

**IN THE  
MISSOURI SUPREME COURT**

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**WALTER BARTON,** )  
 )  
 **Appellant,** )  
 )  
 **vs.** ) **No. SC 93371**  
 )  
 **STATE OF MISSOURI,** )  
 )  
 **Respondent.** )

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF  
CASS COUNTY, MISSOURI  
SEVENTEENTH JUDICIAL CIRCUIT, DIVISION II  
THE HONORABLE R. MICHAEL WAGNER, JUDGE**

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**APPELLANT'S REPLY BRIEF**

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## **JURISDICTION/STATEMENT OF FACTS**

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

**A PROSECUTION DEVOID OF INTEGRITY**  
**AND CREDIBILITY**

Over time, respondent's case has been built on discredited snitch testimony, a 3:00-4:00 p.m. timeline, and questionable blood evidence designed to explain why Barton, who had discovered the bloody scene along with others, had "spatter," rather than just "transfer" stains on his clothing.

All four juries who deliberated heard that snitch Arnold claimed Barton made admissions. This fifth trial's jury didn't hear Arnold, but heard A.A.G. Bradley's opening statement Arnold would testify Barton admitted "he killed an old lady by cutting her throat, stabbing her, cutting an X on her." All the juries never knew A.A.G. Ahsens had a sex for testimony deal with Arnold. Ahsens' deal was chronicled in Arnold's 20 year old letters to his girlfriend with postmarked envelopes written contemporaneously with their sexual rendezvouses in the jail and prosecutor's office.

Snitch Allen testified in three trials and the number of admissions she attributed to Barton increased each time. Judge Sims reversed Barton's fourth trial because Ahsens concealed Allen's deal, withheld Allen's prior convictions, and allowed Allen to give perjured testimony. Most notably, Judge Sims found **he didn't believe Ahsens' 29.15 Allen testimony.**

Throughout, respondent represents there's "overwhelming" evidence against Barton(Resp.Br.36-37,49-50,54-55,66-67,75-76,87-88,121-22). That purported evidence includes : (1) proven perjurious snitch Allen's fifth trial's testimony (2)

purported suspicious circumstances placing Barton at the crime scene at 3:00-4:00 - long hand-washing and changed demeanor; and (3) blood spatter, not blood transfer, on Barton's clothes.

At the same time respondent argues these matters constitute "overwhelming" evidence against Barton, it relies on findings A.A.G. Bruce wrote and the 29.15 court signed. Bruce and Ahsens exchanged e-mails where Bruce accused Judge Sims of unethical behavior in his Allen rulings.

Rather than being "overwhelming," the record shows a case plagued by prosecutorial misconduct compounded by ineffectiveness. Respondent failed to disclose that Selvidge, "a crucial witness" whose "credibility [was] important" to how Barton had Gladys' blood on him, had priors for violating a protective order - calling her victim to say she was having sex with the victim's boyfriend. Respondent failed to disclose the Horton memo that placed the killing between 4:15-5:40, not 3:00-4:00. Counsel failed to impeach Selvidge on when she last spoke to Gladys which would've discredited respondent's 3:00-4:00 timeline. Counsel failed to call Michelle Hampton who could've called into question the 3:00-4:00 timeline. Counsel's "strategy" to not call a blood spatter expert and to only cross-examine respondent's expert was so badly done Judge Dandurand shut it down on his own motion as inappropriate and wasting time and this Court concluded direct appeal challenges to that expert were "frivolous." Counsel failed to impeach Horton on matters going to Barton's hand-washing and demeanor.

This Court should reverse.

## POINTS RELIED ON

### I.

#### AHSENS TRADED SEX FOR TESTIMONY

The motion court clearly erred denying counsel was ineffective for failing to talk to Arnold about his “crooked stuff” letter because if they had they would have learned Ahsens had a sex for testimony deal with Arnold and Judge Dandurand would have had conscience-shocking facts that persuaded him to dismiss or prohibit death as Dandurand had “agonized” over how to appropriately cure the “prejudice” Ahsens already had caused with his snitch actions.

Barton was prejudiced by Arnold’s sex for testimony deal because every deliberating jury has heard Arnold claimed Barton admitted the killing, but none knew Arnold lied because of Ahsens’ sex for testimony deal.

The findings there was no sex for testimony deal because Arnold and Brandy were not credible is clearly erroneous because standing alone Arnold’s twenty year old letters and postmarked envelopes written contemporaneously with Arnold’s sexual encounters chronicled Ahsens’ sex for testimony deal.

*U.S. v. Manthei*,979F.2d124(8thCir.1992);

*U.S. v. Babiar*,390F.3d598(8thCir.2004);

*U.S. v. Barrera-Moreno*,951F.2d1089(9thCir.1991);

*Commonwealth v. Chon*,983A.2d784(Pa.Superior Ct.2009);

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

**II.**

**SELVIDGE'S CALL - THEN HAVING SEX**

**WITH HARREL'S BOYFRIEND**

**The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03 by not disclosing Selvidge's priors because counsel expressly and emphatically testified respondent failed to disclose them and had they known of her priors they would have used them to impeach her.**

*State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013);

*Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008);

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

Rule 25.03

**III.**

**BRADY VIOLATION - HORTON NOTES**

**The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03 by withholding Carol Horton's statements from prosecution interview notes because the notes discredit respondent's 3:00-4:00 timeline and support that Gladys was alive at 4:15 and killed between 4:15 and 5:30-5:40.**

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

Rule 25.03.

**IV.**

**FAILURE TO IMPEACH SELVIDGE - TIMING**

**LAST CONVERSATION WITH GLADYS**

**The motion court clearly erred denying counsel was ineffective for failing to cross-examine Selvidge with her prior testimony on when she last spoke to Gladys and for how long because impeaching Selvidge on this matter was critical to discrediting respondent's 3:00-4:00 timeline.**

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

V.

**FAILURE TO CALL HAMPTON**

**The motion court clearly erred denying counsel was ineffective for failing to call Michelle Hampton to testify she saw Barton repairing Horton’s deck between 4:00-4:20 because the amended motion pled counsel was ineffective for failing to call Hampton to testify to that timing.**

**Hampton was a critical witness whose testimony on when she saw Barton repairing Horton’s deck called into question respondent’s 3:00-4:00 timeline.**

*Middleton v. State*, 80S.W.3d799(Mo.banc2002);

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

**VI.**

**NO BLOOD SPATTER EXPERT**

**The motion court clearly erred denying counsel was ineffective for failing to call a blood spatter expert, like Stuart James, because Judge Dandurand shut down on his own motion as inappropriate and wasting time counsel’s limited “strategy” of only cross-examining respondent’s expert Newhouse and this Court found on direct appeal that the claim Newhouse should have been excluded as a witness was “frivolous.” Pursuing a “frivolous” badly done strategy wasn’t reasonable and Barton was prejudiced.**

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

**VII.**

**FAILURE TO IMPEACH HORTON - BARTON'S  
HANDWASHING/BROKEN DOWN CAR AND DEMEANOR**

**The motion court clearly erred denying counsel was ineffective for failing to cross-examine Horton about her prior inconsistent statements about how long Barton washed his hands, prior knowledge of Barton's car problems, and whether Barton displayed changed demeanor from earlier and the hand-washing time because Horton's inconsistencies would have cast significant doubt on respondent's version of events.**

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

**VIII.**

**ARGUMENT CONTRADICTING WHAT SELVIDGE TOLD**

**OFFICER ISRINGHAUSEN**

**The motion court clearly erred denying counsel was ineffective for failing to object to Bradley’s guilt closing argument that Selvidge told Officer Isringhausen Barton did not pull her away from Gladys and Gladys’ bedroom because the defense explanation for the blood on Barton’s clothing was transfer caused by Barton pulling Selvidge away from Gladys’ body and not that he had spatter through contact with the bloody bedspread.**

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

## ARGUMENT

### I.

#### AHSENS TRADED SEX FOR TESTIMONY

The motion court clearly erred denying counsel was ineffective for failing to talk to Arnold about his “crooked stuff” letter because if they had they would have learned Ahsens had a sex for testimony deal with Arnold and Judge Dandurand would have had conscience-shocking facts that persuaded him to dismiss or prohibit death as Dandurand had “agonized” over how to appropriately cure the “prejudice” Ahsens already had caused with his snitch actions.

Barton was prejudiced by Arnold’s sex for testimony deal because every deliberating jury has heard Arnold claimed Barton admitted the killing, but none knew Arnold lied because of Ahsens’ sex for testimony deal.

The findings there was no sex for testimony deal because Arnold and Brandy were not credible is clearly erroneous because standing alone Arnold’s twenty year old letters and postmarked envelopes written contemporaneously with Arnold’s sexual encounters chronicled Ahsens’ sex for testimony deal.

Respondent asserts Barton’s claim should be rejected because Dandurand had indicated he didn’t intend to dismiss and didn’t think he had the authority to preclude death(Resp.Br.24,29 relying on Ex.247p.1069,1176).

Barton’s claim is that counsel failed to talk to Arnold about his “crooked stuff” letter and what that “crooked stuff” was. Reasonable counsel would’ve done that

because at the fourth trial defense witness inmate Rentschler had testified Arnold had admitted he lied that Barton had admitted killing Gladys(App.Br.52). Counsel who'd talked to Arnold would've acquired conscience-shocking facts that Ahsens had a sex for testimony deal with Arnold. Those facts would've provided the factual basis to persuade Judge Dandurand to dismiss or preclude death because he had "agonized" over taking appropriate action to cure the "prejudice" Ahsens already had caused with his snitch actions.

### **Motion To Preclude Death/Dismiss**

Arnold's "crooked stuff" letter was dated "1/28" and postmarked 1/30/06(Ex.207).

Counsel's motion to dismiss/preclude death was filed January 31, 2006(Ex.224p.77-124).

Counsels' motion and memorandum of law to dismiss/preclude death was premised on *Oregon v Kennedy*,456U.S.667(1982)(Ex.224p.77-124,127-32).

*Kennedy* held the double jeopardy clause can require dismissal where a defendant obtained a mistrial when prosecutorial misconduct caused the defendant to seek the mistrial. *Id.*676. Counsels' motion only relied on factual matters then known to counsel about what had transpired in the four prior trials(Ex.224p.77-78).

Specifically the factual matters relied on were: (1) first trial's mistrial for failure to endorse witnesses; (2) second trial's hung jury; (3) third trial's reversal because of Ahsens' objection; and (4) Ahsens' fourth trial snitch Allen prosecutorial misconduct(Ex.224p.77-78).

On February 3, 2006 Dandurand took-up the motion for the first time(Ex.247p.1-26). Dandurand stated :

THE COURT: Okay. I don't want to talk about unnecessary stuff at this point. I am going to suggest to you this, that **I don't have any doubt in my mind that I have the power to dismiss this case. I do have, I think, under the law the power to dismiss it because of prosecutorial misconduct. I know that.**

MR. KESSLER: Okay.

THE COURT: **The question** is, if I am not going to do that, if I am not inclined to do that, do I have the power to say you are out of luck and you can't seek the death penalty this time?

(Ex.247p.14)(emphasis added). Kessler told Dandurand that if he had the power to dismiss, then he also had the power to preclude death(Ex.247p.14-15).

Dandurand stated he was giving the motion "serious consideration," and "looking at this pretty strongly"(Ex.247p.17,21). Dandurand added if the relief sought was appropriate under law, then he was "darn sure going to consider it based upon the history of this case"(Ex.247p.23-24). Dandurand was "serious" about considering prohibiting respondent seeking death because of the prejudice to Barton, but disinclined to dismiss(Ex.247p.26-27).

On the first day of trial, March 6, 2006, Dandurand revisited the motion and it was the first matter of business(Ex.247p.42-43). Dandurand said he had "agonized over [the motion]. I even wonder about what might be my reason for not granting it

offhand”(Ex.247p.44). Dandurand found Barton was “prejudiced by having to come back over and over again” because respondent’s case kept improving, adding snitch testimony(Ex.247p.45). Dandurand noted: “[t]he only time the jury got to hear a fair crack” it hung(Ex.247p.45). Dandurand added: “So it is almost unarguably that the Defendant has been prejudiced. The Defendant has been prejudiced.”(Ex.247p.45). Dandurand left ruling in abeyance adding if forced to rule, he’d prohibit death(Ex.247p.45-46).

During the same March 6th trial hearing, Kessler informed Dandurand that he’d relied on respondent to investigate Arnold’s “crooked stuff” letter(Ex.247p.46-47). Kessler told Dandurand A.A.G. Bradley agreed the A.G.’s Office would talk to Arnold about Arnold’s letter(Ex.247p.46). Kessler informed Dandurand he needed to know what respondent learned(Ex.247p.46). Bradley stated the A.G.’s Office never spoke to Arnold because it “got busy”(Ex.247p.46). Kessler told Dandurand he had not talked to Arnold about the “crooked stuff” letter(Ex.247p.47-48).

After the guilt verdict and before penalty began, counsel reminded Dandurand he’d held in abeyance ruling on the dismissal/preclude death motion(Ex.247p.1066). Dandurand preferred not to rule because there hadn’t been a punishment verdict(Ex.247p.1068). When counsel requested a ruling, Dandurand denied the motion(Ex.247p.1068-69).

At sentencing, Dandurand asked respondent to address the dismiss/preclude death motion(Ex.247p.1174-76). Dandurand stated that based on the parties’ pretrial submissions he’d concluded that he believed he’d lacked the power as to the one

option of precluding seeking death(Ex.247p.1176). Dandurand told respondent that his ruling that he lacked the authority to preclude death “cause[d] [him] concern” for purposes of appeal(Ex.247p.1176,1178-79).

Respondent told Dandurand the pleadings filed didn’t contain support for the requested relief(Ex.247p.1177).

Dandurand’s February 3, 2006, statements viewed with his sentencing statements indicated he had no doubt about having authority to dismiss, but what he was uncertain about was whether he had the authority to preclude death(Ex.247p.14,1176).

Kessler and Bruns testified that they didn’t talk to Arnold about his letter and what Arnold meant by “crooked stuff”(29.15Tr.437-42,514-15;Ex.207). Instead, Kessler relied on Cleek and Bradley to investigate what Arnold’s letter meant and Bradley indicated the A.G.’s office didn’t because they “got busy”(Ex.247p.46-47).

Arnold testified, outside the jury’s presence during trial, that if called he’d invoke the Fifth(Ex.247p.723). Relying on a statement in the 29.15 findings, respondent asserts Kessler spoke to Arnold before trial and represents Arnold was “interviewed” (Resp.Br.23,28,29 relying on 29.15L.F.1000). The trial transcript and Kessler’s and Bruns’ 29.15 testimony show Kessler talked to Arnold **during** trial on the first day and then only talked with Arnold about whether Arnold intended to take the Fifth(Ex.247p.718 and Ex.247 Index 3-10;29.15Tr.437-42,514-15). Kessler’s conversation with Arnold, on the first day of trial, happened sometime after the hearing in which Bradley reported having failed to talk to Arnold about the “crooked

stuff” letter because Kessler told Dandurand he had not then talked to Arnold(Ex.247p.47-48).

Kessler testified that Bruns was responsible for writing the motion to dismiss/preclude death(29.15Tr.437). Bruns testified he would’ve wanted to know about the deal for “special visits” with “alone time” for sex to support the motion to dismiss/preclude death and because respondent was required to disclose such deals(29.15Tr.514-17).

The Eighth Circuit has recognized trial courts can dismiss charges for prosecutorial misconduct that is “flagrant” and caused substantial prejudice. *See, U.S. v. Manthei*,979F.2d124,126-27(8thCir.1992); *U.S. v. Babiar*,390F.3d598,600(8thCir.2004).

Similarly, courts have recognized that charges can be dismissed for “outrageous” prosecutorial conduct that violates due process. *U.S. v. Barrera-Moreno*,951F.2d1089,1091(9thCir.1991). The power to dismiss can be exercised to remedy a constitutional or statutory violation; to protect judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; or to deter future illegal prosecutorial conduct. *Barrera-Moreno*,951F.2d at1091. All of the remedial *Barrera-Moreno* considerations are implicated in Ahsens’ sex for testimony deal.

If counsel had talked to Arnold about the “crooked stuff,” they would’ve learned about Ahsens’ “flagrant” and “outrageous” conscience-shocking sex for testimony deal. *See Manthei, Babiar, Barrera-Moreno*. Dandurand already found

Barton had been “prejudiced” by Ahsens’ on-going snitch actions(Ex.247p.45). If counsel had been armed with the conscience-shocking facts of Ahsens’ sex for testimony deal in conjunction with the facts counsel relied on, there’s a reasonable probability Dandurand would’ve dismissed, despite his previously stated reluctance to dismiss. Barton’s original brief discusses in detail *Commonwealth v.*

*Chon*,983A.2d784,785-90(Pa.Superior Ct.2009), (App.Br.53-54) which affirmed dismissing charges because of the state’s conscience-shocking conduct of “trading in the currency of intimate relations.” Ahsens’ sex for testimony deal is such “flagrant” “outrageous” conduct that shocks the conscience, and had Dandurand been presented that information, there’s a reasonable probability he would’ve dismissed because he had already found Ahsens’ conduct with snitches had “prejudiced”

Barton(Ex.247p.45). *Cf. Chon.*

Courts have inherent power to impose sanctions for bad faith litigation conduct. *McLean v. First Horizon Home Loan*,369S.W.3d794,801(Mo.App.,W.D.2012). Trading sex for testimony is bad faith litigation conduct. *See Chon.*

Dandurand recognized that he had the power to impose the severest of penalties, dismissal(Ex.247p.14). Kessler told Dandurand that if he had the power to dismiss, then he necessarily had the power to impose a lesser sanction of precluding death(Ex.247p.14-15). Kessler’s statement was a recognition of a court’s inherent authority to impose sanctions for bad faith litigation conduct. *See McLean.* In light of Dandurand’s statement that if the relief sought was appropriate under law, then he

was “darn sure going to consider it based upon the history of this case”(Ex.247p.23-24) and his overriding “agonized” concerns about the possibility of error (Ex.247p.44) repeated at sentencing about having declined to prohibit death (Ex.247p.1176,1178-79) there is a reasonable probability that had Dandurand learned of Ahsens’ sex for testimony deal he would’ve imposed the lesser sanction of precluding death for Ahsens’ bad faith conduct. *See McLean*.

On direct appeal this Court rejected the *Oregon v. Kennedy* argument that retrial should’ve been prohibited. *State v. Barton*,240S.W.3d693,700-02(Mo.banc2007). Had direct appeal counsel been armed with a record that showed Ahsens had a sex for testimony deal with Arnold, there’s good reason to believe this Court’s result would’ve been different. Respondent’s case against Barton is so flawed that, even hearing Arnold’s testimony, the second trial’s jury hung. As Judge Dandurand found, Barton was “prejudiced” through Ahsens continually improving his case through adding snitches(Ex.247p.45).

Respondent asserts Kessler “torpedoed Arnold’s testimony by persuading the trial judge that Arnold could not be declared unavailable simply for invoking his Fifth Amendment rights.”(Resp.Br.28). Respondent continues Kessler “discouraged” the prosecution from calling Arnold by turning Arnold’s letter over to respondent(Resp.Br.28). Respondent then represents these were “strategic” choices resulting in the jury not hearing Arnold(Resp.Br.28). Respondent makes all these assertions without record citations and the record contains no evidence to support them and the record affirmatively refutes them.

During the same first day of trial hearing relating to Arnold's "crooked stuff" letter, Kessler noted Arnold had previously invoked the Fifth and was declared unavailable and his prior testimony read(Ex.247p.48). Dandurand responded the issue of Arnold's availability would have to be decided at a hearing(Ex.247p.48-49). Dandurand noted that it appeared Arnold actually wanted to talk to Barton's counsel, not take the Fifth(Ex.247p.48-49).

At the hearing outside the jury, Cleek called Arnold and Cleek elicited on direct that Arnold intended to take the Fifth(Ex.247p.717-18). When Kessler questioned Arnold, he actually stated he wasn't going to take the Fifth(Ex.247p.719). On Cleek's redirect, Arnold then testified he committed perjury having lied about Barton having made admissions(Ex.247p.719-22). That was followed by Dandurand questioning Arnold and confirming he had no pending charges(Ex.247p.722-23). Dandurand told Arnold without pending charges he couldn't take the Fifth(Ex.247p.722-23). Dandurand then stated that Arnold had just indicated he intended to testify, if he was called(Ex.247p.722-23). Arnold then told Dandurand he would take the Fifth(Ex.247p.722-23). Cleek followed Dandurand and elicited from Arnold he'd take the Fifth(Ex.247p.723).

Immediately after Cleek's final questioning, without any input from Kessler, Dandurand ruled Arnold wasn't entitled to assert the Fifth because he had no pending charges(Ex.247p.724). Dandurand stated if Arnold refused to testify before the jury, then respondent could read Arnold's prior testimony because Arnold was then unavailable(Ex.247p.724-25). Only at the end of all this did Kessler comment that if

Arnold asserted the Fifth, then Dandurand would warn Arnold about contempt and Dandurand responded: “I know. I know.”(Ex.247p.725-26).

There is no record evidence to support respondent’s assertions that counsel’s failure to talk to Arnold about his “crooked stuff” letter strategically “torpedoed Arnold’s testimony,” and “discouraged” the prosecution from calling Arnold and the record expressly shows the contrary(Resp.Br.28). Bradley’s statement that the A.G.’s office didn’t talk to Arnold about his “crooked stuff” letter in response to Kessler turning it over to respondent because it “got busy” (Ex.247p.46) establishes just the opposite. Moreover, that Bradley told the jury in opening statement Arnold would testify Barton admitted “he killed an old lady by cutting her throat, stabbing her, cutting an X on her” establishes respondent was not “discouraged” to call Arnold by any action of Barton’s counsel(Ex.247p.441).<sup>1</sup> Bradley made those statements in opening knowing that Arnold had refused to testify at the fourth trial (Ex.244p.41,688-89) with Arnold’s third trial testimony read to that jury(Ex.244p.727-53 reading from Ex.242p.778-802) and inmate Rentschler having testified at the fourth trial Arnold had told him he had lied Barton had made admissions(Ex.244p.781-87). Most significantly, **Bradley testified at his deposition** Arnold was not called because of how Arnold testified at this fifth trial’s hearing

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<sup>1</sup> In opening, Bradley previewed for the jury it would hear four inmate snitches Arnold, Ellis, Allen, and Dorser and highlighted their prior testimonies(Ex.247p.441-42), but then only called Allen. *See* Point XII.

outside the jury's presence during trial(29.15L.F.755-59,766-67). Bradley testified that Arnold's testimony at that hearing persuaded him and Cleek that Arnold would be "a terrible witness" for respondent because he was "very combative, very rude, egotistical"(29.15L.F.755-59,766-67).

Failing to interview witnesses relates to preparation, not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8<sup>th</sup>Cir.1991). Lack of diligent investigation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Id.*1304. Bruns and Kessler testified they didn't talk to Arnold about what he meant by "crooked stuff" in his letter(29.15Tr.437-42,514-15;Ex.207). Bruns testified he would've wanted to know about Ahsens' sex for testimony deal to support the dismiss/preclude death motion(29.15Tr.514-17). Counsels' failure to interview Arnold about the "crooked stuff" was not a strategy. *See Kenley*. Moreover, Bruns testified he would've wanted the sex for testimony deal information to support the motion to dismiss/preclude death (29.15Tr.514-17), and therefore, not talking to Arnold about the "crooked stuff" wasn't counsels' strategy.

### **Arnold's 20 Year Old Letters With Postmarked Envelopes**

#### **Establish Ahsens' Sex For Testimony Deal**

Respondent asserts Ahsens didn't have a sex for testimony deal because the findings ruled Arnold and Brandy weren't credible witnesses(Resp.Br.27-28). The findings are clearly erroneous because by themselves Arnold's 20 year old letters with their postmarked envelopes written contemporaneously with Arnold's jail and prosecutor's office sexual encounters chronicled Ahsens arranged sex for testimony.

Arnold's May 25, 1993, letter (postmarked 5/27/93 from Farmington) to Brandy included that he couldn't wait to be with her in October, 1993, because in Arnold's negotiations he "was told **if I go through with the deal** we will be left alone for a long time . . . I'm gonna make it the best time you every [sic] had . . . I'm gonna make you cum like you never thought was possible . . ." (Ex.17p.11)(ellipses in original)(emphasis added).

Arnold's December 6, 1993, letter (postmarked 12/7/93) reflected they had sex and Arnold looked forward to more: "I know it's going to be so great to make love with you. I know we've been intimate before, but not to where we could relax and let loose. Baby, it feels so good inside you. You just don't realize what you've done to me." (Ex.81p.1).

Exhibit 83 was a letter Arnold wrote Brandy dated December 8, 1993 (postmarked 12/16/93), in which he directed her "to tell Curtis and Bob that **same deal** as last time Ozark or **no deal**, and we want all our visits in the breathalizer [sic] room." (Ex.83p.11-12)(emphasis added).

Exhibit 98 was a letter dated January 12, 1994, from Arnold described how sexually satisfied Brandy would be when he saw her in Ozark (Ex.98p.5).

On February 18, 1994, Arnold sent Brandy a letter (postmarked 2/22/94) stating: "when we made love the first time it was like never before to me." (Ex.122p.2).

Arnold wrote on April 7, 1994 (postmarked 4/8/94), describing what he planned to do as part of "some loving" when he saw Brandy and he was going to

“make [her] feel sooo good.”(Ex.143p.1-2). Arnold added that when Brandy received his letter he expected they have already been alone(Ex.143p.2).

Exhibit 146 was a Farmington letter postmarked April 25, 1994, that stated:

I got a toy for ya! So have I told you how good you made me feel in Ozark. I really liked it. I really liked it in Tim’s office downstairs. I like going slow. Made me come so fast, though. You’re yummy. I can’t wait to really make love to you. I can’t ever take the time down there to make you feel really good. I’m - I’ll make up for the way you make me feel. Okay, baby. I love you.

(Ex.146p.5-6)(emphasis added).

In Arnold’s May - June 1994, 77 page “letter” he commented on “are [sic] little roll’s in the county jail” and how they’d “romped in the prosucter’s [sic] office”(Ex.158Ap.1-2). Arnold referenced the “first time we had sex” as happening in Ozark(Ex.158Ap.51-52).

Exhibit 176A is Arnold’s letter to Brandy postmarked November 8, 1994. Arnold lamented their relationship’s unraveling because they no longer had the opportunity for sex(Ex.176Ap.6). Arnold commented: “I should have never did what I did in Ozark...”(Ex.176Ap.6). Arnold added once they were “good friends as well as lovers”(Ex.176Ap.6-7).

Exhibit 181 is a letter from Arnold to Brandy dated “Dec 15<sup>th</sup>” (postmarked 12/16/94). Arnold reminisced about the first time they were in court together and

Brandy came there “wearing hot pink shorts looking all sexy” and “**McCormik** [sic] went to McDonald’s for [him]”(Ex.181p.3)(emphasis added).

Exhibit 192 is a letter from Arnold to Brandy dated September 23, 1995, (postmarked 9/25/95), where Arnold referred to Brandy as having been his “lover” and that he remembered their times alone in Ozark(Ex.192 p.2). Arnold continued that he wished he “could have made love to [her] to [her] sexual gratification [sic]”(Ex.192p.2-3).

Exhibit 197 is a letter from Arnold to Brandy sent from Missouri Eastern Correctional (Pacific) dated February 7, 1997 (postmarked 2/10/97). Arnold wrote Pacific’s visiting area was the best of all except for Ozark and he “thought [she] might remember! ☺ Fun, Fun. [G]ood too! ☺”(Ex.197p.3(Arnold numbered as 2)).

Arnold’s 20 year old letters authored contemporaneously with Arnold’s and Brandy’s sexual encounters standing alone establish Ahsens had a sex for testimony deal with Arnold.

In February, 2004, after Judges Sims’ findings, Ahsens exchanged e-mails with A.A.G. Bruce, this 29.15 findings’ author(29.15L.F.9-10,460,688-744,938-46;29.15Tr.566-67). Ahsens wrote Bruce that retrying Barton before Sims was problematic because “He is not t [sic] the top of my hit parade either.”(29.15L.F.460). Bruce responded: “I suspect that the decision was based on the judge’s [Judge Sims] dislike of his predecessor, who tried the case, [Judge Scott] as more than the merits.”(29.15L.F.460)(bracketed material added).

This Court in considering not only the findings on Ahsens' sex for testimony deal, but all of the findings ought to weigh that the findings' author here, A.A.G. Bruce, in his e-mail exchange with Ahsens, accused Judge Sims of engaging in unethical, illegitimate, injudicious conduct when Sims granted Barton a new trial because of Ahsens' fourth trial Allen snitch misconduct. Judge Sims' findings were a thoughtful well-reasoned application of the law and facts to Ahsens' misconduct(See Sims' Findings Ex.224p.82-124).

The shocking and outrageous nature of Bruce's accusations leveled at Judge Sims is underscored by Sims' treatment of respondent's motion to disqualify him for cause from serving at the fifth trial. Cleek filed a motion to disqualify Sims for cause asserting that Ahsens would be the "main attorney" at the fifth trial(Ex.224p.40-42). Cleek's asserted cause grounds for disqualifying Judge Sims was that he had found that he "did not believe" Ahsens' 29.15 testimony(Ex.224p.40-42). Judge Sims overruled the motion, but then on his own motion recused himself(Ex.224p.49). Judge Sims' conduct throughout evidences adherence to the highest standards of judicial ethics and was beyond reproach.

This Court should reverse and order Barton's charges dismissed with prejudice or at minimum impose life without parole.

## II.

### SELVIDGE'S CALL - THEN HAVING SEX

#### WITH HARREL'S BOYFRIEND

**The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03 by not disclosing Selvidge's priors because counsel expressly and emphatically testified respondent failed to disclose them and had they known of her priors they would have used them to impeach her.**

Respondent relies on the 29.15 finding that defense counsel had no recollection or knowledge whether they knew about Selvidge's priors, and therefore, counsel didn't know whether it was their strategy to impeach Selvidge or not(RespBr.33,37-38 relying on 29.15L.F.1005). Respondent also relies on a finding that counsel wouldn't have used Selvidge's priors to impeach because they wanted her off the stand quickly(Resp.Br.35 relying on 29.15L.F.1022).

Bruns testified Selvidge's priors weren't disclosed, but if they had he would've used them to cross-examine her even though there was a generalized strategy of wanting Selvidge off quickly because she was emotional(29.15Tr.512-14,533-36).

Bruns emphatically and without reservation testified:

“if they [Selvidge's priors] would have been given to me, I would have brought these up in cross-examination.”

(29.15Tr.513-14). Kessler testified any cross-examination involving Selvidge's priors would've been Bruns' decision, if they'd been disclosed(29.15Tr.433-34). Counsels' 29.15 testimony expressly contradicts the findings, and therefore, they are clearly

erroneous because counsels' testimony reflects respondent didn't disclose Selvidge's priors, counsel didn't know about those priors and if counsel had known of Selvidge's priors they would've used them to impeach Selvidge, despite a generalized strategy of wanting her off the stand quickly.

Moreover the findings stated that respondent "admits that it was unaware of these convictions and did not disclose them."(29.15L.F.1005)(emphasis added). Bruns testified that Selvidge's priors were not disclosed and if they had been he would have cross-examined Selvidge about them(29.15Tr.513-14). Respondent's representations to this Court that counsel didn't know whether they were aware of Selvidge's priors, and they decided not to use them to impeach Selvidge, are expressly contradicted by Bruns' testimony and the findings.

Respondent argues that it exercised due diligence, but simply failed to locate Selvidge's priors (Resp.Br.30-31,34). This Court has held *Brady* is violated when the state suppressed evidence whether the suppression was willful or inadvertent, and therefore, respondent's argument must be rejected. *See State ex rel. Woodworth v. Denney*,396S.W.3d330,338(Mo.banc2013).

Respondent argues postconviction counsel didn't offer evidence on how they learned about Selvidge's priors. This Court has never required evidence of how postconviction counsel learned about undisclosed *Brady* evidence. *See, e.g., Taylor v. State*,262S.W.3d231,240(Mo.banc2008). How *Brady* material ultimately was discovered simply isn't relevant to the *Brady* inquiry which requires: (1) favorable evidence either exculpatory or impeaching; (2) that evidence was suppressed whether

willfully or inadvertently; and (3) prejudice. *Woodworth v. Denney*, 396 S.W.3d at 338. To impose such a requirement would make postconviction counsel a witness in 29.15 proceedings in which *Brady* material was uncovered. This Court hasn't imposed the requirement there be evidence of how postconviction counsel learned of *Brady* evidence for good reasons - a lawyer cannot serve as both an advocate and a witness in the same proceeding. *See State v. Eckelkamp*, 133 S.W.3d 72, 74 n.2 (Mo.App., E.D. 2004) (relying on Rule 4-3.7).

A new trial is required.

### III.

#### **BRADY VIOLATION - HORTON NOTES**

**The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03 by withholding Carol Horton’s statements from prosecution interview notes because the notes discredit respondent’s 3:00-4:00 timeline and support that Gladys was alive at 4:15 and killed between 4:15 and 5:30-5:40.**

Respondent states that the Horton notes represent Barton left Horton’s trailer after a lengthy handwashing session “at 4:00 p.m.,” and therefore, do not establish an alibi if he was not seen doing repair work until later(Resp.Br.39 n.4 relying on Ex.253p.2-3).

At this fifth trial Horton testified, Barton went back to Gladys’ at 3:00 and returned to Horton’s at 4:00(Ex.247p.458-59). Horton testified Barton used the bathroom for a long time, ten minutes(Ex.247p.459-61). Assuming Barton left immediately after washing his hands for ten minutes, the earliest he left Horton’s was 4:10. The Horton notes pages respondent references actually state Barton left Horton’s “about 4pm” and not “at 4:00 p.m.”(Ex.253p.2-3).

The significance of the Horton notes is that they discredit respondent’s 3:00-4:00 timeline for the killing through creating a timeframe that Gladys was alive at 4:15 and killed between 4:15 and 5:30-5:40(App.Br.82-85).

Respondent asserts it “disclosed after trial” the Horton notes(Resp.Br.38). The findings state respondent stipulated the Horton notes were in the Christian County

Prosecutor's file(29.15L.F.1008). Bruns testified Ex.253, the Horton notes, were undisclosed for use at trial(29.15Tr.521-22).

A new trial is required.

#### IV.

#### **FAILURE TO IMPEACH SELVIDGE - TIMING**

#### **LAST CONVERSATION WITH GLADYS**

**The motion court clearly erred denying counsel was ineffective for failing to cross-examine Selvidge with her prior testimony on when she last spoke to Gladys and for how long because impeaching Selvidge on this matter was critical to discrediting respondent's 3:00-4:00 timeline.**

Respondent treats the amended motion's pleading that Selvidge had "always" testified she spoke to Gladys for 20-25 minutes between 3:00 and 3:30 as Barton's argument on appeal, which it was not(Resp.Br.45-48). Barton's point and the substance of the amended motion pleading is that Selvidge had given prior inconsistent testimony on this subject and counsel should've impeached Selvidge with her significant prior inconsistent testimony. Barton's brief doesn't argue Selvidge "always" had done anything.

Barton's brief noted that at the fifth trial Selvidge testified as follows(App.Br.91). Selvidge and Gladys phoned one another while watching the Povich show, which started at 4:00(Ex.247p.503,505-06). Selvidge last spoke to Gladys at 2:30 on October 9, 1991(Ex.247p.505).

Barton's brief also noted in prior testimony, specifically the April, 1994 and April, 1998 trials, Selvidge testified as follows(App.Br.91). Selvidge's prior trials' testimony included that she last spoke to Gladys **after 3:00 for 20-25** minutes and

that their routine was to watch Oprah at 4:00, not Povich(Ex.242p.519-23;Ex.244p.472-78).

What respondent's brief has done is to reproduce almost verbatim the 29.15 findings with the findings' select excerpts from Selvidge's 1994 and 1998 trials direct testimony where Selvidge testified in generic terms she last talked to Gladys mid-afternoon(Resp.Br.45-47;See Findings 29.15L.F.1020-21). It was Selvidge's cross-examinations in the 1994 and 1998 trials where she testified she last spoke to Gladys **after 3:00 for 20-25** minutes and that their routine was to watch Oprah at 4:00, not Povich(Ex.242p.519-23;Ex.244p.472-78). It's this prior cross-examination testimony that impeaches Selvidge and discredits respondent's 3:00-4:00 timeline.

A new trial is required.

## V.

**FAILURE TO CALL HAMPTON**

The motion court clearly erred denying counsel was ineffective for failing to call Michelle Hampton to testify she saw Barton repairing Horton's deck between 4:00-4:20 because the amended motion pled counsel was ineffective for failing to call Hampton to testify to that timing.

Hampton was a critical witness whose testimony on when she saw Barton repairing Horton's deck called into question respondent's 3:00-4:00 timeline.

Relying on the findings respondent asserts the claim briefed was waived because it was not included in the amended motion(Resp.Br. 51-52). Respondent asserts the pleadings didn't include an allegation about when Hampton saw Barton(Resp.Br.51-52).

In the amended motion this claim was titled "Failed to Investigate/Call Michelle Hampton"(29.15L.F.110). The motion pled: "Ms. Hampton lived in the trailer park in October 1991, and she has twice testified that she saw Mr. Barton **working on Ms. Horton's deck at 4:00 p.m.** the day of the murder and that he had no blood on him at that time."(29.15L.F.110,248)(emphasis added). The pleadings continued alleging that Hampton's testimony would have discredited respondent's 3:00-4:00 timeline(29.15L.F.110,248). The pleadings alleged that counsel was ineffective for failing to investigate and present this evidence from Hampton(29.15L.F.110,248). The pleadings alleged that calling Hampton would've

discredited Horton's testimony placing Barton as repairing Horton's deck at 4:30 p.m.(29.15L.F.247-48).

The claim pled is identical to what was briefed that Hampton should've been called to testify to seeing Barton working on Horton's deck at 4:00 p.m.(29.15L.F.110,248).

Respondent asserts calling Hampton wouldn't have helped as Selvidge was unable to reach Gladys at 4:00 by phone so that placing Barton at Horton's at 4:00 wasn't inconsistent with Gladys already being dead and Barton had admitted answering Gladys' phone at 3:15(Resp.Br.53). Respondent continues that because it was Horton's deck Barton repaired and Horton testified it was 4:30 that Hampton's testimony didn't matter(Resp.Br.53).

This Court cannot look at Hampton's deck repairing testimony in isolation as it relates to discrediting respondent's timeline as respondent argues. Instead, Hampton's testimony is one piece when coupled with others that substantially discredits respondent's timeline. The undisclosed Horton notes (Point III) support that Gladys was alive at 4:15 and someone killed Gladys between 4:15 and 5:30-5:40. The impeachment that could've been done of Selvidge on the timing of her last call to Gladys (Point IV) supports that there simply wasn't enough time for Barton to have committed this crime during 3:00-4:00. Hampton's testimony was one piece of multiple pieces of critical evidence the jury never heard that discredited respondent's timeline.

Respondent asserts there was no prejudice because Hampton had testified at the fourth trial and Barton got death there and the findings state counsel testified they didn't want to repeat past failed approaches (Resp.Br.53)(relying on *Middleton v. State*,80S.W.3d799,810(Mo.banc2002). Middleton got death sentences in two separate trials for killing separate victims. *Id.*810. Unlike *Middleton*, Hampton testified in a trial that Judge Sims found was so fundamentally flawed because of Ahsens' Allen snitch misconduct that it wasn't a reliable result and ordered a new trial. Moreover, the fourth trial's verdict is unreliable because the jury was read Arnold's third trial testimony (Ex.244p.727-53 reading from Ex.242p.778-802) and never learned of Ahsens' sex for testimony deal with Arnold.

A new trial is required.

## VI.

### NO BLOOD SPATTER EXPERT

**The motion court clearly erred denying counsel was ineffective for failing to call a blood spatter expert, like Stuart James, because Judge Dandurand shut down on his own motion as inappropriate and wasting time counsel's limited "strategy" of only cross-examining respondent's expert Newhouse and this Court found on direct appeal that the claim Newhouse should have been excluded as a witness was "frivolous." Pursuing a "frivolous" badly done strategy wasn't reasonable and Barton was prejudiced.**

Respondent asserts counsel made the reasonable strategic decision not to present their own blood spatter expert and reasonably relied on attacking Newhouse's testimony as "junk science"(Resp.Br.56,60).

Counsel's cross-examination and attacking Newhouse as "junk science" wasn't reasonable because Judge Dandurand shutdown on his own motion counsel's cross-examination as inappropriate and wasting time(See App.Br.101-02). The unreasonableness of this "strategy" was established on direct appeal when this Court held the claim Newhouse should have been excluded as a witness was "frivolous." (See App.Br.110 relying on *State v. Barton*,240S.W.3d693,704-05(Mo.banc2007)).

Relying on the findings, respondent asserts that 29.15 expert Stuart James didn't do any testing to determine if Newhouse's testing was accurate(Resp.Br.61 relying on 29.15L.F.991). Both the 29.15 findings and respondent's argument premised on them are false. James testified that he reviewed Newhouse's findings,

defense blood expert Gietzen's fourth trial testimony, and examined Barton's clothing(29.15Tr.213,215,220-21). A comparison of Newhouse's report (Ex.301) to what James' testimony establishes James did everything possible to examine the accuracy of Newhouse's opinions.

Throughout respondent's brief it argues that Barton wasn't prejudiced by its misconduct and counsels' ineffectiveness because of "overwhelming" evidence against Barton which included Newhouse's blood spatter opinions(Resp.Br.36-37,49-50,54-55,66-67,75-76,87-88,121-22). In arguing the lack of prejudice, respondent even describes Newhouse's testimony as "uncontroverted"(Resp.Br.77,86-87). This Court should not condone respondent's inherently inconsistent positions that Newhouse's "uncontroverted" blood spatter evidence is part of the "overwhelming" evidence against Barton and that Barton's counsel wasn't ineffective for failing to call James to establish Newhouse's conclusions were wrong.

Throughout respondent's brief it footnotes Freter's reporting that she talked to Lawrence Renner at the Life in the Balance training and her reporting that Renner had raised concerns that there were three different types of blood stains on Barton's clothing(Resp.Br.50,55,76,89,122). Renner testified that he may have talked to Barton's counsel there, but he wasn't provided any materials to review(29.15Tr.388-89,392). Renner also testified he has never rendered an opinion on blood spatter based on materials shown to him at a training conference because his review of photos is done with special lenses he doesn't bring to conferences(29.15Tr.389-90). Renner only provides opinions after he's talked with counsel for about one hour, obtained a

package of crime photos/videos, and obtained a second all case documents package(29.15Tr.388-89). Renner never has advised an attorney, based on informal training discussions, that any further blood spatter investigation was unwarranted(29.15Tr.391-92). Before Renner is able to render a case opinion he must've devoted at least thirty hours to it(29.15Tr.392-93).

A new trial is required.

## VII.

### **FAILURE TO IMPEACH HORTON - BARTON'S HANDWASHING/BROKEN DOWN CAR AND DEMEANOR**

**The motion court clearly erred denying counsel was ineffective for failing to cross-examine Horton about her prior inconsistent statements about how long Barton washed his hands, prior knowledge of Barton's car problems, and whether Barton displayed changed demeanor from earlier and the hand-washing time because Horton's inconsistencies would have cast significant doubt on respondent's version of events.**

Respondent refers to Horton having testified that Barton had asked her for a ride to his car at Fast Track(Resp.Br.67). Respondent then speculates that Barton's car not being at the trailer park discredits Barton's reporting that he had been working on a car and why he was washing his hands at Horton's(Resp.Br.68n.9). Horton also testified that Barton was living out of his car, sleeping in it(Ex.247p.457). Since Barton was living out of his car, it is to be expected his car would not have been impermissibly permanently parked on trailer park grounds and he had to wash his hands at someone's home, like Horton's.

In an effort to demonstrate counsel's effectiveness in cross-examining Horton, respondent quotes an excerpt of counsel's questioning Horton about her prior testimony about Barton's demeanor and then summarizes part of that same testimony(Resp.Br.70-71). Viewing the entire verbatim exchange actually

demonstrates why counsel’s cross-examination was ineffectual and unhelpful to Barton. The complete exchange shows:

Q. In your trailer. Yes. And I want you to look on line 4: “Question: How was the Defendant acting at this time?” Do you see that?

A. Yes.

Q. “Answer: Really, no difference that I could tell.” That was your answer; correct?

A. **No. When he came back from being up there the second time –**

Q. I am just going to ask you, was that the answer that you gave in the transcript?

A. **No. What I said was that he acted different when he came back the second time. That’s the statement I have gave, and I am not changing it.**

Q. I understand that. Would you agree that that is what the transcript says?

A. **If that’s the way you want to take it.**

(Ex.247p.499-500)(emphasis added). This attempt at impeachment failed badly because Horton disputed what Bruns asserted was an inconsistent statement accusing Bruns of taking her testimony out-of-context(Ex.247p.499-500).

A new trial is required.

## VIII.

### ARGUMENT CONTRADICTING WHAT SELVIDGE TOLD

#### OFFICER ISRINGHAUSEN

**The motion court clearly erred denying counsel was ineffective for failing to object to Bradley’s guilt closing argument that Selvidge told Officer Isringhausen Barton did not pull her away from Gladys and Gladys’ bedroom because the defense explanation for the blood on Barton’s clothing was transfer caused by Barton pulling Selvidge away from Gladys’ body and not that he had spatter through contact with the bloody bedspread.**

Respondent asserts that the defense explanation for Barton having blood on his clothing was he got blood “spatter” on himself through slipping and “contacting the bloody sheet”(Resp.Br.77-78,86-87). According to respondent, Barton has “confuse[d]” his theory from previous trials with this trial(Resp.Br.78). The record is expressly to the contrary.

Officer Hodges testified Barton told Hodges he got blood on himself when he pulled Selvidge away from Gladys(Ex.247p.550-51). Barton told Hodges he thought he got the blood on himself because he slipped when he pulled Selvidge away from Gladys and his slipping was caused by stepping in blood(Ex.247p.555-56).

Officer Hodges testified Selvidge told him Barton reached around her and pulled her away from Gladys’ body while Horton was present(Ex.247p.542-45,549). Selvidge thereby confirmed for Hodges what Barton reported that he pulled Selvidge away from Gladys(Ex.247p.551-52).

Officer Merritt testified Barton told Officer Hodges he got blood on himself when he was pulling Selvidge away from Gladys' body(Ex.247p.672,683).

Kessler argued Barton told the police at the time he was questioned that while he pulled Selvidge away from Gladys' body he slipped and got blood on himself(Ex.247p.1030). Kessler continued that same evening Merritt and Hodges talked to Selvidge who confirmed what Barton reported to them(Ex.247p.1030). These arguments were about blood transfer and not some new defense theory that Barton had blood "spatter" on himself as respondent now claims.

Respondent asserts that Kessler's closing argument defense was that Barton got spatter on him through slipping followed by contact with the bloody bedspread(Resp.Br.86 relying on Ex.247p.1034). Kessler's argument was:

What is the blood consistent with? Exactly what he told the police seven years **before they [the state] hire a blood spatter expert.** I slipped. He didn't say I slipped in the blood and fell into the blood. He said, I slipped while I was pulling away and fell in the blood. Okay? Perfectly consistent with hitting that bed spread as you will see in Exhibit 17 and 18 and a little bit of blood gets on him.

(Ex.247p.1034)(emphasis added). Kessler's point here was Barton had provided a blood transfer explanation immediately to the police which was to be contrasted with respondent who seven years after the offense got Newhouse to make a spatter finding. As Kessler argued, the bedspread was one among many potential sources of blood transfer not spatter(See Resp.Br.78,86relying on Ex.247p.1034). That the bedspread

was only one of many potential sources of transfer is in keeping with Bruns' testimony that because the crime scene was so bloody the responsible person would've been covered in blood and Barton wasn't(29.15Tr.558-59).

Kessler argued Barton told the police he got blood on him when he slipped and that the police confirmed what Barton reported with Selvidge and Horton(Ex.247p.1041-42).

Respondent asserts there was no blood on Selvidge to transfer(Resp.Br.77,84). Respondent provides no record reference because there is nothing to support its assertion. Moreover, what Barton reported to the police was that he inadvertently got blood on himself during the entire process of pulling Selvidge away from Gladys and he never attributed the blood on him as having been on Selvidge and transferred to him from Selvidge(Ex.247p.542-45,549-52,555-56,672,683).

Respondent argues extensively why Newhouse's testimony proves the blood on Barton was spatter not transfer(Resp.Br.86-87). Respondent's reliance on Newhouse's spatter findings proves why counsel was ineffective in failing to call their own spatter expert. *See* Point VI.

A new trial is required.

## CONCLUSION

For the reasons discussed in the original and reply briefs, this Court should order the following: (a) Points II through VIII and XII - a new trial; (b) Points IX through XI - a new penalty phase; (c) Point I - impose life without parole or reverse and dismiss the charges with prejudice; and (d) Point XIII - a new trial where seeking death is prohibited or reverse death and impose life without parole.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,748 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant’s reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in January, 2014. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court’s electronic filing system this 24th day of January, 2014, on Assistant Attorney General Gregory L. Barnes at greg.barnes@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift  
William J. Swift