside, or correct the judgment and sentence entered against him in *State v. Nicholas P. Godejohn*, Greene County, Missouri, Case No. 1531-CR03590-01 (D23; D24). The Honorable David C. Jones denied Mr. Godejohn's amended motion following an evidentiary hearing (D23P2, 27). This appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri, and jurisdiction therefore lies in the Missouri Court of Appeals, Southern District. Mo. Const., Article V, § 3; § 477.060, RSMo.

TIMELINESS STATEMENT

On September 30, 2020, this Court issued its mandate affirming Mr. Godejohn’s convictions on direct appeal (D1P26). Mr. Godejohn timely filed his pro se postconviction motion 90 days later, on December 29, 2020 (D2P1). *See* Rule 29.15(b) (2019).

A public defender entered her appearance on January 4, 2021, before being appointed by the motion court (D1P11). The court granted two 30-day extensions of time for the amended motion, allowing postconviction counsel a total of 120 days from her entry of appearance (D1P11). *See* Rule 29.15(g) (2019). Counsel timely filed Mr. Godejohn’s amended motion on April 28, 2021 (D1P13).

STATEMENT OF FACTS

Underlying Criminal Case

On direct appeal, this Court summarized the facts in the underlying criminal case as follows:

Nicholas Paul Godejohn ("Defendant") was convicted of first-degree murder and armed criminal action for killing [C.B.] ("Victim").

...

Defendant met Victim's daughter [G.B] through an internet dating site in October 2012. They began a secret romantic relationship because Victim controlled every aspect of [G.B.'s] life and would not let her have a boyfriend. [G.B.] told Defendant that Victim had forced her to pretend to be disabled to receive financial help and charity. By at least May 2014, Defendant and [G.B.] had developed three different plans to try to get [G.B.] away from Victim so they could be together. After a meeting between Defendant and Victim was unsuccessful, they decided on a plan that involved killing Victim.

Between May 27 and June 10, 2015, Defendant and [G.B.] sent each other numerous electronic messages about the plan. In these messages, [G.B.] asked Defendant about the items he needed to commit the crime. He chose a knife for the crime and also told [G.B.] he wanted duct tape to muffle Victim. Defendant texted [G.B.] as he travelled from his home in Wisconsin to Springfield, Missouri, and informed her when he had arrived. On the night of the crime, [G.B.] texted Defendant and told him Victim had taken her sleeping pill. On June 10, 2015, at 2:07 in the morning, Defendant texted [G.B.], informing her he had arrived at her house and telling her to get in the bathroom. After entering the home and making sure [G.B.] was in the bathroom, Defendant waited a minute and thought about if he "really wanted to do it." After the murder, Defendant and [G.B.] went back to Defendant's home in Wisconsin.

On June 14, 2015, authorities discovered Victim's body lying on her bed. Victim died as a result of 14 stab wounds to her back. After

authorities identified Defendant as a suspect, [A.M.] of the Greene County Sheriff's Office ("[Detective M]") traveled to Wisconsin to interview Defendant. Defendant waived his *Miranda* [footnote omitted] rights and made a statement in which he admitted killing Victim.

Defendant was charged with first-degree murder and armed criminal action. While he was waiting for trial, Defendant also made statements about the crime to a journalist. Both [Dr. F] for the defense and [Dr. D] for the State examined Defendant prior to trial and testified at trial. [Their testimony established that Defendant has autism spectrum disorder ("ASD") and an IQ on the low side of average, but he could read and graduated from high school (D45P6, 8).] The jury found Defendant guilty on both counts, and the trial court sentenced Defendant to life in prison without parole for first-degree murder and a concurrent term of 25 years in prison for armed criminal action.

In his first point, Defendant argues the trial court abused its discretion in excluding proposed testimony of the defense's psychological expert [Dr. F] regarding the effect Defendant's ASD had on his ability to deliberate at the time of the offense. [Footnote omitted.] In his second point, Defendant argues the trial court abused its discretion when it permitted the State to call [Dr. D] in rebuttal because the examination [Dr. D] conducted of Defendant prior to trial was not authorized under Rule 25.06(b)(9) [Footnote omitted]. With respect to both of these points, Defendant argues he was prejudiced because his primary defense was lack of deliberation due to his ASD. Both of these claims fail because there was overwhelming evidence of deliberation in spite of the evidence that Defendant had been diagnosed with ASD.

Here, there was overwhelming evidence of deliberation, showing that any alleged error in the exclusion of [Dr. F]'s testimony or the admission of [Dr. D]'s testimony was harmless beyond a reasonable doubt and therefore not so prejudicial that it deprived Defendant of a fair trial. Defendant and [G.B.] discussed the proposed crime for a period of over a year, as shown by electronic

messages regarding the plan from as early as 2014. In addition to rejecting alternative courses of action, they communicated about what type of equipment Defendant would need, including a knife and duct tape to muffle Victim. There were also text messages between Defendant and [G.B.] as Defendant traveled to Springfield to commit the crime. Finally, Defendant admitted to both a detective and a reporter that he stopped to think about the crime immediately prior to committing it. Under these circumstances, the result of the trial would not have been different if [Dr. F] had testified that Defendant's ASD affected his ability to deliberate on the night of the crime or if [Dr. D] had been prevented from testifying.

(D45P2-5). The Court affirmed Mr. Godejohn's convictions, and the Rule 29.15 proceedings began (D46; D2).

Amended Motion Claim A

Claim A of the amended motion alleged:

Nicholas Godejohn was denied effective assistance of counsel, a fair trial, due process, and was subjected to cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution in that his trial counsel failed to fully investigate and present evidence from a qualified neuropsychologist specializing in Autism Spectrum Disorder to support a diminished capacity defense. Counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances. Nicholas Godejohn was prejudiced as a result, in that had counsel not been ineffective, there is a reasonable probability that he would not have been convicted of first degree murder and armed criminal action and would not have been sentenced to life without probation and parole and twenty-five years.

(D13P2-3). The motion further alleged that, once trial counsel elected to put forth a diminished capacity defense based on autism and Asperger's, any reasonably competent defense counsel would have investigated and presented

evidence from a qualified neuropsychologist who had expertise and experience in the area of ASD and Asperger's Syndrome (D13P3-5). The motion alleged that Dr. F was not a specialist and did not have much practical experience with autism (D13P5-7). The State argued that Dr. F is not qualified to testify as an expert this case at a pretrial offer of proof hearing because he does not know the legal standards involved (D13P6; D34P109). The amended motion alleged that, after that hearing, trial counsel was on notice to investigate an expert in neuropsychology specializing in autism (D13P7-8).

The amended motion pointed out that, unlike a specialist with practical experience, Dr. F could not explain how Mr. Godejohn's diagnoses would affect his ability to deliberate (D13P5-8). On the other hand, a neuropsychologist with experience in autism would have explained to the jury that G.B.'s manipulation of Mr. Godejohn over two and a half years combined with Mr. Godejohn's ASD/Asperger's, which would have negated Mr. Godejohn's ability to deliberate (D13P8-9). A specialist would have explained that Mr. Godejohn's conditions caused him to surrender his deliberation to G.B.'s logic because he took her statements as literal facts when she said that killing her mother was the only way they could be together and that it was up to him to rescue her (D13P9). The amended motion pointed out that trial counsel would have been on notice to investigate and call such an expert after Dr. F's competency examination and a review of Mr. Godejohn's school and disability records (D13P9).

The amended motion explained that a neuropsychologist specializing in ASD/Asperger's would have rebutted Dr. D's testimony that Mr. Godejohn grew out of autism into Asperger's, and that he had a "very mild" form of the condition (D13P11). If defense counsel would have investigated and called a specialist, the jury would have known that "mildly autistic" is misleading

because “mild” refers to a person’s superficial socialness to mask social dysfunction, rather than the severity of the person’s disability (D13P11). The levels of autism correspond to how much support a person needs, and Mr. Godejohn did not receive the support he needed at home or through services in the community (D13P12).

In support of Claim A, Mr. Godejohn pleaded that he would call Dr. W, who is a pediatric neuropsychologist, to testify at the postconviction hearing (D13P101). Dr. W is a founding member and current president of the American Board of Pediatric Neuropsychology (D13P101). He has substantial, practical experience evaluating and treating individuals with Autism Spectrum Disorders/Asperger’s Syndrome (D13P101). The amended motion alleged that he would testify as follows:

[P]eople with Autism Spectrum Disorders (ASD), are susceptible to other people’s wishes and are the ideal targets for manipulation. They often misperceive social intentions. Social impairment is one of the most prominent features of ASD. Dr. [W] will testify that people at the high end of the spectrum (such as those with Asperger’s) want intimacy, but have a very difficult time maintaining it. They also have a greater need for emotional intimacy, but have trouble maintaining it as well. People with ASD are tense and anxious about their relationships because their relationships often fail. Dr. [W] will testify that those with ASD have a lot of high emotional empathy with others which parallels the emotional state of that other person. They are also unable to read facial expression and intentions. Dr. [W] will also testify that people with ASD are hyper-focused on narrow interests—they can’t think about or do anything else and almost can’t feel their own emotions because of it. A person with ASD will take everything that another person says at face value because they are so hyper-focused and don’t pick up on social cues.

(D13P102-03).

Mr. Godejohn’s amended motion gave notice that he would rely on the testimony of trial counsel to establish that counsel did not have a reasonable

trial strategy reason for failing to investigate and present evidence from a qualified neuropsychologist with substantial, practical experience in evaluating and treating individuals with ASD/Asperger's to support a defense of diminished capacity in the guilt phase (D13P107-08).

The amended motion alleged that Mr. Godejohn was prejudiced by defense counsel's failure to investigate and call a neuropsychologist specializing in ASD because the jury did not otherwise hear evidence that Mr. Godejohn's autism played a role in his social relationship with G.D. and her ability to manipulate him as a highly susceptible person (D13P12-14). As it was, the prosecutor was able to argue in closing that G.D. did not deceive Mr. Godejohn into killing her mother because she merely asked him, and he made the decision (D13P15).

The motion further alleged that, had a specialist like Dr. W testified, Mr. Godejohn would not have been convicted of first-degree murder (D13P15). The specialist would have testified that Mr. Godejohn's autism characteristics are always present and cannot be separated from him (D13P8-9). The specialist would also testify that Mr. Godejohn is impaired in understanding social cues and how to respond to them (D13P12). The motion elaborated,

Had counsel hired the appropriate type of expert, a neuropsychologist with substantial expertise in evaluating and treating individuals with Autism Spectrum Disorders/Asperger's Syndrome, such as Dr. [W], counsel would have known that individuals with Asperger's Disorder are extremely susceptible to social manipulation and suggestion by virtue of the following characteristics: 1) a greater need for emotional intimacy, both romantic and otherwise; 2) the fragile nature of their developing relationships; 3) social impairment; 4) empathy imbalance (deficit of cognitive empathy which is being able to understand and predict other's mental state, but a surplus of emotional empathy, which is the capacity for attachment); and 5) hyper-focus on a narrow range of interests. An expert neuropsychologist specializing in [ASD]/Asperger's would have explained to the jury at trial how

these recognized and accepted characteristics combined with [G.B.'s] methodical manipulation of Nicholas over a two and a half year period resulted in Nicholas' inability to deliberate at the time of the offense.

(D13P8).

On August 9-10, 2022, the motion court held an evidentiary hearing on the amended motion (Tr. ii-iii). As pleaded in the amended motion, trial counsel and Dr. W testified as to Claim A (D13P101, 107-08; Tr. ii-iii).

Lead Trial Counsel's Testimony

Mr. Godejohn's lead trial counsel D.P. testified that he has been a public defender for 32 years (Tr. 294). His co-counsel in Mr. Godejohn's case was A.M. (Tr. 295).

Lead counsel recalled that Mr. Godejohn was charged with first degree murder (Tr. 298). The State's theory was that Mr. Godejohn and G.P. worked together to kill the victim, and that Mr. Godejohn deliberated (Tr. 298). Lead counsel knew early in the representation that Mr. Godejohn had been diagnosed with autism as a child and Asperger's Syndrome as a teenager (Tr. 298-99). Counsel reviewed Mr. Godejohn's Social Security disability records (Tr. 299).

Trial counsel hired Dr. F to evaluate whether Mr. Godejohn was competent to stand trial (Tr. 299). Dr. F made a report and found that Mr. Godejohn had ASD but was competent to stand trial (Tr. 300). Trial counsel had not requested that Dr. F look into diminished capacity, but Dr. F brought it to counsel's attention as something he had real questions about (Tr. 300).

Prior to Mr. Godejohn's case, lead counsel did not have much experience with ASD, but he learned more about the disorder during his representation (Tr. 301). He learned more information about ASD from Dr. F, who also provided some reading materials on the subject (Tr. 302).

Lead counsel remembered that the State had objected to Dr. F testifying on the subject of diminished capacity, as it was not mentioned in Dr. F's report (Tr. 303-04; D34P40). At the November 30, 2016 pretrial hearing on whether Dr. F would be allowed to testify about diminished capacity, the prosecutor asked Dr. F under oath whether Mr. Godejohn's ASD prevented him from deliberating (D34P101). Dr. F answered that the deliberation was "[w]ithin the confines of his autistic disorder...There was deliberation, but it was skewed." (D34P101). Even though the language is not as strong as counsel would have liked, counsel decided to go forward with that evidence (Tr. 305). Counsel felt comfortable with Dr. F on that issue (Tr. 305-06). Counsel did not seriously consider any other experts aside from Dr. F (Tr. 306-07).

Trial counsel remembered that the State called Dr. D in rebuttal to Dr. F (Tr. 307). Dr. D found Mr. Godejohn's autism to be more mild than Dr. F did (Tr. 307). Counsel did not consider hiring an expert in autism to counter Dr. D (Tr. 307). If counsel had hired a neuropsychologist with experience in autism, he would have wanted to present that person to the jury (Tr. 308). Lead counsel testified that he did not have a strategy reason for not hiring a neuropsychologist specializing in autism, other than the fact that counsel had not hired Dr. F (Tr. 309).

Co-Counsel's Testimony

Co-counsel A.M. testified that he had a significant role in representing Mr. Godejohn at the trial (Tr. 222). He entered his appearance two years before trial (Tr. 222). He handled the suppression motion, voir dire, opening statement, and the cross-examinations of many of the State's witnesses (Tr. 222). A.M. did not have a role in hiring Dr. F, but he did work with him after the expert was hired (Tr. 223-24). They hired Dr. F for a competency evaluation (Tr. 224). Dr. F found Mr. Godejohn competent to stand trial and provided a

report diagnosing him with ASD level 2, requiring substantial support (Tr. 224).

According to A.M., the defense theory of the case was to argue for second-degree murder based on diminished capacity due to Mr. Godejohn's ASD (Tr. 225). A.M. recalled that the State objected to Dr. F testifying about diminished capacity (Tr. 225). He "unfortunately" never discussed concerns about Dr. F's experience with autism or the possibility of hiring a neuropsychologist who specializes in autism (Tr. 225-26). The defense did not have a strategic reason for not investigating and hiring a neuropsychologist with autism specialty to support diminished capacity (Tr. 226). They were comfortable with Dr. F, and it did not occur to A.M. to hire a specialist until shortly after trial (Tr. 226). Co-counsel believed that hiring a specialist "would have aided the jury quite a bit in deliberation" (Tr. 227). Co-counsel explained, "I think Dr. [F] did a good job, but he isn't an expert in autism, and I think it could have been framed properly by an expert in autism" (Tr. 227).

Co-counsel A.M. testified that he is familiar with autism and attempting to communicate with people who are autistic because A.M. has an autistic son (Tr. 291). A.M. testified, "I can state affirmatively that Mr. Godejohn is autistic, and any thoughts, ideas, notions he would have ever had would have been filtered through the brain of an autistic man (Tr. 290).

A.M. recalled G.B.'s statement that Mr. Godejohn was manipulative like G.B.'s mother (Tr. 266-67). A.M. thought that could not have been any farther from the truth (Tr. 267). In A.M.'s opinion, G.B. was like her mother because she was very manipulative (Tr. 267). "She learned the art of manipulation from her mother, and that's part and parcel of who she is" (Tr. 267).

Dr. W's Testimony

Dr. W testified at the postconviction hearing that he is a pediatric neuropsychologist (Tr. 93). He is not a forensic psychologist (Tr. 170). His specialties are neurodevelopmental disorders such as autism, attention deficit disorder, obsessive-compulsive disorder, and traumatic brain injuries (Tr. 93). He is boarded in clinical psychology from the American Board of Professional Psychology, and he is boarded in pediatric neuropsychology from the American Board of Pediatric Neuropsychology (Tr. 94). He is currently licensed in Florida and previously practiced in New York and New Jersey (Tr. 94). He has cared for thousands of children on the autism spectrum every year at large clinics in Florida (Tr. 97). He helped open two preschools for autistic children (Tr. 97). He was consulted to write laws for the State of Florida to regulate schools for autistic children (Tr. 97). He has been treating some of his same autistic patients for the past 25-30 years, from childhood into adulthood (Tr. 97-98). He has extensive experience publishing and testifying in court (Tr. 97-99; Mov. Ex. 7).

Dr. W testified that neurodevelopmental disorders have a neurological basis for the manifestations of behaviors that are not typical, and they change the way a person's brain functions (Tr. 100). Autism, including Asperger's, is a neurodevelopmental disorder (Tr. 100). ASD refers to a group of disorders, with a variety of etiological agents, that impair social judgment and social interaction in one form or another (Tr. 101). A person's neurodevelopmental disorder characterizes the way the person processes information, such that they are never free from its effects (Tr. 101). The disorder is always there modulating the information flow that comes through the person's life (Tr. 101-02).

Regarding Asperger's Syndrome specifically, Dr. W testified that it is not a current diagnosis in the United States, with the DSM-5, but it is still a potential diagnosis in other parts of the world that use a different system (Tr. 102). The term was used in the United States until around 2012, when it was grouped with autism (Tr. 103). The authors of the DSM-5 were grouping disorders together based on behaviors, rather than underlying conditions (Tr. 103). The behaviors that made a person autistic were the same behaviors that made a person with Asperger's, so they were lumped together for the purpose of diagnosis (Tr. 103).

Dr. W testified that people with Asperger's are quite different from other autistic people (Tr. 103-04). The primary difference between a person with Asperger's and a person who is classically Kanner's description of autism is that a person with Asperger's is essentially superficially social (Tr. 104). They want to be social and get along with people, but they just don't know how (Tr. 104). They don't have the social skills because they miss judgments and cues (Tr. 104). They have the same kind of social isolation as a person with classic autism, but the isolation is due to their inadequacy as opposed to a choice (Tr. 104).

People with Asperger's are more susceptible to suggestion and social manipulation because they do not pick up social cues from the interactions they have with people (Tr. 105). They are devoid of the ability to decode social language (Tr. 105). Instead, they most often get their social cues and structure from things like videos or books (Tr. 105).

Hyperfocus is relevant to all people with autism (Tr. 105). It is the selective assignment of attention to a particular area, such as trains or Legos, to the exclusion of everything else (Tr. 105-06). These days many autistic people hyperfocus on video games or other types of electronic media (Tr. 106).

Dr. W testified that the Levels 1, 2, and 3 of autism correlate to the level of disruption in the person's life and their inability to function within society (Tr. 107). It refers to the level of support that an individual needs rather than the severity of the autism (Tr. 107-08).

Regarding the term "mild" being used to describe autistic people, Dr. W pointed out that, to be classified as autistic, a person must be in the top two percent of the people who are being considered for the diagnosis (Tr. 108). It is still a rare diagnosis, and a person has to be severely impacted at baseline to be considered autistic at all (Tr. 108). The idea that someone could be "mild" and that most of the day it doesn't bother them or doesn't impact them is a misinterpretation of the word mild because an autistic person's thinking is always characterized by their autism (Tr. 108).

In preparation for the Rule 29.15 proceeding, Dr. W reviewed records, discovery, psychological reports, videos, and other information about Mr. Godejohn and the case (Tr. 109-113). He interviewed Mr. Godejohn at Potosi Correctional Center on March 25, 2022 (Tr. 109). He also considered the reports of Dr. F and Dr. D (Tr. 114-15).

After completing his evaluation of Mr. Godejohn, Dr. W found that Mr. Godejohn meets the criteria for the diagnosis of autism spectrum disorder (Tr. 115). Dr. W determined that Mr. Godejohn meets the criteria for moderate 2 (Tr. 116).

Dr. W considered significant that Mr. Godejohn had a traumatic birth, requiring intervention from difficulty breathing and the cord wrapped around his neck (Tr. 116). The records indicated that Mr. Godejohn was placed on Social Security disability at the age of 19 due to ASD/Asperger's (Tr. 116). The records indicated a severe disruption of his ability to function in society, hold employment, have friends, maintain relationships, prepare his own food, and

take care of his hygiene (Tr. 117). He had problems grasping the real world and understanding the environment around him, which is typical for patients with the Asperger's form of ASD (Tr. 118-19). When asked what he does all day, Mr. Godejohn answered that he goes on the computer, walks, eats, and sleeps (Tr. 120).

Dr. W noted that Mr. Godejohn was isolated (Tr. 121). Mr. Godejohn reported that he gets frustrated with people and does not like crowds, which is typical for ASD (Tr. 121).

Based on his review of the available materials, Dr. W discovered that Mr. Godejohn's condition affects every aspect of life, from self-care to general demeanor during the day, and to social interactions (Tr. 121). His need for support was identified early on, and he was placed in a special education program for children with neurodevelopmental disorders (Tr. 122). He went through three levels of intervention until he was receiving the most support available (Tr. 122-23). His reading and writing skills were at fourth or fifth-grade level when he was 16 years old (Tr. 124). The records indicate that the disorder has been all-encompassing for Mr. Godejohn's entire life (Tr. 125-27).

Records indicated to Dr. W that past relationships failed because Mr. Godejohn had trouble thinking (Tr. 125-26). Mr. Godejohn could not look introspectively to say what went wrong, so he was not able to draw appropriate social conclusions (Tr. 128). Like most people with Asperger's/ASD, Mr. Godejohn was desperate to have a relationship and went right back to find a new person without having learned from his prior experiences (Tr. 128).

Dr. W testified that Mr. Godejohn met G.B. on the Christian Dating for Free website in 2012 (Tr. 128). After reading Nick's profile, G.B. contacted him first (Tr. 128). They messaged on that website for a day and a half before G.B. suggested that they move to Facebook to continue their relationship (Tr. 128).

Dr. W testified that, as is typical with autistic people, Mr. Godejohn did not initiate but was responding to the direction he was getting (Tr. 129).

Mr. Godejohn kept a journal between 2012 and 2015 that detailed his online relationship with G.B. (Tr. 130). Dr. W testified that the journal reflects Mr. Godejohn's ASD/Asperger's because it mostly recounts facts instead of qualitative emotional content (Tr. 131). He wrote goodnight to himself (Tr. 131). Once he wrote, "Note to self: Always keep [G.B.] close, for she is everything I ever wanted" (Tr. 133). He also noted that he and G.B. were becoming in sync with each other by their communication (Tr. 133). The journal reflects that the relationship was all-encompassing to Mr. Godejohn (Tr. 134).

Dr. W reviewed the large number of videos that G.B. sent to Mr. Godejohn and the ones that Mr. Godejohn sent back (Tr. 134-35). The videos span from February 2013 to May 26, 2015 (Tr. 135). G.B. also communicated with Nick from her "Demona LoveSlave" account (Tr. 135). In many videos she was depicted in role-playing personas, as well as being naked and masturbating (Tr. 136). They both took turns being dominant and submissive, or "master" and "slave" (Tr. 136-37). G.B. told Mr. Godejohn when it was his turn to be master or slave (Tr. 138).

Dr. W found that the videos from G.B. to Mr. Godejohn were instructional videos (Tr. 138). Autistic people receive their information about the social requirements of relationships from the structure of videos rather than the outside world (Tr. 138). Mr. Godejohn was receiving his information about the requirements for his social relationship from the video, and not from anywhere else (Tr. 138). The various personae were feeding Mr. Godejohn instructions (Tr. 138-39). On the subject of love, for example, she instructed him, "If you love me, you will do this. If you love me, you will do that" (Tr. 139).

The instruction videos demonstrated how to stab somebody (Tr. 139). They were instruction videos that told him what the rewards would be for appropriate behavior, and they were instructional videos that told him what the punishment would be for behavior that the persona did not like (Tr. 139). It was a process of shaping a person who had social deficits into action of some form that would demonstrate his love for her (Tr. 139).

Dr. W testified that the videos would affect Mr. Godejohn differently than a non-autistic person because “[t]he videos would totally define Nick’s reality” (Tr. 139). There would not be a separate Nick out in the real world who could second-guess his role-playing (Tr. 139). When he was in the role-playing situations, “he was totally there” (Tr. 139). He was totally there in an instructional setting where she laid the ground rules for how he was to relate to her (Tr. 140).

Dr. W found G.B.’s videos to be fascinating because each role had its own set of rules (Tr. 140):

So you had Demona that was the master who was telling Nick that "If you do what I want you to do, there will be sex and there will be favors. If you don't, there will be punishment. I'll take away [G.B]." And then we have this later character introduced that basically shows up in a red wig and gives him instructions about how to hurt people and that we're going to rob and steal and all the rest of the stuff.

So these were -- it was a -- to me it was just a very organized attempt to manipulate someone who didn't have the social judgment to really suspend belief.

(Tr. 140).

Dr. W testified that role-playing is the primary way that people with ASD use to build their relationships with others (Tr. 140). The actual physical-social interaction with people is too threatening and has too much information, so, they can't process it (Tr. 141). There are treatment programs that are based

on role-playing games online (Tr. 141). People like Nick are still autistic even when they are role-playing and losing themselves to the characters (Tr. 141).

After reviewing all the videos and messages between G.B. and Mr. Godejohn, Dr. W concluded that, for the most part, it was a process of shaping Mr. Godejohn (Tr. 141). It was a process of taking a person with a social deficit and shaping his behavior by sending the instructions that, if he loved her, he would do what all of her personae asked him to do (Tr. 141).

Dr. W testified that G.B. was Mr. Godejohn's hyperfocus, and she made herself conditional upon his doing what she said (Tr. 145). It was part of the process of indoctrination, which is well-established in psychology and the military (Tr. 145). It is typical for people with Asperger's to have hyperfocused periods of time (Tr. 146). Taking her away would be very threatening and upsetting to him (Tr. 146).

Dr. W reviewed the texts between G.B. and Mr. Godejohn from the night of the murder (Tr. 146). He found that they were a continuation of the pattern where she gives him instructions (Tr. 146-47). The two years of role-playing were a foundation for the events that took place on the night of the murder (Tr. 147). They were part of programming a person with an autistic disorder to follow instructions and engage in a behavior based on the fact that he would lose his object of fascination if he did not (Tr. 147). The behavior was always equated with love because that is the only way an autistic person would be able to understand this (Tr. 147).

In one video, G.B. went into her mother's bedroom and made a stabbing motion over the bed (Tr. 148). It was significant to Dr. W because it was a demonstration of how Mr. Godejohn was supposed to engage in the behavior that would up in the death of the victim (Tr. 151). That video was dated about three weeks before the murder (Tr. 151).

About three days later, G.B. sent Mr. Godejohn another video called "Ruby's Introduction to Her Perfect Man" (Tr. 151). Ruby was a new character G.B. introduced to Nick (Tr. 151).

Ruby introduces herself as a sociopath. She says that she herself is a person that breaks the rules, violates the rules, creates mayhem, and she basically tells Nicholas that she is his perfect match. "We are together, and together we are going to go" essentially on what she describes as a "crime spree." "And we're going to rob, we're going to steal, and we're going to do all of these things because you are my perfect match. We will be together."

So it's sort of like the culmination of the training, which, again, to just remind everybody, is behavior, behavior, behavior. "If you love me, this is what you'll do." So Ruby was introduced to basically summarize that up so -- in case there was any confusion if that was what Nick understood.

(Tr. 152).

Dr. W reviewed the interrogation videos from when Mr. Godejohn was first arrested (153-54). When Mr. Godejohn was waiting for detectives to arrive, he periodically mentioned that he was worried about G.B. (Tr. 154). He was still fixated on her at that time, and an autistic person will do anything to get to their fixation (Tr. 158).

Dr. W testified that multiple times G.B. turned down Mr. Godejohn's proposal to run away instead of commit murder, which is part of the process of training (Tr. 148, 161). She eliminated alternatives until the only option left was what she wanted him to do (Tr. 148). When Mr. Godejohn arrived in Springfield on the night of the murder, it was his intention to talk G.B. out of it and run away (Tr. 161). He did not bring anything with him, and G.B. provided it all to him (Tr. 161). He tried to talk her out of it, but he was not able to because she said there was no other option (Tr. 161).

Dr. W testified that when Mr. Godejohn was walking to the victim's room, he was having an argument with himself, which is typical of someone on the spectrum because they get overwhelmed and overstimulated (Tr. 161-62). The argument in his head leads to "autistic panic," when the autistic person does not think well (Tr. 162). They panic when things get out of their control, and sometimes they are hospitalized for it (Tr. 165). It is a typical reaction when they feel pressured by competing things or things outside of their control (Tr. 165).

Like the experts at trial, Dr. W was not allowed to testify to the ultimate conclusion on the element of deliberation, pursuant to Section 490.065.2(3)(b) (Tr. 162-63). As an offer of proof, however, Dr. W was allowed to answer,

Nicholas' thinking, at the time of the murder, was characterized by the same features and factors that Nicholas' thinking was always characterized: by the -- because he's autistic and because that's how he processes information.

If Nicholas -- his fixation on [G.B.] would have characterized everything that he did, and it would have colored everything that he did. I can't state whether that meets whatever criteria you guys are talking about, but I would say, with a lot of certainty, that was his preeminent thought at the time.

(Tr. 165). Dr. W elaborated that Mr. Godejohn's thinking would have been on the things that were causing him the stress, and his focus would have been on the argument he was having with himself (Tr. 167).

Dr. W reviewed Dr. D's CV and did not see a lot of experience in treating autism, although Dr. D did report evaluating people who were autistic in certain circumstances (Tr. 167). Dr. W did not think that Dr. D purposely mischaracterized anything at trial, but his use of the word "mild" misrepresented the level of disruption in Mr. Godejohn's life (Tr. 168). It left the impression that the autism was not so bad, like Nick could go about his day

for the most part like anybody else, which is not accurate (Tr. 168-69). Mr. Godejohn is never able to think or act without the deficits of an autistic person (Tr. 169).

On cross-examination, Dr. W testified that Mr. Godejohn is able to think, but all of his thoughts are colored or characterized by ASD (Tr. 169-70). G.B. initially brought up the idea of killing her mother in a joking manner, and she got progressively more serious about it (Tr. 170-71). Mr. Godejohn was against the idea, and he asked her many times if she was certain (Tr. 171). About one year prior to the murder, Nick told a Facebook friend that he thought G.B. was crazy for wanting to kill her mom (Tr. 172). Mr. Godejohn justified the plan by bringing up how badly the victim treated G.B. (Tr. 172).

About a month before the murder, Nick told a Facebook friend, "Me and the one I'm with are defying the laws of nature to stay together. It is as bad as can be. I won't tell you what I have to do to stay with her, but I will do it if it means keeping her" (Tr. 173). Dr. W testified that this statement is exactly consistent with what Dr. W had been saying about (Tr. 173). Dr. W had reviewed and was aware of the alternative plans that had been considered as well as Nick's internet searches to prepare for the murder (Tr. 174-75).

Dr. W recalled Nick's statement that there was a moment when Nick stood outside the victim's bedroom door and something clicked, and he realized he had given his word and was bound by it (Tr. 171). Mr. Godejohn cut the back of the victim's neck so she would die quickly, and he briefly thought about having sex with the victim before deciding not to (Tr. 171).

Dr. W acknowledged that "Victor" was Mr. Godejohn's "master" character, and Mr. Godejohn had previously used that character with another girlfriend prior to G.B. (Tr. 166-67).

Dr. W testified that Nick described the argument in his head like having a devil on one shoulder and an angel on the other shoulder (Tr. 176). However, it would be a mischaracterization to think they are two rational actors having a rational conversation (Tr. 180). It was turmoil from the pressure of two competing sets of thought, and Mr. Godejohn would have described it as “arguing” because his vocabulary was limited (Tr. 180). From the pressure between love and the general rules of society, Nick went back and forth and reached a point where he snapped (Tr. 180-81). Dr. W would not characterize it as a conversation in Nick’s head because it was more like pressure (Tr. 182).

Plea Offers

The prosecutor stated at the postconviction hearing that Mr. Godejohn was twice offered mitigated plea deals to plead guilty to murder in the second degree, with a life sentence, and the prosecutor had taken mitigation into account when he extended those offers to Mr. Godejohn (Tr. 57). The State believed that the case was prosecutable with deliberation and that the State would be able to overcome Dr. F’s testimony if put to the test, but the State also believed that a just result could have been reached short of trial (D23P10; Resp. Ex. A). Mr. Godejohn was open to a plea deal but rejected the specific offers because he was hoping for a sentence closer to the 10-year sentence that G.B. received (Tr. 315, 318, 328-29).

Findings of Fact and Conclusions of Law

At the conclusion of the evidentiary hearing, the motion court announced, “I’m sort of like Nicholas. I do better reading than listening. If I may suggest that you give me written suggestions, if you wish to do so” (Tr. 388). The prosecutor asked, “May we do so in the form of a proposed order?”

(Tr. 388). The Court allowed the parties to submit their suggestions in the form of their choice (Tr. 388).

Postconviction counsel submitted Mr. Godejohn's proposed findings of fact and conclusions of law on September 26, 2022, and the State followed on October 11, 2022 (D20P1; D21P1).

On February 22, 2023, the motion court signed the State's proposed judgment, adopting it as the court's judgment verbatim (D21; D22; D23).

In denying Claim A, the motion court found that Dr. F, who had testified at Mr. Godejohn's trial and in about 120 prior cases, was an expert in the field of forensic psychology, including ASD (D23P6). Dr. F testified that Mr. Godejohn's IQ was in the low average range, and he diagnosed Mr. Godejohn with ASD level 2, requiring substantial support with accompanying intellectual impairment (D23P6). Dr. F further testified about Mr. Godejohn's social deficits (D23P6). When asked how ASD affects a person's ability to deliberate, Dr. F testified, "It's going to reduce it. He's going to have difficulty with any kind of cognitive task, any kind of social task, any sort of reasoning. It's going to reduce it" (D23P6).

The motion court's judgment recounts Dr. W's testimony at the evidentiary hearing (D23P6-7). The judgment notes, "Dr. [W], however, did not testify that Movant's mental disease precluded him from deliberating. Nor would such testimony have been credible as in this case there was overwhelming evidence of Movant's deliberation." The judgment then copied the list of "overwhelming" evidence from this Court's Statement on direct appeal (D23P7-8; D45P5). On the subject of manipulation, the judgment held,

Movant relies heavily upon Dr. [W]'s testimony that because of his ASD, Movant was susceptible to manipulation by [G.B]. First, there was considerable evidence that Movant himself engaged in portions of the planning of the murder independently of [G.B.] and that he considered his options over the course of year and just

before committing the crime. Second, even if Movant was susceptible to such manipulation, Missouri law contemplates that a person can deliberate upon committing a murder while also being under the domination of another person. See, Section 565.032.3(5), RSMo, which provides that after a defendant is convicted of murder in the first degree in a death penalty case, a statutory mitigating factor is that “the defendant acted under extreme duress or under the substantial domination of another person.” Also note that duress is not a defense to murder. See Section 562.071, RSMo.

(D23P7).

The judgment held that Mr. Godejohn failed to demonstrate that counsel’s performance was deficient in the strategic choice of Dr. F over another expert who may have testified more favorably (D23P8). The judgment cited caselaw holding that the selection of witnesses is unchallengeable trial strategy, and defense counsel is not obligated to shop for an expert witness who might provide more favorable testimony (D23P8).

Mr. Godejohn timely filed his notice of appeal on March 24, 2023, and this appeal follows (D24P1).

POINT RELIED ON

The motion court clearly erred in denying Mr. Godejohn's Rule 29.15 motion because a review of the record leaves a definite and firm impression that he was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 18(a) of the Missouri Constitution, in that trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to fully investigate and present evidence from a qualified neuropsychologist specializing in Autism Spectrum Disorder to support the diminished capacity defense. Mr. Godejohn was prejudiced because the testimony of a neuropsychologist specializing in ASD would have caused the jury to have a reasonable doubt as to the deliberation element, and there is a reasonable probability that Mr. Godejohn would not have been found guilty of first-degree murder.

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

Vaca v. State, 314 S.W.3d 331 (Mo. 2010);

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

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

Mo. Const., Art. I, Sec. 18(a); and

Mo. Sup. Ct. Rule 29.15.

ARGUMENT

The motion court clearly erred in denying Mr. Godejohn's Rule 29.15 motion because a review of the record leaves a definite and firm impression that he was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 18(a) of the Missouri Constitution, in that trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to fully investigate and present evidence from a qualified neuropsychologist specializing in Autism Spectrum Disorder to support the diminished capacity defense. Mr. Godejohn was prejudiced because the testimony of a neuropsychologist specializing in ASD would have caused the jury to have a reasonable doubt as to the deliberation element, and there is a reasonable probability that Mr. Godejohn would not have been found guilty of first-degree murder.

Preservation and Standard of Review

This claim is preserved because it was included in the amended motion as Claim A (D13P2-15, 101-08).

A postconviction movant must demonstrate counsel's performance was deficient, that is, counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This requires a showing that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the movant was thereby prejudiced. *Id.* To prove prejudice, a movant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Butler*, 951 S.W.2d 600, 608 (Mo. 1997). A "reasonable probability" is a probability sufficient to undermine

confidence in the outcome. *State v. Johnson*, 968 S.W.2d 686, 695 (Mo. 1998). The motion court's findings and conclusions are reviewed for clear error. *Id.* The findings and conclusions are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Id.*

Adopting Proposed Judgment

The motion court signed the prosecutor's proposed judgment, adopting it verbatim (D21; D22; D23). Signing off on a party's proposed findings verbatim is not the best practice, and it may cause a problem as to appearance. *State v. Griffin*, 848 S.W.2d 464, 471-72 (Mo. 1993). "The preferable practice is for the trial court to prepare its own specific findings of fact and conclusions of law so as to better insure that all issues raised are addressed and that erroneous allegations of a fact or law made in a state's motion are not incorporated in a court order." *Goad v. State*, 839 S.W.2d 749, 751 (Mo. App. 1992) (quoting *Malone v. State*, 747 S.W.2d 695, 699 (Mo. App. 1988)).

However, "[a]dopting one party's proposed findings of fact and conclusions of law 'has become a common practice in Missouri courtrooms and raises no constitutional problems so long as the court, after independent reflection, concurs with the contents of the proposed findings and conclusions.'" *Ferguson v. State*, 325 S.W.3d 400, 414 (Mo. App. 2010) (quoting *Skillicorn v. State*, 22 S.W.3d 678, 690 (Mo. 2000)). "Still, to be valid, the proposed findings of fact and conclusions of law must be supported by the evidence." *Skillicorn* at 690. Given the law of this state and this country on ineffective assistance of counsel, there will be times when the state's proposal will be correct. *State v. Griffin*, 848 S.W.2d at 472.

"In cases such as this one, the trial court should take care in adopting one party's interpretation of the case[.]" *McHugh v. Slomka*, 531 S.W.3d 588,

593, n. 3 (Mo. App. 2017). “Advocates are prone to excesses of rhetoric and lengthy recitals of evidence favorable to their side but which ignore proper evidence or inferences from evidence favorable to the other party. Trial judges are well advised to approach a party's proposed order with the sharp eye of a skeptic and the sharp pencil of an editor.” *Id.* (quoting *Massman Const. Co. v. Mo. Hwy. & Transp. Commn.*, 914 S.W.2d 801, 804 (Mo. 1996)).

In drafting its proposed judgment, the State made the same arguments about Sections 562.071 and 565.032 that it had made at the evidentiary hearing (Tr. 279-80; D21P7; D23P7). But the duress statute is inapplicable because Mr. Godejohn was using a diminished capacity defense rather than duress, and evidence about manipulation could be relevant to either defense. The death penalty mitigation statute is also inapplicable because the jury in a capital trial could consider evidence of manipulation on the issue of deliberation in the guilt phase *and/or* on the issue of punishment in the penalty phase. The fact that manipulation is a mitigating circumstance in the penalty phase does not mean that it is not relevant to the issue of deliberation in the guilt phase. Some evidence is relevant in both phases. The State assumes that manipulation could never factor into whether someone deliberated, even if the person was affected by a mental disease or defect. The motion court signed the proposed judgment even though it contained the inapplicable statutes (D21; D22).

When the Court is considering the merits of the *Strickland* claim, Mr. Godejohn prays the Court will be mindful that the motion court's judgment was originally the prosecutor's “suggestions” “in the form of” a proposed judgment (Tr. 388). The inapplicable statutes were examples of “excesses of rhetoric” from an advocate. *See Massman Const. Co. v. Mo. Hwy. & Transp.*

Commn., 914 S.W.2d at 804 (signed proposed order did not properly respond to motion for additur).

Performance Prong

The motion court held that Claim A was alleging ineffective assistance of counsel for defense counsel's selection of a less favorable expert witness over a more favorable one (D23P8). The judgment cites caselaw holding that defense counsel is not obligated to shop for an expert witness who might provide more favorable testimony (D23P8). *See Goodwin v. State*, 191 S.W.3d 20, 29 (Mo. 2006); *Taylor v. State*, 126 S.W.3d 755, 762 (Mo. 2004).

This is not a case about shopping among experts until more favorable testimony is found. It is about experts being specialists in different fields, and investigations into different fields being reasonable and necessary in different situations. For example, a patient with chest problems might need either a cardiologist or a pulmonologist, or both.¹

In *Vaca v. State*, 314 S.W.3d 331, 334 (Mo. 2010), the postconviction movant alleged that counsel was ineffective for failing to give consideration to a mental health report or enter it into evidence. The court considered whether to treat the claim as failure to call a witness. *Id.* Like the motion court here, the Supreme Court remembered that "the selection of witnesses and evidence

¹ The amended motion does not allege that trial counsel was ineffective for affirmatively choosing to call Dr. F as a witness at trial, although the pleading assumes that a neuropsychologist specializing in ASD would have testified "instead" of Dr. F (D13P2-100; D13P5). The heading and first paragraph of Claim A allege that counsel was ineffective for *not* fully investigating and presenting evidence from a neuropsychologist specializing in ASD (D2P2-3). That pleading leaves open the possibilities that Dr. F may or may not have testified in addition to a neuropsychologist specializing in ASD (D13P2-15). The claim points out that the State previously argued that Dr. F is not qualified on the issues in this case, and that put counsel on notice to investigate a neuropsychologist specializing in ASD (D13P6-7; D34P109).

are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim” *Id.* at 336. The Supreme Court then pivoted, as Mr. Godejohn did in his amended motion, noting, “However, this is true “[w]here counsel has investigated possible strategies.” *Id.* (D13P5). In *Vaca*, defense counsel admitted that he gave no consideration to calling the author of the mental health report, and there “was no strategic reason” for not calling him. *Id.* The Supreme Court stated, “the holding of this case is not that counsel was ineffective for not calling Dr. Geis. Rather, this case rests on the fact that the question of whether to call Dr. Geis was never considered. *Id.* at 337.

Similarly, in Mr. Godejohn’s case, lead counsel knew early in the representation that Mr. Godejohn had been diagnosed with autism as a child and Asperger’s Syndrome as a teenager (Tr. 298-99). Counsel reviewed Mr. Godejohn’s Social Security disability records (Tr. 299). Trial counsel hired Dr. F to evaluate whether Mr. Godejohn was competent to stand trial (Tr. 299). Dr. F made a report and found that Mr. Godejohn had ASD but was competent to stand trial (Tr. 300). Trial counsel had not requested that Dr. F look into diminished capacity, but Dr. F brought it to counsel’s attention as something he had real questions about (Tr. 300).

Lead counsel and co-counsel both remembered that the State had objected to Dr. F testifying on the subject of diminished capacity, as it was not mentioned in Dr. F’s report (Tr. 225; 303-04; D34P40). At the November 30, 2016 pretrial hearing on whether Dr. F would be allowed to testify about diminished capacity, the prosecutor asked Dr. F under oath whether Mr. Godejohn’s ASD prevented him from deliberating (D34P101). Dr. F answered that the deliberation was “[w]ithin the confines of his autistic disorder...There was deliberation, but it was skewed.” (D34P101). Even though the language is

not as strong as counsel would have liked, counsel decided to go forward with that evidence (Tr. 305).

Trial counsel remembered that the State called Dr. D in rebuttal to Dr. F (Tr. 307). Dr. D found Mr. Godejohn's autism to be milder than Dr. F did (Tr. 307). Counsel did not consider hiring an expert in autism to counter Dr. D (Tr. 307). If counsel had hired a neuropsychologist with experience in autism, he would have wanted to present that person to the jury (Tr. 308).

The defense did not have a strategic reason for not investigating and hiring a neuropsychologist with autism specialty to support diminished capacity (Tr. 226). Lead counsel testified that he did not have a strategy reason for not hiring a neuropsychologist specializing in autism, other than the fact that counsel had Dr. F (Tr. 309). Counsel felt comfortable with Dr. F on the issue of deliberation (Tr. 226, 305-06). Counsel did not seriously consider any other experts aside from Dr. F (Tr. 306-07). It did not occur to co-counsel to hire a specialist until shortly after trial (Tr. 226). Co-counsel believed that hiring a specialist "would have aided the jury quite a bit in deliberation" (Tr. 227). Co-counsel explained, "I think Dr. [F] did a good job, but he isn't an expert in autism, and I think it could have been framed properly by an expert in autism" (Tr. 227). Co-counsel "unfortunately" never discussed concerns about Dr. F's experience with autism or the possibility of hiring a neuropsychologist who specializes in autism (Tr. 225-26).

This case is analogous to *Vaca*. Like defense counsel in *Vaca*, Mr. Godejohn's defense counsel unreasonably stopped all investigation and consideration into the subject of diminished capacity just when the facts necessitated that counsel "retain the flexibility to make strategic decisions" by considering whether to investigate more. 314 S.W.3d at 336-37.

Counsel may choose to call or not call almost any type of witness or to introduce or not introduce any kind of evidence for strategic

considerations. Here however, experienced defense counsel candidly admitted that, without consideration and for no strategic reason, he failed to call a mental health expert. His failure to consider was ineffective.

Id. at 337.

In Mr. Godejohn's case, Dr. F had testified at the offer of proof hearings, and counsel was aware of the substance of his testimony, his limited experience in autism, his limited experience on the issue of diminished capacity, and the State's objections. Both attorneys testified that they failed to consider a specialist between that point and the trial. Under *Vaca*, their failure to consider made their performance deficient.

Having previously argued that Dr. F was not qualified to testify on the issue of diminished capacity in Missouri (D34P109), it would be inconsistent for the State now to argue that Dr. W was the same type of expert as Dr. F, such that no additional consideration or investigation was necessary.

Returning to the hypothetical case where a patient with chest problems might need a cardiologist and/or a pulmonologist, let us assume that a cardiologist was called at trial, and the defendant was found guilty. If no investigation into the field of pulmonology had been attempted or even considered by trial counsel, and postconviction counsel later proved that an expert in that field would have made a difference, an appellate court following *Vaca* would not hold that the claim was simply expert-shopping. The Court would hold that there was ineffective assistance of counsel because defense counsel must remain flexible by at least considering whether to investigate all reasonable avenues. *Vaca* at 237. Even though there might be some overlap on the topic of general medicine, the two specialists would aid the jury in understanding different specialties (of which there was no overlap).

Similarly, here, the claim is not expert-shopping but an unreasonable failure to investigate. Had the investigation been considered, defense counsel would have learned the substance of Dr. W's testimony, and trial counsel too would have wanted to put that evidence on if they knew it was available (Tr. 227, 308). Trial counsel did not give themselves the flexibility under *Vaca* to make that decision because they never investigated or even considered investigating a neuropsychologist specializing in ASD.

For these reasons, the motion court clearly erred in finding that Mr. Godejohn's trial counsel were not ineffective.

Prejudice Prong

As co-counsel testified, an expert in autism, such as Dr. W, frames the question of deliberation differently than it had been framed at trial (Tr. 227). After considering the testimony of Dr. W, the question for the jury on the element of deliberation becomes whether ASD colored Mr. Godejohn's thinking to the point that G.D.'s programming and instructions caused enough pressure in his mind to stop him from coolly reflecting.

The Court's Statement on direct appeal lists the "overwhelming" evidence of deliberation (D45P5), but the jury was not made aware by a specialist in autism that ASD "colors" or "characterizes" each item on the list (Tr. 169-70). Dr. W's testimony changes each item that the Court listed as overwhelming evidence at D45P5, as follows: (1) although Mr. Godejohn and G.B. discussed the proposed crime for over a year, G.B.'s programming and manipulation would have affected Mr. Godejohn's thinking through his autism, which always modulates his information; (2) although Nick and G.B. rejected alternative courses of action and communicated about what equipment they would need, G.B. threatened to take away Mr. Godejohn's autistic hyperfocus; (3) although they texted while he traveled to Springfield

to commit the crime, Mr. Godejohn planned to talk G.B. out of it and was pressured to follow her instructions because she used characters to threaten to take herself away if he did not; and (4) although Mr. Godejohn stopped to think about the crime immediately before committing it, his mind was in turmoil and under pressure by autistic panic (D45P5).

Had the jury known that each item on the list of “overwhelming” evidence was actually part of a perfect storm of circumstances to affect Mr. Godejohn’s mental condition and overpower his freewill, the jury likely would have found that Nick did not deliberate due to his programming, instructions, and ASD/Asperger’s.

It is easy to think of scenarios in which a mountain of evidence seems insurmountable, but one additional fact re-characterizes the entire mountain. For example, we can imagine a jury trial for an accused bank robber. If ten eyewitnesses all independently identify the defendant as the robber, the reviewing court on direct appeal could characterize the evidence as “overwhelming.” If, at the postconviction stage, however, an exhibit was admitted to demonstrate that all ten eyewitnesses had previously been found guilty of conspiring together to frame another person, the single additional fact would require the postconviction court to re-examine the earlier determination that the evidence had been overwhelming. The single additional fact would demonstrate prejudice and require a new trial because the single fact re-colors or re-characterizes the entire mountain of evidence from before.

In diminished capacity cases in general, the evidence of deliberation often seems to be overwhelming before the evidence about the defendant’s mental disease or defect is introduced. The actus reus is usually obvious and undisputed, and the mens rea is called into question when the defendant puts on evidence of mental disease or defect.

The same is true here with the additional facts now available about Mr. Godejohn's mental condition. Given that Mr. Godejohn exercised his right to a jury and that the sole disputed issue is the deliberation element, only the jury can determine whether Mr. Godejohn's ASD and Asperger's resulted in diminished capacity or not. Only testimony from a specialist in autism like Dr. W could help the jury understand the question before it.

Dr. W testified at the postconviction hearing that he is a pediatric neuropsychologist specializing in neurodevelopmental disorders, such as autism, attention deficit disorder, obsessive-compulsive disorder, and traumatic brain injuries (Tr. 93). Dr. W testified that autism, like all neurodevelopmental disorders, has a neurological basis for the manifestations of behaviors that are not typical, and it changes the way a person's brain functions (Tr. 100). ASD refers to a group of disorders, with a variety of etiological agents, that impair social judgment and social interaction in one form or another (Tr. 101). A person's neurodevelopmental disorder characterizes the way the person processes information, such that they are never free from its effects (Tr. 101). The disorder is always there modulating the information flow that comes through the person's life (Tr. 101-02).

Dr. W testified that people with Asperger's, like Mr. Godejohn, are quite different from other autistic people (Tr. 103-04). The primary difference between a person with Asperger's and a person who is classically Kanner's description of autism is that a person with Asperger's is essentially superficially social (Tr. 104). They want to be social and get along with people, but they just don't know how (Tr. 104). They don't have the social skills because they miss judgments and cues (Tr. 104). They have the same kind of social isolation as a person with classic autism, but the isolation is due to their inadequacy as opposed to a choice (Tr. 104). People with Asperger's are more

susceptible to suggestion and social manipulation because they do not pick up social cues from the interactions they have with people (Tr. 105). They are devoid of the ability to decode social language (Tr. 105). Instead, they most often get their social cues and structure from things like videos or books (Tr. 105).

Hyperfocus is relevant to all people with autism (Tr. 105). It is the selective assignment of attention to a particular area, such as trains or Legos, to the exclusion of everything else (Tr. 105-06). These days many autistic people hyperfocus on video games or other types of electronic media (Tr. 106).

Dr. W testified that the Levels 1, 2, and 3 of autism correlate to the level of disruption in the person's life and their inability to function within society (Tr. 107). It refers to the level of support that an individual needs rather than the severity of the autism (Tr. 107-08).

Regarding the term "mild" being used to describe autistic people, Dr. W pointed out that, to be classified as autistic, a person must be in the top two percent of the people who are being considered for the diagnosis (Tr. 108). It is still a rare diagnosis, and a person has to be severely impacted at baseline to be considered autistic at all (Tr. 108). Dr. W believed the word "mild" misrepresented the level of disruption in Mr. Godejohn's life (Tr. 168). It left the impression that the autism was not so bad, like Nick could go about his day for the most part like anybody else, which is not accurate (Tr. 168-69). Mr. Godejohn is never able to think or act without the deficits of an autistic person (Tr. 169). Although he is able to think, all of his thoughts are colored or characterized by ASD (Tr. 169-70). An autistic person's thinking is always characterized by their autism (Tr. 108).

Based on his review of the available materials, Dr. W discovered that Mr. Godejohn's condition affects every aspect of life, from self-care to general

demeanor during the day, and to social interactions (Tr. 121). The records indicate that the disorder has been all-encompassing for Mr. Godejohn's entire life (Tr. 125-27).

Dr. W found that Mr. Godejohn meets the criteria for the diagnosis of autism spectrum disorder, level 2 (moderate) (Tr. 115-16).

Records indicated to Dr. W that past relationships failed because Mr. Godejohn had trouble thinking (Tr. 125-26). Mr. Godejohn could not look introspectively to say what went wrong, so he was not able to draw appropriate social conclusions (Tr. 128). Like most people with Asperger's/ASD, Mr. Godejohn was desperate to have a relationship and went right back to find a new person without having learned from his prior experiences (Tr. 128).

Dr. W testified that Mr. Godejohn met G.B. on the Christian Dating for Free website in 2012 (Tr. 128). After reading Nick's profile, G.B. contacted him first (Tr. 128). They messaged on that website for a day and a half before G.B. suggested that they move to Facebook to continue their relationship (Tr. 128). Dr. W testified that, as is typical with autistic people, Mr. Godejohn did not initiate but was responding to the direction he was getting (Tr. 129).

Mr. Godejohn kept a journal between 2012 and 2015, and the journal reflects that Mr. Godejohn's relationship with G.B. was all-encompassing to him (Tr. 134).

Dr. W reviewed the large number of videos that G.B. sent to Mr. Godejohn and the ones that Mr. Godejohn sent back (Tr. 134-35). The videos span from February 2013 to May 26, 2015 (Tr. 135). G.B. also communicated with Nick from her "Demona LoveSlave" account (Tr. 135). In many videos she was depicted in role-playing personas, as well as being naked and masturbating (Tr. 136). They both took turns being dominant and submissive,

or “master” and “slave” (Tr. 136-37). G.B. told Mr. Godejohn when it was his turn to be master or slave (Tr.138).

Dr. W found that the videos from G.B. to Mr. Godejohn were instructional videos (Tr. 138). Autistic people receive their information about the social requirements of relationships from the structure of videos rather than the outside world (Tr. 138). Mr. Godejohn was receiving his information about the requirements for his social relationship from the video, and not from anywhere else (Tr. 138). The various personae were feeding Mr. Godejohn instructions (Tr. 138-39). On the subject of love, for example, she instructed him, “If you love me, you will do this. If you love me, you will do that” (Tr. 139).

The instruction videos demonstrated how to stab somebody (Tr. 139). They were instruction videos that told him what the rewards would be for appropriate behavior, and they were instructional videos that told him what the punishment would be for behavior that the persona did not like (Tr. 139). It was a process of shaping a person who had social deficits into action of some form that would demonstrate his love for her (Tr. 139).

Dr. W testified that the videos would affect Mr. Godejohn differently than a non-autistic person because “[t]he videos would totally define Nick’s reality” (Tr. 139). There would not be a separate Nick out in the real world who could second-guess his role-playing (Tr. 139). When he was in the role-playing situations, “he was totally there” (Tr. 139). He was totally there in an instructional setting where she laid the ground rules for how he was to relate to her (Tr. 140).

Dr. W found G.B.’s videos to be fascinating because each role had its own set of rules (Tr. 140):

So you had Demona that was the master who was telling Nick that "If you do what I want you to do, there will be sex and there will be favors. If you don't, there will be punishment. I'll take away

[G.B.]" And then we have this later character introduced that basically shows up in a red wig and gives him instructions about how to hurt people and that we're going to rob and steal and all the rest of the stuff.

So these were -- it was a -- to me it was just a very organized attempt to manipulate someone who didn't have the social judgment to really suspend belief.

(Tr. 140).

Dr. W testified that role-playing is the primary way that people with ASD use to build their relationships with others (Tr. 140). The actual physical-social interaction with people is too threatening and has too much information, so, they can't process it (Tr. 141). There are treatment programs that are based on role-playing games online (Tr. 141). People like Nick are still autistic even when they are role-playing and losing themselves to the characters (Tr. 141).

After reviewing all the videos and messages between G.B. and Mr. Godejohn, Dr. W concluded that, for the most part, it was a process of shaping Mr. Godejohn (Tr. 141). It was a process of taking a person with a social deficit and shaping his behavior by sending the instructions that, if he loved her, he would do what all of her personae asked him to do (Tr. 141).

Dr. W testified that G.B. was Mr. Godejohn's hyperfocus, and she made herself conditional upon his doing what she said (Tr. 145). It was part of the process of indoctrination, which is well-established in psychology and the military (Tr. 145). It is typical for people with Asperger's to have hyperfocused periods of time (Tr. 146). Taking her away would be very threatening and upsetting to him (Tr. 146).

Dr. W reviewed the texts between G.B. and Mr. Godejohn from the night of the murder and found that they were a continuation of the pattern where she gives him instructions (Tr. 146-47). The two years of role-playing were a foundation for the events that took place on the night of the murder (Tr. 147).

They were part of programming a person with an autistic disorder to follow instructions and engage in a behavior based on the fact that he would lose his object of fascination if he did not (Tr. 147). The behavior was always equated with love because that is the only way an autistic person would be able to understand this (Tr. 147).

In a video dated three weeks before the murder, G.B. went into her mother's bedroom and made a stabbing motion over the bed (Tr. 148, 151). It was significant to Dr. W because it was a demonstration of how Mr. Godejohn was supposed to engage in the behavior that would up in the death of the victim (Tr. 151). A few days later, G.B. sent Mr. Godejohn another video called "Ruby's Introduction to Her Perfect Man" (Tr. 151). Ruby was a new character G.B. introduced to Nick (Tr. 151).

Ruby introduces herself as a sociopath. She says that she herself is a person that breaks the rules, violates the rules, creates mayhem, and she basically tells Nicholas that she is his perfect match. "We are together, and together we are going to go" essentially on what she describes as a "crime spree." "And we're going to rob, we're going to steal, and we're going to do all of these things because you are my perfect match. We will be together."

So it's sort of like the culmination of the training, which, again, to just remind everybody, is behavior, behavior, behavior. "If you love me, this is what you'll do." So Ruby was introduced to basically summarize that up so -- in case there was any confusion if that was what Nick understood. (Tr. 152).

When Mr. Godejohn was arrested and being held for questioning, he was still fixated on G.B. at that time, which demonstrated to Dr. W the general principle that an autistic person will do anything to get to their fixation (Tr. 158).

Dr. W testified that multiple times G.B. turned down Mr. Godejohn's proposal to run away instead of commit murder, which is part of the process of training (Tr. 148, 161). She eliminated alternatives until the only option left was what she wanted him to do (Tr. 148). When Mr. Godejohn arrived in Springfield on the night of the murder, it was his intention to talk G.B. out of it and run away (Tr. 161). He did not bring anything with him, and G.B. provided it all to him (Tr. 161). He tried to talk her out of it, but he was not able to because she said there was no other option (Tr. 161).

Dr. W testified that the argument in Nick's head was more like pressure than rational debate (Tr. 176-82). Mr. Godejohn was likely having autistic panic when he entered the victim's house and killed her (Tr. 161-65).

Like the experts at trial, Dr. W was not allowed to testify to the ultimate conclusion on the element of deliberation, pursuant to Section 490.065.2(3)(b) (Tr. 162-63). As an offer of proof, however, Dr. W was allowed to answer,

Nicholas' thinking, at the time of the murder, was characterized by the same features and factors that Nicholas' thinking was always characterized: by the -- because he's autistic and because that's how he processes information.

If Nicholas -- his fixation on [G.B.] would have characterized everything that he did, and it would have colored everything that he did. I can't state whether that meets whatever criteria you guys are talking about, but I would say, with a lot of certainty, that was his preeminent thought at the time.

(Tr. 165). Dr. W elaborated that Mr. Godejohn's thinking would have been on the things that were causing him the stress, and his focus would have been on the argument he was having with himself (Tr. 167). All of this testimony would be admissible at trial because none of it reaches the ultimate conclusion of whether Mr. Godejohn coolly reflected/deliberated or not at the time of the crime.

Dr. W would not need to testify to the ultimate conclusion of the deliberation element to make a difference in the verdict at Mr. Godejohn's trial. His testimony about the pressure and turmoil that an autistic person feels when their fixation is in jeopardy would be enough to satisfy a reasonable probability of diminished capacity. His testimony about how G.D. programmed Nick through his ASD and instructed him would have been enough for the jury to determine that Nick's will was overborne at the time of the murder, without Dr. W testifying to the conclusion.

There is a reasonable probability that investigating a specialist in autism would have led to testimony like Dr. W's being adduced at trial, which would have led to a not guilty finding on the element of deliberation. Given Dr. W.'s postconviction testimony about manipulation, autistic panic, pressure, and turmoil, only a jury should determine whether ASD and Asperger's colored Mr. Godejohn's thinking so much that he did not meet the definition of deliberation.

The prosecutor stated at Mr. Godejohn's postconviction hearing that the State offered plea bargains for Nick to plead guilty to murder in the second degree, with a life sentence, and the prosecutor had taken Mr. Godejohn's mitigating circumstances into account when he extended those offers to Mr. Godejohn (Tr. 57). The State believed that the case was prosecutable with deliberation and that the State would be able to overcome Dr. F's testimony if put to the test, but the State also believed that a just result could have been reached short of trial (D23P10; Resp. Ex. A). Having previously recognized Mr. Godejohn's autism as a mitigating circumstance, and having recognized that Dr. F's testimony would put the State to the test on the issue of deliberation, it would be inconsistent for the State to argue now that a jury would never decide the deliberation element differently, even with Dr. W's testimony.

An appellate court has previously found prejudice and granted a new trial when available autism evidence was not introduced to the jury, albeit in a direct appeal case. *State v. Boyd*, 143 S.W.3d 36, 47 (Mo. App. 2004). In that case, after finding that it was an error to exclude evidence of the defendant's Asperger's, the appellate court considered the issue of prejudice. The reviewing court noted that the evidence against Boyd came from highly-suspect witnesses who had struck plea deals for reduced charges, and whose testimony was riddled with inconsistencies. *Id.* Similarly here, G.B. struck a plea deal and testified that Nick helped plan the murder by deciding what the weapon would be and what their story would be (D37P51, 72). In addition, the new evidence re-colors all of the prior evidence on the disputed issue.

Mr. Godejohn does not argue that ASD or Asperger's always vitiates deliberation. Under the specific facts in this case, like in *Boyd*, Mr. Godejohn's diagnoses are relevant to a particular part of the factual scenario. In *Boyd*, the diagnosis was particularly relevant because, in order to be guilty, the defendant would have been required to lead others through the woods, but his Asperger's made it unlikely that he could have led others. Similarly, here, Mr. Godejohn's specific conditions made him highly susceptible to being manipulated, and the evidence was that G.B. did manipulate him over the course of years. The manipulation that Mr. Godejohn experienced played right into his ASD and Asperger's diagnoses, and the combination was enough in this particular scenario to cause autistic panic and negate the deliberation element.

For these reasons, the motion court clearly erred in finding that Mr. Godejohn failed to demonstrate *Strickland* prejudice.

Because the motion court clearly erred on both *Strickland* prongs, this Court should reverse and remand for a new trial.

CONCLUSION

For the reasons stated herein, Nicholas P. Godejohn respectfully requests that this Court reverse the findings of the motion court, vacate Mr. Godejohn's convictions, and remand the case to the trial court for a new trial or sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Tyler P. Coyle, 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 in Century Schoolbook size 13-point font. Excluding the cover page, the signature block, this certificate of compliance, and appendix, the brief contains 13,168 words, which does not exceed the 31,000 words allowed for an appellant's brief. This brief was served on the opposing party through the electronic filing system pursuant to Rule 103.08.

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