

NO. 84934

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel.
JUDITH WOOD,

Relator,

v.

JENNIFER MILLER, Supt.
Chillicothe Correctional Center,

Respondent.

BRIEF FOR RELATOR

ELIZABETH UNGER CARLYLE
ATTORNEY FOR RELATOR
200 S.E. Douglas St., Ste. 200
Lee's Summit, MO 64063
(816) 525-6540
FAX (816) 525-1917
Missouri Bar Number 41930

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JUDITH WOOD,

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Chillicothe Correctional Center,

Respondent.

JURISDICTIONAL STATEMENT

Judith Wood was convicted upon her plea of guilty of the offense of second degree murder and sentenced to life imprisonment. The date of judgment and conviction (in the circuit court of Barton County, Missouri) was January 28, 1997. The current action before the Court originated when Ms. Wood filed a petition for writ of habeas corpus in this Court challenging the legality of her conviction and

sentence. This petition followed substantially similar petitions filed in the circuit court of Livingston County, Missouri (Cause No. CV701-138CC, relief denied April 21, 2002) and the Missouri Court of Appeals, Western District (Cause No. WD62118, relief denied November 14, 2002.) Pursuant to Missouri Supreme Court Rules 91.02(a) and 84.22(a), this Court has jurisdiction over the petition.

STATEMENT OF FACTS

Overview and Statement of Issues.

Ms. Wood contends that her conviction and sentence should be vacated, and that she should be permitted to withdraw her plea of guilty, because her plea was involuntary and was the result of ineffective assistance of counsel. She contends that she is entitled to habeas corpus relief because she can demonstrate cause and prejudice for not raising the issues in a post-conviction proceeding, and because she is actually innocent. The issues raised in her petition are:

1. Trial counsel failed to investigate the possibility that the murder of which Ms. Wood was convicted had been committed by Ms. Wood's estranged paramour, Ed Spaulding.
2. Trial counsel failed to attack effectively Ms. Wood's confession.
3. Trial counsel failed to challenge the warrantless search of Ms. Wood's home, where the alleged murder weapon was seized.

4. Trial counsel misled Ms. Wood concerning the plea agreement, and she did not understand the effect of the sentence she would receive.

Procedural background.

Ms. Wood was convicted of second degree murder upon her *Alford*¹ plea of guilty and sentenced to life imprisonment. A charge of first degree murder was dismissed as part of the plea agreement. A copy of the transcript of the guilty plea and sentencing is attached as Exhibit 2 to her original petition for writ of habeas corpus filed in this court.

Prior to the plea of guilty, Ms. Wood's trial counsel filed a motion to suppress her statement. The motion was denied. Ms. Wood failed to file a timely motion under Mo. Sup. Ct. R. 24.035 because she was informed by her trial counsel that he had appealed her conviction on the grounds that her statement should have been suppressed. Ms. Wood's affidavits are attached as Exhibits 3 and 4 to the original petition for writ of habeas corpus filed in this court. Her belief that an appeal had been filed is supported by the trial court record in this case; trial counsel stated on the record at the conclusion of the plea and sentencing proceedings that he wished to appeal on this issue. The prosecutor responded that

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970), held that a defendant may enter a plea of guilty without admitting the facts of the offense.

if the case was remanded, he would no longer offer a plea to second degree murder. Pet. Ex. 2, p. 17.

Once Ms. Wood finally learned that no appeal had been filed, she attempted to obtain the documents pertinent to her case from trial counsel and from the trial court so that she could pursue *pro se* remedies. Obtaining these documents took over a year. She then mistakenly filed an untimely *pro se* motion under Sup. Ct. R. 24.035. Such motions are not permitted, and the Rule 24.035 motion was dismissed as untimely. Pet. Ex. 3, 4. See also Pet. Ex. 5, the affidavit of Mrs. Wood's daughter, Kimberly Wood Rowe, concerning her communications with trial counsel.

Ms. Wood has filed substantially similar petitions for writ of habeas corpus in the circuit court of Livingston County, Missouri and in the Missouri Court of Appeals, Western District. In the circuit court, trial counsel submitted an affidavit, which has also been submitted by the Respondent as Exhibit B to her Suggestions in Opposition to Petition for Habeas Corpus. No evidentiary hearings have been held on any of these petitions.

Facts concerning the offense.

Judith Wood was convicted of the second degree murder of Catherine Undernehr in Pineville, Missouri. Ms. Undernehr was killed in a trailer belonging to

Ed Spaulding, with whom Ms. Wood had had a long, albeit stormy, relationship. On the night of Ms. Undernehr's death, Ms. Wood was highly intoxicated. Officers found 17 empty beer cans at her home the next morning. She was interviewed by officers, and, in response to leading questions, admitted that she had killed Ms. Undernehr. Afterward, however, she recanted this statement, and said that she did not remember the events of the evening and certainly did not remember killing Ms. Undernehr.

After Ms. Wood was removed from her home, officers returned and continued to search there. A firearm, most likely the murder weapon, was found between the cushions of a recliner. The weapon was not found in the earlier search, and Ms. Wood's door was locked when she and the officers left the house. However, Ed Spaulding had a key to Ms. Wood's home.

Mr. Spaulding, who had a history of violence towards women, was unable to account for his whereabouts the night of the incident. He clocked in at his place of employment, Tyson Foods, at 3:40 a.m. on the night of the offense, but never clocked out. He was seen in the parking lot at 5:00 a.m. by a fellow employee. He arrived at the McDonald County sheriff's department at 5:45 a.m. to report the shooting. He identified Ms. Wood as the perpetrator. Law enforcement authorities searched his jeep, but found nothing. They performed a gunshot residue test on Mr.

Spaulding's hands, but never submitted it to the lab. Instead, the investigation focused exclusively on Ms. Wood.

POINTS RELIED ON

POINT I

MS. WOOD IS ENTITLED TO HABEAS CORPUS REVIEW BECAUSE SHE CAN SHOW “CAUSE AND PREJUDICE” FOR HER FAILURE TO SEEK REVIEW UNDER MO. SUP. CT. R. 24.035. SHE WAS TOLD BY HER TRIAL ATTORNEY THAT HE WOULD APPEAL THE DENIAL OF HER MOTION TO SUPPRESS EVIDENCE, AND DID NOT LEARN THAT THIS WAS FALSE UNTIL AFTER THE TIME FOR FILING A RULE 24.035 MOTION. BECAUSE HER PLEA WAS INVOLUNTARY, SHE CAN DEMONSTRATE THE REQUIRED PREJUDICE. SHE IS ALSO ENTITLED TO HABEAS CORPUS REVIEW BECAUSE SHE IS ACTUALLY INNOCENT OF THE OFFENSE.

Brown v. State, 66 S.W.3d 721 (Mo. banc 2002)

Reuscher v. State, 887 S.W.2d 588 (Mo. banc 1994)

Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000)

POINT II

MS. WOOD'S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE SHE DID NOT UNDERSTAND THE EFFECT OF THE SENTENCE TO WHICH SHE WAS PLEADING GUILTY. HER FAILURE TO COMPREHEND THE TERMS OF THE PLEA AGREEMENT WAS THE RESULT OF TRIAL COUNSEL'S FAILURE ADEQUATELY TO COMMUNICATE IT TO HER, IN VIOLATION OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Beal v. State, 51 S.W.3d 109 (Mo. App. 2001)

Henderson v. Morgan, 426 U.S. 637 (1976)

Garmon v. Lockhart, 938 F.2d 120 (8th Cir. 1991)

POINT III

MS. WOOD'S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE HER ATTORNEY ADVISED HER TO PLEAD GUILTY WITHOUT AN ADEQUATE INVESTIGATION INTO THE FACTS OF HER CASE IN VIOLATION OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Gennetten v. State, 2003 WL 202453 (Mo. App. Jan. 31, 2003)

Thomas v. State, 516 S.W.2d 761, 767 (Mo. App. 1974)

Pavel v. Hollins, 261 F.3d 210, 218 (2nd Cir. 2001)

POINT IV

MS. WOOD'S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE TRIAL COUNSEL ADVISED HER TO PLEAD GUILTY WITHOUT CHALLENGING THE WARRANTLESS SEARCH OF HER HOME TO WHICH SHE GAVE NO VALID CONSENT, IN VIOLATION OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

State v. Galicia, 973 S.W.2d 926 (Mo. App. 1998)

Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000)

Hernandez v. Cowan, 200 F.3d 995 (7th Cir. 2000)

POINT V

MS. WOOD'S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE TRIAL COUNSEL FAILED ADEQUATELY TO CHALLENGE THE ADMISSIBILITY OF MS. WOOD'S STATEMENT TO LAW ENFORCEMENT AUTHORITIES; HAD HE DONE SO, THE STATEMENT WOULD HAVE BEEN EXCLUDED AND MS. WOOD WOULD NOT HAVE ENTERED A PLEA OF GUILTY.

Gennetten v. State, 2003 WL 202453 (Mo. App. Jan. 31, 2003)

ARGUMENT AND AUTHORITIES

POINT I

MS. WOOD IS ENTITLED TO HABEAS CORPUS REVIEW BECAUSE SHE CAN SHOW “CAUSE AND PREJUDICE” FOR HER FAILURE TO SEEK REVIEW UNDER MO. SUP. CT. R. 24.035. SHE WAS TOLD BY HER TRIAL ATTORNEY THAT HE WOULD APPEAL THE DENIAL OF HER MOTION TO SUPPRESS EVIDENCE, AND DID NOT LEARN THAT THIS WAS FALSE UNTIL AFTER THE TIME FOR FILING A RULE 24.035 MOTION. BECAUSE HER PLEA WAS INVOLUNTARY, SHE CAN DEMONSTRATE THE REQUIRED PREJUDICE. SHE IS ALSO ENTITLED TO HABEAS CORPUS REVIEW BECAUSE SHE IS ACTUALLY INNOCENT OF THE OFFENSE.

In *Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002), this Court held that habeas corpus relief is available where the petitioner has shown both legal cause for failing to file a timely post-conviction motion and that she was prejudiced by being unable to raise these grounds for relief. The Court further held that if the petitioner could show that she was unaware of the need for action until after the 90 day period for filing a motion under Rule 24.035, she had made the necessary showing of

“cause” to permit her to proceed under Rule 91. See also *Geitz v. State*, 87 S.W.3d 350 (Mo. App. E.D. 2002).

Even prior to *Brown*, the appellate courts of this state granted habeas corpus relief to prevent manifest injustice on occasions when Rules 29.15 and 24.035 did not provide an adequate remedy. In *Reuscher v. State*, 887 S.W.2d 588 (Mo. banc 1994), this Court recognized that when a defendant fails to file a timely post-conviction motion because of the erroneous advice of trial counsel, he has demonstrated “cause” because of the inherent conflict of interest between trial counsel and the defendant who may file a motion to raise trial counsel’s ineffectiveness. (In subsequent unpublished proceedings, Mr. Reuscher was granted leave to raise his claims in a Rule 91 proceeding, and his conviction was vacated.) Like Mr. Reuscher, Ms. Wood relied on her lawyer’s statement that an appeal was pending. Her counsel, like Mr. Reuscher’s counsel, had a conflict of interest, which interfered with his duty to inform her that there was no appeal, and that the time for filing her post-conviction motion was running.

In *State ex rel. Hahn v. Stubblefield*, 996 S.W.2d 103 (Mo. App. 1999), the court granted relief where the petitioner had not filed a Rule 29.15 motion because, like Ms. Wood, he was under the mistaken impression that an appeal from his conviction was pending. The court vacated the sentence to allow for resentencing and a timely appeal. In *In Re Brown v. Gammon*, 947 S.W.2d 437, 440 (Mo. App.

1997), the court granted relief from an involuntary guilty plea where the petitioner had entered the plea in the mistaken belief that he would be given a 120-day callback. By the time the 120 days had passed and he learned that he would not be called back, it was too late to file a motion under Rule 24.035.

Ms. Wood's affidavits and the record before this court demonstrate legal cause for her failure to raise the claims advanced in this petition in a timely motion under Rule 24.035. Ms. Wood was told that her counsel would appeal the denial of her motion to suppress evidence after she entered her plea of guilty and was sentenced. Counsel's intent to do this appears in the record at her plea proceeding at Pet. Ex. 2, p. 17. Although trial counsel's affidavit states that "Judith Wood entered her plea voluntarily to Judge Curless and waived her right to appeal on the record," Resp. Ex. B, this statement is flatly contradicted by the record of the plea proceeding. Since Ms. Wood believed that an appeal was pending, she obviously had no reason to attack her guilty plea in a *pro se* Rule 24.035 proceeding.

Trial counsel refused to communicate with Ms. Wood about the appeal after she was sentenced to prison, and refused to provide her with her file:

My daughter Kimberly told me, after I was in prison, that [trial counsel] had told her that she could not obtain a copy of my file and that he would only deal with me. I wrote to him requesting the file. He

refused to provide it, and indicated that if I wrote to him again, he would contact the prison warden.

Petition, Exhibit 4.

This information is confirmed in the affidavit of Kimberly Wood Rowe, Mrs. Wood's daughter (Petition, Exhibit 5):

In July of 1997, I wrote to [trial counsel] requesting a copy of the file. He refused to provide it to me, and said he would deal only with my mother. Then, after my mother wrote to him, he wrote her back and told her that if she wrote to him again, he would contact the prison warden. Neither I nor my sister have [trial counsel]'s file.

Should this court not find that the record before it justifies a finding of legal cause, it would be appropriate for the court to appoint a master to conduct an evidentiary hearing and take testimony on this issue.

The prejudice prong of the "cause and prejudice" standard is satisfied by showing the merits of the claims which could have been advanced in a Rule 24.035 proceeding. That is, if Ms. Wood would have prevailed on any claim, she has shown prejudice from the failure to raise the claim in a Rule 24.035 motion. The merits of each of these claims are discussed in succeeding Points Relied On, and the court is respectfully referred to those Points for a determination of prejudice.

Ms. Wood also meets this court's alternative basis for habeas corpus relief. Ms. Wood's claims raise the issue of actual innocence. See *Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000) (Habeas corpus relief available where but for the alleged error, it is more likely than not that no reasonable juror would have found the defendant guilty.) Ms. Wood challenges the admissibility of her confession and of the murder weapon, which was found in her home. She challenges the failure of trial counsel to investigate the evidence showing that she was innocent. Had this investigation been carried out, and had the confession and weapon been suppressed, it is indeed likely that no reasonable juror would have convicted her. These claims will require a hearing so that the court can make a final determination as to this issue.

POINT II

MS. WOOD’S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE SHE DID NOT UNDERSTAND THE EFFECT OF THE SENTENCE TO WHICH SHE WAS PLEADING GUILTY. HER FAILURE TO COMPREHEND THE TERMS OF THE PLEA AGREEMENT WAS THE RESULT OF TRIAL COUNSEL’S FAILURE ADEQUATELY TO COMMUNICATE IT TO HER, IN VIOLATION OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Ms. Wood stated in her affidavit, “[Trial counsel] told me that I would be sentenced to 13-15 years and would serve no more than 7 years before parole. I agreed to this plea agreement because I did not want to die in prison for something I did not do.” Pet. Ex. 3. Trial counsel’s affidavit contradicts this statement: “I explained to Judith Wood that based on what I had learned from the Division of Probation and Parole, she had to complete 15 years of her sentence before being eligible for parole and the 15 years would match the time she turned 65, making her a prime candidate for parole.” Resp. Ex. B. It should be noted that at the time she entered her plea of guilty, Ms. Wood was 62 years of age, not 50 years of age. This fact certainly casts doubt on trial counsel’s memory of the advice he gave Ms.

Wood. Further, Ms. Wood's daughter states in her affidavit, "I do recall his telling her that because of her age, she would only serve six to seven years, and that she would certainly be released by the time she was 70 years old." Pet. Ex. 5. In light of this factual conflict, appointment of a master to conduct an evidentiary hearing as to this claim would be appropriate. If the hearing establishes that Ms. Wood was actually misinformed as to the amount of time she would serve under her plea agreement, she is entitled to withdraw her plea of guilty.

Due process of law under the *Drone v. State*, 973 S.W.2d 897, 902 (Mo. App. 1998), United States Constitution, amend. XIV and the Missouri Constitution, art. I, §10, requires that a plea of guilty must be knowingly and voluntarily entered. When a defendant is misinformed about the nature or consequences of her plea, her plea is involuntary. *Henderson v. Morgan*, 426 U.S. 637 (1976); *Boykin v. Alabama*, 395 U.S. 238 (1969). And where that misinformation comes from trial counsel, she is denied effective assistance of counsel. *Ayres v. State*, 93 S.W.3d 827 (Mo. App. 2002) (evidentiary hearing required as to allegation that defendant was misinformed by trial counsel as to maximum sentence); *Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); U.S. Const. amend. VI.

Where the defendant is misadvised by trial counsel about parole eligibility, and alleges in a post-conviction motion that the incorrect information affected the

decision to enter a guilty plea, the defendant is entitled to withdraw the plea. In *Beal v. State*, 51 S.W.3d 109 (Mo. App. 2001), the court allowed the movant to withdraw his guilty plea where the plea was based on the mistaken statement by trial counsel that the negotiated sentence would not be subject to the 85% requirement of Mo. Rev. Stat. §558.019.3. The court noted that trial counsel was not required to inform Mr. Beal about the 85% requirement, but since he did so and misinformed him, Mr. Beal was entitled to relief. In so holding, the court distinguished *Drone v. State*, 973 S.W.2d 897 (Mo. App. 1998), which held that Drone was not entitled to relief on the basis that his trial counsel did not inform him about the 85% requirement. Like Mr. Beal's attorney, Ms. Wood's trial counsel took it upon himself to advise her about the amount of time she would serve. Although this advice was not required, this Court cannot disregard the fact that it was given.

Misinformation about the effect of a plea bargain has formed the basis for relief in several other cases. In *Coker v. State*, 995 S.W.2d 7 (Mo. App. 1997), the court found counsel ineffective, and set aside the plea of guilty, where the defendant was misinformed about whether his sentence would be consecutive to his other sentences. In *Hampton v. State*, 877 S.W.2d 250 (Mo. App. 1994), the court found that the defendant was entitled to a hearing on his allegation that he had not been advised of his status as a Class X offender, which affected his parole eligibility. In *Crenshaw v. State*, 852 S.W.2d 181 (Mo. App. 1993), the court

asserted that relief should be granted if the defendant pled guilty in reliance on counsel's erroneous advice that a successful appeal on another case would vacate the sentences in the cases in which he entered a plea of guilty. (The case was remanded for factual findings as to reliance.)

The rule that misinformation about release on parole invalidates a guilty plea has also been applied in federal court as a matter of federal constitutional law. In *Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991), the court held that Mr. Garmon, who had been advised by his attorney that he would be paroled after five years, when in fact he was not eligible for parole for fifteen years, was entitled to withdraw his plea of guilty. The court held that the attorney's misinformation to his client violated the standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

In *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979), the court declined to apply the rule that parole was a collateral issue which did not need to be covered in the plea proceeding to the situation where a defendant was misinformed, and held that the misinformed defendant was entitled to relief because of ineffective assistance of counsel:

North Carolina has appealed upon the ground that the parole eligibility date is but a collateral consequence of the plea of which Strader need

not have been informed. It urges us to apply the rule in a case in which there was positive misinformation. We decline to do so.

The record of the plea proceeding indicates some hesitation on the part of Ms. Wood when the plea agreement was announced. This provides support for her account of the events. If, in fact, she believed that she would actually serve a relatively short period as a result of her plea agreement, she is entitled to relief. Upon hearing, this court should set aside her plea of guilty and allow her to plead anew.

POINT III

MS. WOOD'S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE HER ATTORNEY ADVISED HER TO PLEAD GUILTY WITHOUT AN ADEQUATE INVESTIGATION INTO THE FACTS OF HER CASE IN VIOLATION OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel has a responsibility to investigate fully the facts underlying the client's case before developing a theory of defense or advising a client to plead guilty. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Ms. Wood informed trial counsel that she did not believe that she was guilty, and requested that he

investigate alternative explanations for Ms. Undernehr's death, including the action of Ed Spaulding. Trial counsel failed to do this, and breached his duty to his client.

In *Gennetten v. State*, 2003 WL 202453 (Mo. App. Jan. 31, 2003), the court found ineffective assistance of counsel where trial counsel failed to take advantage of available discovery, which revealed that one of the treating physicians agreed with the defendant's view that the victim's burns were accidentally inflicted. Characterizing defense counsel's investigation as "perfunctory at best," the court granted a new trial. In *State v. Baldrige*, 857 S.W.2d 243, 259 (Mo. App. 1993), the court held that the failure to investigate witnesses who might provide a plausible defense was ineffective assistance of counsel. Cautioning against insulating all of counsel's "strategic" decisions from review, the court noted, "[S]trategy decisions made in the absence of investigation may be held to be ineffective assistance of counsel." Similarly, in *Thomas v. State*, 516 S.W.2d 761, 767 (Mo. App. 1974), the conviction was reversed because trial counsel was ineffective for failing to investigate alibi witnesses. Counsel's strategy to rely on the success of his pretrial motion to dismiss "was a dangerous [gamble] and resulted in a deprivation of movant's constitutional right to effective assistance of counsel."

Where counsel is aware of the identity of witnesses who may have relevant information, it is ineffective assistance of counsel not to interview them. *State v. Williams*, 945 S.W.2d 575 (Mo. App. 1997); *Clay v. State*, 876 S.W.2d 760 (Mo.

App. 1994); *State v. Ivy*, 869 S.W.2d 297 (Mo. App. 1994); *State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App. 1990).

In Ms. Wood's case, gunshot residue tests were performed on Mr. Spalding but the evidence was never sent to the crime lab. Had trial counsel properly reviewed the discovery in this matter, he could have caused the evidence to be tested to determine whether Mr. Spalding, who could not account for his whereabouts at the time of the offense, had recently fired a gun.

Recently, this Court found trial counsel ineffective for failing to test hair samples found in the back seat of the victim's car. *Wolfe v. State*, 2003 WL 282315 (Mo. banc Feb. 11, 2003). In *State v. Butler*, 951 S.W.2d 600 (Mo. banc 1997), this Court found trial counsel ineffective for failing to obtain independent evidence which would have shown that the fibers from the victim's fingernail scrapings did not match the fibers of the defendant's clothes. Other Missouri cases finding counsel ineffective for failure to investigate expert evidence include *State v. Woods*, 994 S.W.2d 32 (Mo. App. 1999) (failure to investigate mental competence of defendant); *Moore v. State*, 827 S.W.2d 213 (Mo. 1992) (failure to investigate and obtain blood test results); *State v. Moon*, 602 S.W.2d 828, 837 (Mo. App. 1980) (failure to obtain mental evaluation of defendant); *Frederick v. State*, 754 S.W.2d 934 (Mo. App. 1988) (hearing required to determine whether failure to obtain expert testimony as to medical tests of victim was ineffective assistance of counsel). See

also *Bonner v. State*, 734 S.W.2d 606 (Mo. App. 1987) (failure to investigate witness's prior record).

A recent federal court decision cautions against giving “strategic decision” deference to determinations by trial counsel that primarily have the effect of avoiding work. In *Pavel v. Hollins*, 261 F.3d 210, 218 (2nd Cir. 2001), the court found that while trial counsel gave a reason for not interviewing witnesses and preparing a defense, that reason was not a strategic justification:

Th[e] goal, however, was mainly avoiding work--not, as it should have been, serving Pavel's interests by providing him with reasonably effective representation. Therefore, although [trial counsel's] decision was “strategic” in *some* senses of the word, it was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefiting his client that the federal courts have denominated “strategic” and been especially reluctant to disturb.

See also *United States v. Gray*, 878 F.2d 702, 712 (3rd Cir. 1989) (“Counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence.”)

In *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994), the court found ineffective assistance for failing to investigate alibi witnesses even though the defendant gave their names to counsel only three days before trial. In *Rios v. Rocha*, 299 F.3d 796

9th Cir. 2002), trial counsel rejected a misidentification defense after interviewing only one of several available witnesses. The court rejected this as a reasonable strategic decision because of trial counsel's failure to investigate completely. Similarly, in *Avila v. Garza*, 297 F.3d 911 (9th Cir. 2002), the court found counsel ineffective for failing to investigate the defendant's suggestion that his brother might have been the shooter. Other cases where ineffective assistance for failure to investigate and call witnesses was found include *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *White v. Godinez*, 301 F.3d 796 (7th Cir. 2002); *Luna v. Cambra*, 306 F.3d 954 (9th Cir. 2002); *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992); *Montgomery v. Petersen*, 839 F.2d 407 (7th Cir. 1988); *Sullivan v. Fairman*, 819 F.2d 1382 (7th Cir. 1988); and *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985).

Ms. Wood alleges that trial counsel failed to investigate evidence that another person committed the offense. Counsel failed to investigate whether fingerprints were found on the murder weapon. He failed to investigate whether Ed Spaulding's hands had gunpowder residue on them. He failed to investigate Ed Spaulding's whereabouts on the night of the offense. Any or all of these investigations would have yielded information demonstrating Mr. Spaulding's guilt and Ms. Wood's innocence, or at least cast a reasonable doubt upon her guilt. But instead of performing this investigation, trial counsel simply advised Ms. Wood to enter an

Alford plea. Accordingly, Ms. Wood was prejudiced by her counsel's omissions and is entitled to relief.

POINT IV

MS. WOOD'S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE TRIAL COUNSEL ADVISED HER TO PLEAD GUILTY WITHOUT CHALLENGING THE WARRANTLESS SEARCH OF HER HOME TO WHICH SHE GAVE NO VALID CONSENT, IN VIOLATION OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel failed to file a motion to suppress the evidence seized in the search of Ms. Wood's home. A successful motion to suppress would have resulted in the exclusion from evidence of a weapon found at Ms. Wood's home. A ballistics expert opined that the fatal bullet came from this weapon. Accordingly, the weapon was an important piece of evidence against Ms. Wood.

Ms. Wood's home was searched without a warrant; the officers asserted that they obtained her consent for the search. Other evidence available to trial counsel cast doubt on the voluntary nature of the consent. Ms. Wood had been drinking heavily within a few hours of the time she was interviewed by the officers. She had emotional difficulties which were later documented. Under such circumstances, there is a reasonable probability that a motion to suppress evidence would have

been successful, and this had a reasonable probability of affecting the outcome of the proceeding.

The investigation and filing of pretrial motions is an established part of effective assistance of counsel. In *State v. Galicia*, 973 S.W.2d 926 (Mo. App. 1998), the court reversed the defendant's conviction for ineffective assistance of counsel where counsel did not file a motion to suppress the evidence of the defendant's post-arrest invocation of his rights to counsel and to remain silent. Defense counsel proffered a "strategic" reason for this omission, that he wanted to garner sympathy for the defendant by not objecting to the officer's testimony. But the court noted that defense counsel had actually objected frequently and vociferously to other aspects of the officer's testimony. The court therefore rejected this justification and concluded that Galicia was denied effective assistance of counsel, noting,

The mere assertion that conduct of trial counsel was "trial strategy" is not sufficient to preclude a movant from obtaining post-conviction relief based on a claim of ineffective assistance of trial counsel. *State v. Hamilton*, 871 S.W.2d 31, 34 (Mo.App. W.D. 1993). For "trial strategy" to be the basis for denying post-conviction relief, the strategy must be reasonable. *Id.*

This case is also similar to *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), where the court granted a new trial. Defense counsel failed to object to the state's

presentation of evidence of the defendant's pre-arrest invocation of the right to counsel. The court held that since the law on the admissibility of the statement was not completely settled at the time of trial, reasonably competent counsel would have objected to the use of the client's statement. The court noted that it could perceive no possible strategic reason for the failure to object.

The court in *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000), found trial counsel ineffective for failing to move to sever the defendant's trial from that of a co-defendant on the basis of antagonistic defenses which would require the defendant to defend against both the state and his co-defendant. Prejudice was found because the motion to sever would likely have been granted. Ms. Wood's case is substantially similar. Upon hearing, this court should vacate her conviction and sentence and allow her to withdraw her plea of guilty.

POINT V

MS. WOOD’S PLEA OF GUILTY WAS INVOLUNTARY BECAUSE TRIAL COUNSEL FAILED ADEQUATELY TO CHALLENGE THE ADMISSIBILITY OF MS. WOOD’S STATEMENT TO LAW ENFORCEMENT AUTHORITIES; HAD HE DONE SO, THE STATEMENT WOULD HAVE BEEN EXCLUDED AND MS. WOOD WOULD NOT HAVE ENTERED A PLEA OF GUILTY.

Trial counsel filed a motion to suppress Ms. Wood’s inculpatory statement, and a hearing was held on the motion. A transcription of the interview with Ms. Wood reveals that she gave monosyllabic answers to leading questions asked by the law enforcement officers. In fact, on the tape of the interview, her answers are virtually inaudible. It is quite clear that she never narrated the events of the murder to the officer. Expert evidence on the issue of false and involuntary confessions would have demonstrated that Ms. Wood’s statement was not voluntary. In *Berg v. Maschner*, 260 F.3d 869 (8th Cir. 2001), the court considered a claim that trial counsel was ineffective for failing to obtain expert evidence on the voluntariness of the defendant’s confession. While the court found that the error was harmless, it implicitly acknowledged that such evidence might be necessary in other cases. Similar evidence has been considered by trial courts. See *State v. Cook*, 67

S.W.3d 718 (Mo. App. 2002); *Elliott v. Williams*, 248 F.3d 1205 (10th Cir. 2001); and *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001); *United States v. Williams*, 128 F.3d 1128 (7th Cir. 1997).²

Trial counsel's failure to support adequately his motion to suppress was clearly not trial strategy; if he believed the motion should be filed, he had no possible reason for not supporting it adequately. Because this motion was actually filed, it is clear that the court's failure to grant it affected the decision to enter a plea of guilty. Ms. Wood refers the court to the authorities cited under Points III and IV above, which support this claim of failure to call witnesses and support pretrial motions. In particular, *Gennetten v. State*, 2003 WL 202453 (Mo. App. Jan. 31, 2003) supports the granting of relief in this case. Accordingly, upon hearing, Ms. Wood is entitled to relief.

² Ms. Woods acknowledges that in these cases, the judge or jury rejected the expert's conclusion about the voluntariness of the confession. This should not lead to the conclusion that such testimony is of no value, since cases in which the expert evidence led to the suppression of a confession are seldom appealed.

CONCLUSION

For the foregoing reasons, Judith Wood prays the court to direct that an evidentiary hearing be conducted, and, upon hearing, to grant her relief from her unlawful conviction and sentence.

Respectfully submitted,

Elizabeth Unger Carlyle
200 S.E. Douglas, Ste. 200
Lee's Summit, MO 64063
Missouri Bar No. 41930
(816)525-6540
FAX (816) 525-1917
ATTORNEY FOR RELATOR

CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 6,648 words.

The disk submitted with this brief has been scanned for viruses and is virus-free.

ELIZABETH UNGER CARLYLE

I hereby certify that a copy of the foregoing brief was served upon John M. Morris, counsel for respondent, by U.S. Mail on March 13, 2003.

ELIZABETH UNGER CARLYLE