IN THE
MISSOURI SUPREME COURT

HERBERT SMULLS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 83179
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE EMMETT O'BRIEN AND
THE HONORABLE JAMES HARTENBACH, JUDGES

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

WILLIAM J. SWIFT, MOBar #37769
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
(573) 882-9855

INDEX

Page

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER

JURISDICTION

Because death was imposed, this Court has exclusive jurisdiction. Art.V., Sec.3, Mo. Const.

INTRODUCTION

Justice O'Connor recently urged state courts to take "concrete action" to ensure courts do not "perpetuate racial or gender bias." May 15, 1999 Remarks To The National Conference on Public Trust and Confidence in the Justice System at p.5 (National Center for State Courts and web site: http://ncsc.dni.us/PTC/trans/oconnor.htm). Those remarks follow from the precept that according dignity to individuals is a fundamental Constitutional right and principle. Paust, Human Dignity As A Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria And Content, 27 Howard L.J. 145,155-58,161,210-22(1984). That dignity was not accorded to Mr. Smulls and Margret Sidney, an African-American woman, who the State was allowed to strike over a Batson objection.

Judge Corrigan disputed Ms. Sidney is African-American even though her race is obvious (App.A1-2) and professed he is incapable of acknowledging anyone's race, invoking the "one drop of blood" racially insensitive notion. Judge Corrigan did so even though he told one of Mr. Smulls' attorneys he was "the best black attorney that had ever tried a case in front of him." His professed inability to identify race must be considered against the backdrop of a racially inflammatory "barbecue joke" he told at a judges' meeting.

Racial bias in criminal justice is central to racial minorities' concerns because our society defines itself through a commitment to the rule of law and fairness. Stevenson & Friedman, Deliberate Indifference: Judicial Tolerance of Racial Bias In Criminal Justice, 51Wash & Lee L.Rev.509,514(1994). The rule of law and fairness was absent because

authority was given to a judge to decide whether the explanation for striking Ms. Sidney was truthful while he falsely and unforthrightly maintained he is incapable of acknowledging a person's race.

To find Judge Corrigan's behavior did not undermine the integrity of the process would rightly cause African-Americans to view with hostility the criminal justice system. This Court should send a clear message of unwavering commitment to treating African-Americans fairly and reverse Mr. Smulls' case.

STATEMENT OF FACTS

On June 25, 1996, this Court issued an opinion strongly criticizing Judge Corrigan (Ex.65).[1] Those criticisms were made while addressing the 29.15 claims that Corrigan was unable to fairly address Smulls' Batson claim because of racial bias he has displayed (R.L.F.185-89). During Smulls' Batson hearing, Corrigan professed that he was incapable of acknowledging anyone's race, including the only eligible African-American venireperson, Ms. Sidney, because "[y]ears ago they used to say one drop of blood constitutes black." (Tr.II 380-82). Corrigan also represented that he did not know what black "is", "constitutes", or "means" (Tr.II 380-82). Corrigan stated he would "never" acknowledge anyone as African-American **"no matter what any appellate court may say"** and he required "direct evidence" as to who is black (Tr.II 380-82) (bold typeface added). Despite these representations, Corrigan told one of Smulls' trial attorneys that he was "the best black attorney that had ever tried a case in front of him." (Rem.R.Tr.680-81) (emphasis added). On the trial judge's report, Corrigan answered several race

[1]Two motions seeking leave to account for new Special Rule No. 1's 31,000 word limit and the new Rule 84.04(e) requirement to repeat Points Relied On were denied. They reflect that on the identical issues now before this Court, Mr. Smulls was allowed to file a 55,504 word brief, and accounting for 84.04(e) would require 59,419 words. For that reason, only last names are used throughout, even as to judges, with no disrespect intended to anyone.

specific questions including identifying Smulls as "Black" and answering "No" to the question: "Were members of the defendant's race represented on the jury" (Ex.24 at 4,7).

This Court was the subject of many attacks from the media, bench, and bar because of its criticisms of Corrigan. Two former members of this Court, and Corrigan friends, Judges Bardgett and Simeone filed rehearing motions on his behalf (Rem.R.L.F.159;Exs.68,69). Judge Drumm reportedly "expressed astonishment" with this Court's decision (Ex.75). Several pages attached to Bardgett's motion reflected they originated from the Attorney General's fax machine on July 3, 1996 (Rem. R.L.F.291;Rem. R.Tr. 31-33;Ex.68).

The media attacks included referring to this Court's members as "the seven stooges" who "after an uproarious, slapstick deliberations scene - there's a lot of eye-poking and headknocking - the stooges vote, 5-2, to rebuke Judge Corrigan" (Ex.76). One alleged this Court's actions occurred not out-of-concern for fairness to African-Americans, but because Democratic appointee Corrigan "has long been an outspoken critic of the Republican dominated Supreme Court" (Ex.80). That attack asserted Judge Robertson "dominates the court" and should be given "credit" for having "orchestrated" the criticisms (Ex.80).

On November 19, 1996, a modified opinion was issued deleting some of the language criticizing Corrigan. State v. Smulls,935S.W.2d9(Mo. banc.1996). When the 29.15 was before Corrigan, he had refused to allow his court reporter to record two proceedings, but did allow a private reporter Smulls supplied for both to record one proceeding (R.L.F.64-70,99,819-53;Rem.R.Tr.1391-93). Corrigan refused to allow the

private reporter to attend the September 9, 1993 conference yelling he "didn't give a shit" a reporter had been furnished (R.L.F.677-84,857); State v. Smulls,935S.W.2d at 25. At the September 9, 1993, conference, Corrigan stated the claims involving his bias "pisses him off" and dismays him from a "union standpoint" (R.L.F.677-78,860-61,867).

The 29.15 case was remanded for a new hearing before a new judge. Smulls,935S.W.2d at 27. A new hearing was held before Judge O'Brien. At that hearing, Judge Campbell recounted having attended a St. Louis County Court en banc meeting during which Corrigan had joked a judicial barbecue could not be held because there were no black judges to do the barbecuing (Ex.53 at 4-10,33,38).

Judge Satz attended the evidentiary hearing before O'Brien (Rem.R.Tr.597-98). O'Brien refused to allow one of Smulls' 29.15 attorneys to testify to statements Satz directed at counsel (Rem.R.Tr.1408-23) and ordered undersigned counsel that counsel could not state for the record what co-counsel's testimony would be (Rem.R.Tr.1408-23). O'Brien refused to allow this record because these matters would be part of the record which this Court could again use to reverse (Rem.R.Tr.1408-23). O'Brien entered Findings denying all claims (Rem.R.L.F.785-844).

Based on Corrigan's deposition statements, this Court remanded for a hearing to determine whether O'Brien was able to have fairly served. Smulls v. State, 10S.W.3d497,504-05 (Mo.banc2000). If the hearing court concluded O'Brien was able to have fairly served, then he was to re-enter his judgment. Id.504-05.

A hearing was held before Judge Hartenbach. O'Brien was with Corrigan when Corrigan condemned this Court's original opinion for calling him "a racist" and

Corrigan's statements reflected it was not Corrigan's "favorite opinion" from this Court (O'B.Rem.Tr.134-35,140). Corrigan expressed "an overall displeasure with the opinion" (O'B.Rem.Tr.146-47). O'Brien was uncertain whether he made any statements about the original opinion, but if he did then they were directed at language calling into question Corrigan's ability to continue to serve as a judge (O'B.Rem.Tr.121,123-24). O'Brien believed that was something more appropriate for the Commission on Discipline (O'B.Rem.Tr.123-24). Hartenbach found O'Brien was able to have fairly served because O'Brien: (1) did not express any opinion about the original opinion's merits; (2) did not express any opinion about the Corrigan racial bias claims; and (3) formed no opinions on the merits before hearing evidence (O'B.Rem.L.F.213-14). O'Brien then reentered his judgment (O'B.Rem.L.F.220-79).

This appeal of all findings entered and all related rulings followed.

POINTS RELIED ON

I. JUDGE CORRIGAN DID NOT FAIRLY DECIDE BATSON

O'BRIEN CLEARLY ERRED FAILING TO FIND SMULLS WAS DENIED A FAIR TRIAL ON GROUNDS CORRIGAN COULD NOT FAIRLY CONSIDER HIS BATSON CHALLENGE AND COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO DISQUALIFY CORRIGAN ON SUCH GROUNDS BECAUSE SMULLS WAS DENIED DUE PROCESS, EQUAL PROTECTION, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND EFFECTIVE ASSISTANCE, U.S. CONST., AMENDS. 6, 8, AND 14, AS SMULLS WAS TRIED BEFORE A JUDGE WHO MADE STATEMENTS AND ENGAGED IN CONDUCT DURING AND PRIOR TO HIS CASE ESTABLISHING HE CANNOT AND DID NOT FAIRLY DECIDE SMULLS' BATSON CLAIM.

In re Ferrara,582N.W.2d817(Mich.1998);

Georgia v. McCollum,505U.S.42(1992);

Peters v. Kiff,407U.S.493(1972);

Vasquez v. Hillery,474U.S.254(1986);

U.S. Const., Amends. 6,8, and 14;

Gotanda, A Critique of "Our Constitution Is Color Blind", 44Stan.L.Rev.1(1991);

Johnson, The Language And Culture (Not To Say Race) Of Peremptory Challenges,35Wm. & Mary L.Rev.21(1993);

Kennedy, Race, Crime and the Law(1997);

Stevenson & Friedman, Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice,51Wash. & Lee L.Rev.509(1994);

Hickman, The Devil and The One Drop Rule: Racial Categories, African-Americans, And The U.S. Census,95Mich.L.Rev.1161(1997);

Higginbotham, Shades of Freedom(1996);

Armour, Negrophobia and Reasonable Racism The Hidden Costs of Being Black In America(1997);

Johnson, Racial Imagery In Criminal Cases,67Tul.L.Rev.1739(1993);

Bright, Discrimination, Death And Denial: The Tolerance of Racial Discrimination In Infliction Of The Death Penalty,35 Santa Clara L.Rev.433(1995);

Bright, The Politics Of Crime And The Death Penalty: Not "Soft On Crime", But Hard On The Bill Of Rights,39St. Louis U.L.J.479(1995);

Johnson, Batson Ethics For Prosecutors And Trial Court Judges,73Chicago-Kent L.Rev.475(1998);

Baker, Waiting and Wondering, ABA Journal Feb. 1999 at 53;

Pinder, When Will Black Women Lawyers Slay The Two-Headed Dragon; Racism and Gender Bias?,20 Pepperdine L.Rev.1053(1993);

Conference The Death Penalty In The Twenty-First Century, 45Amer.U.L.Rev.239(1995);

Report Of The Missouri Task Force On Gender and Justice;

First Black Federal District Judge Here, St. Louis American, June 26, 1980(front page);

Allport, The Nature of Prejudice(1958); and

Johnson, Unconscious Racism And The Criminal Law,73Cornell L.Rev.1016(1988).

II. JUDGE O'BRIEN COULD NOT FAIRLY SERVE

HARTENBACH ERRED FINDING O'BRIEN WAS ABLE TO FAIRLY SERVE BECAUSE SMULLS WAS DENIED FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, DUE PROCESS, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14, AS O'BRIEN WAS WITH CORRIGAN WHEN CORRIGAN CONDEMNED THIS COURT'S CALLING HIM "A RACIST" AND O'BRIEN MAY HAVE PARTICIPATED IN CRITICIZING LANGUAGE THAT PRODUCED LOBBYING AGAINST THIS COURT THEREBY CREATING AN APPEARANCE OF IMPROPRIETY AND O'BRIEN'S RULINGS THROUGHOUT ESTABLISH ACTUAL BIAS.

FURTHER, HARTENBACH ERRED DENYING RENEWED MOTIONS TO DISQUALIFY ALL ST. LOUIS COUNTY JUDGES BECAUSE SMULLS WAS DENIED THE NOTED RIGHTS AND HIS INTERNATIONAL LAW RIGHT TO A FAIR HEARING AS HARTENBACH'S "TORTURED HISTORY" COMMENT ESTABLISHES WHY ST. LOUIS COUNTY SHOULD BE DISQUALIFIED.

State v. Smulls,935S.W.2d9(Mo.banc1996);

State v. Nicklasson,967S.W.2d596(Mo.banc1998);

Haynes v. State,937S.W.2d199(Mo.banc1996);

State v. Sutherland,939S.W.2d373(Mo.banc1997);

U.S. Const., Amends. 8 and 14;

International Covenant on Civil and Political Rts. Art.14 para.1;

American Convention on Human Rts. Art.8 para.1; and

European Convention Protection of Human Rts. and Fund. Freedoms Art.6 para.1.

III. JUDGE O'BRIEN'S BIAS - EXCLUDED EVIDENCE

HARTENBACH CLEARLY ERRED REFUSING TO ADMIT AND/OR CONSIDER JUDGES CALVIN'S AND SHAW'S TESTIMONY (EXS.91-92), THE REHEARING MOTIONS/"LETTERS" FILED ON CORRIGAN'S BEHALF (EXS.67-70), AND POST PUBLICATIONS DOCUMENTING THE CONTROVERSY SURROUNDING THE ORIGINAL OPINION AND ONE CONTROVERSY SOURCE (EXS.74-78 AND 80-86) BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST. AMENDS. 8 AND 14, AS THIS ALL ESTABLISHED THERE WAS A SUBSTANTIAL CONTROVERSY SURROUNDING SMULLS' CASE FOCUSED ON DEFENDING CORRIGAN WHICH WAS RELEVANT TO DEMONSTRATE BIAS IN O'BRIEN'S TESTIMONY.

State v. Johnson,700S.W.2d 815(Mo.banc1985);

State v. Street,732S.W.2d 196(Mo.App.,W.D.1987);

State v. Murray,744S.W.2d762(Mo.banc1988);

State v. Sutherland,939S.W.2d373(Mo.banc1997); and

U.S. Const. Amends. 8 and 14.

IV. REFUSAL TO ACKNOWLEDGE RACE - EXCLUDED EVIDENCE

O'BRIEN CLEARLY ERRED REFUSING TO ADMIT EX.21 (SMULLS' ADMISSIONS REQUESTS), EX.22 (REQUESTS TRANSCRIPT) AND REFUSING TO CONSIDER FORMER 29.15 COUNSEL LEFTWICH'S TESTIMONY CORRIGAN ASKED CO-COUNSEL WHETHER HE WAS AWARE THE WOMAN ATTORNEY WHO OBTAINED A GENDER DISCRIMINATION JUDGMENT AGAINST HIM WAS "WHITE" AND EX.23 (LEFTWICH'S CONTEMPORANEOUS AFFIDAVIT - CORRIGAN'S QUESTION) BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14, BECAUSE THEY WERE NECESSARY TO ESTABLISH CORRIGAN'S FALSE AND UNFORTHRIGHT PROFESSING HE IS INCAPABLE OF IDENTIFYING ANYONE'S RACE AND THEREFORE DID NOT FAIRLY RULE SMULLS' BATSON CLAIM AND NONE WOULD HAVE BEEN NECESSARY EXCEPT CORRIGAN REFUSED TO ALLOW HIS COURT REPORTER TO RECORD THE PROCEEDINGS.

Owen v. State,776S.W.2d467(Mo.App.,E.D.1989);

Bayte v. State,599S.W.2d231(Mo.App.,W.D.1980);

Johnston v. Johnston,573S.W.2d406(Mo.App.,K.C.D.1978);

State v. Sutherland,939S.W.2d373(Mo.banc.1997); and

U.S. Const., Amends. 8 and 14.

V. NO BLACK JUDGES TO DO BARBECUING

O'BRIEN CLEARLY ERRED DISMISSING EVIDENCE OF CORRIGAN'S "BARBECUE JOKE", RELYING ON IRRELEVANT HEARSAY COURT EN BANC MINUTES TO DISPUTE CORRIGAN TOLD THE "JOKE", RELYING ON CORRIGAN'S HEARSAY DENIAL, AND SUSTAINING RESPONDENT'S OBJECTION TO KRAFT'S TESTIMONY IF SHE HAD BEEN AWARE CORRIGAN WAS ALLEGED TO HAVE TOLD THIS "JOKE" THEN SHE WOULD HAVE CONSIDERED DISQUALIFYING HIM, AND FOUND CORRIGAN WAS ABLE TO FAIRLY RULE ON BATSON BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, A FULL AND FAIR HEARING AND EFFECTIVE ASSISTANCE, U.S. CONST., AMENDS. 6, 8, 14 AS JUDGE CAMPBELL TESTIFIED CORRIGAN TOLD THE "JOKE" AND THAT TESTIMONY WAS OFFERED FOR THE NON-HEARSAY PURPOSE CORRIGAN MADE THE STATEMENT, EVANS, THE AUTHOR OF AN ARTICLE ABOUT THE "JOKE" TESTIFIED ABOUT HIS REPORTING WITH THE REPORTING OFFERED TO SHOW COUNSEL SHOULD HAVE BEEN AWARE OF IT, AS THE "JOKE" IS HIGHLY PROBATIVE OF CORRIGAN'S INABILITY TO FAIRLY DECIDE SMULLS' BATSON CLAIM AND WHETHER COUNSEL WOULD HAVE MOVED TO DISQUALIFY CORRIGAN RELEVANT TO INEFFECTIVENESS WHILE INADMISSIBLE HEARSAY WAS USED TO DISMISS CORRIGAN TOLD THE "JOKE."

State v. Sutherland,939S.W.2d373(Mo.banc.1997);

State v. Beck,785S.W.2d714(Mo.App.,E.D.1990);

State v. Weber,814S.W.2d298(Mo.App.,E.D.1991);

Kenley v. Armontrout,937F.2d1298(8thCir.1991);

§ 490.130; and

U.S. Const., Amends. 6, 8, and 14.

VI. JUDGE O'TOOLE'S DEPOSITION - IMPROPERLY STAYED

O'BRIEN CLEARLY ERRED STAYING JUDGE O'TOOLE'S DEPOSITION BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14, AS THIS COURT WAS CLEAR SMULLS WAS TO HAVE A HEARING ON CORRIGAN'S RACIAL BIAS, INCLUDING HIS "BARBECUE JOKE", THE RULING DENIED ACCESS TO A WITNESS WHO SMULLS HAD REASON TO BELIEVE HEARD CORRIGAN'S "JOKE" AND WHO COULD, AS PRESIDING JUDGE, BE EXPECTED TO KNOW ABOUT THE ST. LOUIS COUNTY JUDICIARY'S LOBBYING AGAINST THIS COURT AND SMULLS WAS ONLY ALLOWED TO PROCEED WHEN O'TOOLE WAS TOO ILL AND DIED.

Barry v. State,850S.W.2d348(Mo.banc1993);

Smulls v. Missouri,117S.Ct.2415(June 2, 1997);

State v. Smulls,935S.W.2d9(Mo.banc 1996);

State v. Pizzella,723S.W.2d384(Mo.banc1987);

U.S. Const., Amends. 8 and 14;

Section 56.060; and

Rule 56.01.

VII. GENDER DISCRIMINATION JUDGMENT EVIDENCE

O'BRIEN CLEARLY ERRED EXCLUDING EX.60, THE AFFIDAVIT OF GOODWIN (TUBBESING), WHO SUCCESSFULLY SUED CORRIGAN FOR GENDER DISCRIMINATION AND EX.61, THAT ACTION'S DOCKET SHEETS, BECAUSE THE AFFIDAVIT IDENTIFIED GOODWIN AS WHITE, THE DOCUMENTS REFLECTED JUDGE CAHILL, WHO IS AFRICAN-AMERICAN, PRESIDED AND CORRIGAN DID NOT PAY THE JUDGMENT AGAINST HIM AND DENIED SMULLS DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 6, 8, AND 14 AS GOODWIN'S RACE WAS RELEVANT TO DEMONSTRATING CORRIGAN HAS FALSELY AND UNFORTHRIGHTLY PROFESSED HE IS INCAPABLE OF ACKNOWLEDGING RACE AFTER CORRIGAN INJECTED GOODWIN'S RACE AND CAHILL'S JUDICIAL ROLE WAS RELEVANT TO DEMONSTRATING AND PROVING WHY CORRIGAN APPROXIMATELY ONE YEAR LATER TOLD THE "BARBECUE JOKE", AND CORRIGAN NOT PAYING THE JUDGMENT WAS RELEVANT TO DEMONSTRATE WHY HE FELT HE COULD MAKE RACIALLY OFFENSIVE COMMENTS HERE WITH IMPUNITY.

Barry v. State,850S.W.2d348(Mo.banc1993);

State v. Richardson,838S.W.2d122(Mo.App.,E.D.1992);

Stevinson v. Deffenbaugh Industries,870S.W.2d851(Mo.App.,W.D.1993);

Taylor v. State,728S.W.2d305(Mo.App.,W.D.1987); and

U.S. Const., Amends. 6, 8, and 14.

VIII. WALDEMER LIED - WHY HE STRUCK SIDNEY

O'BRIEN CLEARLY ERRED DENYING WITHOUT A HEARING CLAIMS SMULLS WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO PRESENT EVIDENCE WALDEMER LIED ABOUT WHY HE STRUCK SIDNEY AND THE SUBSTANTIVE CLAIM WALDEMER LIED, REFUSED THE OFFERS OF PROOF, REFUSED TO COMPEL RESPONDENT TO ANSWER INTERROGATORIES AND QUASHED WALDEMER'S DEPOSITION SUBPOENA BECAUSE THOSE RULINGS DENIED SMULLS THE OPPORTUNITY TO DEMONSTRATE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, EQUAL PROTECTION, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST., AMENDS. 6, 8, AND 14 AND DENIED SIDNEY DUE PROCESS AND EQUAL PROTECTION, AS THE PLEADINGS ALLEGED FACTS WARRANTING RELIEF, THE OFFERS CONTAIN SOME OF THE EVIDENCE THAT WOULD ESTABLISH WALDEMER LIED, AND THE DISCOVERY WOULD PRODUCE ADDITIONAL EVIDENCE WALDEMER LIED.

McGurk v. Stenberg,163F.3d470(8thCir.1998);

Davidson v. Gengler,852F.Supp.782(W.D.Wisc.1994);

Peters v. Kiff,407U.S.493(1972);

Vasquez v. Hillery,474U.S.254(1986);

U.S. Const., Amends. 6, 8, and 14; and

Rule 56.01.

IX. JUDGE CORRIGAN'S RETENTION TROUBLES

O'BRIEN CLEARLY ERRED DENYING CLAIMS COUNSEL WERE INEFFECTIVE FOR FAILING TO MOVE TO DISQUALIFY CORRIGAN AND SMULLS WAS DENIED DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT THROUGH CORRIGAN PRESIDING BECAUSE CORRIGAN COULD NOT CONSIDER LIFE AS IT WOULD ADVERSELY IMPACT HIS CHANCES FOR FUTURE RETENTION AND EXCLUDING SMULLS' EVIDENCE, EXS.54 - 58, BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 6, 8, AND 14, AS THE EXCLUDED EVIDENCE RELATED TO CORRIGAN'S BAD BAR EVALUATIONS AND THE MEDIA REPORT OF SMULLS' SENTENCING SO SMULLS WAS DENIED THE OPPORTUNITY TO PROVE HIS CLAIMS ON THE MERITS.

State v. Feltrop,803S.W.2d1(Mo.banc1991);

Roll v. Bowersox,16F.Supp.2d1066(W.D. Mo.1998);

Harris v. Alabama,513U.S.504(1995);

Taylor v. State,728S.W.2d305(Mo.App.,W.D.1987);

U.S. Const., Amends. 6, 8, and 14;

Conference - The Death Penalty In The Twenty-First Century,45Amer.U.L.Rev.239(1995); and

Keenan and Bright, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75B.U.L.Rev.759(1995).

X. EXCLUDING MR. SMULLS' EXPERT AND ALLOWING JUDGE CORRIGAN'S CHARACTER EXPERT FRIENDS

O'BRIEN CLEARLY ERRED OVERRULING SMULLS' OBJECTIONS AND ALLOWING RESPONDENT TO PRESENT CORRIGAN'S REPUTATION EXPERT FRIENDS' OPINIONS AND ENTIRELY EXCLUDING SMULLS' EXPERT, PROFESSOR GALLIHER'S TESTIMONY BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14 AS REPUTATION AND CHARACTER EVIDENCE ARE INADMISSIBLE AND GALLIHER'S TESTIMONY WAS ADMISSIBLE TO SHOW A PATTERN OF BEHAVIOR DEMONSTRATING CORRIGAN COULD NOT FAIRLY CONSIDER SMULLS' BATSON CHALLENGE.

O'BRIEN FURTHER CLEARLY ERRED REFUSING TO ALLOW SMULLS TO CROSS-EXAMINE THREE CORRIGAN REPUTATION EXPERT FRIENDS ALL HAD PROVIDED SWORN STATEMENTS/TESTIMONY THE LONG-STANDING POLICY AND PRACTICE OF THE ST. LOUIS COUNTY PROSECUTOR'S OFFICE HAS BEEN TO STRIKE AFRICAN-AMERICANS BECAUSE OF THEIR RACE, AND REFUSED EXS.45 AND 46-PRIOR SWORN STATEMENTS OF TWO SO STATING, AND REFUSED TO CONSIDER ONE BELIEVES THAT PRACTICE AND POLICY EXISTED WHEN SMULLS WAS RETRIED BECAUSE SMULLS WAS DENIED ALL NOTED RIGHTS, AS THIS

EVIDENCE WAS HIGHLY PROBATIVE OF WHY IT WAS CRUCIAL TO HAVE A JUDGE OTHER THAN CORRIGAN DECIDE BATSON.

Williams v. Bailey,759 S.W.2d394(Mo.App.,S.D.1988);

Haynam v. Laclede Electric Cooperative, Inc.,827S.W.2d200(Mo. banc1992);

State v. Kinder,942S.W.2d313(Mo.banc1996);

In re Ferrara,582N.W.2d817(Mich.1998); and

U.S. Const., Amends. 8 and 14.

XI. RACIALLY MOTIVATED SEEKING DEATH

O'BRIEN CLEARLY ERRED WHEN HE DENIED, WITHOUT A HEARING, THE SUBSTANTIVE CLAIM DEATH WAS SOUGHT FOR RACIALLY DISCRIMINATORY REASONS AND ITS COMPANION INEFFECTIVE ASSISTANCE CLAIM, REFUSED OFFERS OF PROOF, AND DENIED DISCOVERY, BECAUSE THOSE RULINGS DENIED SMULLS DUE PROCESS, EQUAL PROTECTION, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 6, 8, AND 14 AS THE PLEADINGS ALLEGED FACTS WARRANTING RELIEF, THE OFFERS CONTAINED SOME OF THE SUPPORTING EVIDENCE, AND THE DISCOVERY WAS RELEVANT TO THE CLAIMS ALLEGED AND WOULD GENERATE ADDITIONAL EVIDENCE PROVING SMULLS' CLAIMS.

McCleskey v. Kemp,481U.S.279(1987);

U.S. v. Bradley,880F.Supp.271(M.D.Pa.1994);

State v. Taylor,929S.W.2d209(Mo.banc1996);

U.S. v. Cuff,38F.Supp.2d 282(S.D.N.Y.,1999);

U.S. Const., Amends. 6, 8, and 14; and

Lawrence, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism,39Stan.L.Rev.317(1987).

XII. GUNSHOT RESIDUE

O'BRIEN CLEARLY ERRED REJECTING SMULLS' CLAIM COUNSEL FAILED TO PRESENT GUNSHOT RESIDUE EVIDENCE CO-DEFENDANT BROWN'S TEST RESULTS SUPPORTED FINDING HE FIRED A GUN AND SMULLS HAD NOT BECAUSE SMULLS WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST., AMENDS. 6, 8, AND 14, AS REASONABLY COMPETENT COUNSEL WOULD NOT HAVE WAITED UNTIL THEY SUBPOENAED HIGHWAY PATROL CHEMIST ROTHOVE TO TRIAL TO LEARN HE WOULD NOT SUPPORT THEIR THEORY THE SHOOTING WAS WITHOUT SMULLS' PRIOR KNOWLEDGE AND THE CO-DEFENDANT WAS THE SHOOTER AND SMULLS WAS PREJUDICED BECAUSE SOMEONE WITH SIMILAR EXPERTISE COULD HAVE SUPPORTED COUNSELS' THEORY.

Barry v. State,850S.W.2d348(Mo.banc1993);

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

Kyles v. Whitley,514U.S.419(1995); and

U.S. Const., Amends. 6, 8, and 14.

XIII. ABSENT MITIGATION

O'BRIEN CLEARLY ERRED OVERRULING THE CLAIM SMULLS WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO CALL MITIGATION WITNESSES BROWN, EDWARDS, HODGES, MAJOR, THE THREE LEES, CAIN, CARTER, MILTON, ROSS, MORRIS, DECLUE-SMITH, TOGNOLI, WILLIAMS, SIMMONS, FRAZIER, HENNINGS, AND KINDELL TO TESTIFY ABOUT SMULLS' NONVIOLENT PERSONALITY INCLUDING TESTIMONY THE CO-DEFENDANT MADE ADMISSIONS THAT HE, AND NOT SMULLS, SHOT THE HONICKMANS, HIS AMICABLE AND HELPFUL CHARACTER TRAITS, PASSIVE PERSONALITY, AND ABANDONED CHILDHOOD BECAUSE SMULLS WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST., AMENDS. 6, 8, AND 14 AS REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THOSE WITNESSES. SMULLS WAS PREJUDICED BECAUSE THE JURY DID NOT HEAR EVIDENCE WARRANTING LIFE.

Kenley v. Armontrout,937F.2d1298(8thCir.1991);

Kyles v. Whitley,514 U.S.419(1995);

State v. Phillips,940 S.W.2d512(Mo.banc1997);

Green v. Georgia,442U.S.95(1979); and

U.S. Const., Amends. 6, 8, and 14.

XIV. HEARING REQUIRED

O'BRIEN CLEARLY ERRED DENYING A HEARING ON MULTIPLE CLAIMS BECAUSE SMULLS ALLEGED FACTS WARRANTING RELIEF AS SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, A FULL AND FAIR HEARING, EFFECTIVE ASSISTANCE, AND EQUAL PROTECTION, U.S. CONST., AMENDS. 6, 8, AND 14, AS THE PLEADINGS INCLUDED ALLEGATIONS OF COUNSELS':

A. PRESENTING PSYCHOLOGIST, DR. HIVELY, WHEN HE HAD NOT AUTHORED THE REPORT THAT WAS THE SUBJECT OF HIS TESTIMONY AND FAILING TO PRESENT A COMPREHENSIVE MENTAL HEALTH EXAMINATION;

B. GIVING A PENALTY PHASE OPENING STATEMENT CHARACTERIZING SMULLS' RESPONSE TO HIS HAND INJURY AS TAKING "THE EASY WAY OUT" BY GOING INTO A LIFE OF CRIME;

C. FAILING TO REQUEST A MISTRIAL OR ALTERNATIVELY TO RENEW THE MOTION TO REOPEN VOIR DIRE AFTER THE JURY'S NOTE, PRIOR TO PENALTY PHASE, WHICH SUGGESTED IT HAD ALREADY REACHED A PENALTY VERDICT;

D. FAILING TO OBJECT AND PRESENT EVIDENCE PENALTY PHASE INSTRUCTIONS DO NOT PROPERLY INSTRUCT;

E. FAILING TO OBJECT TO CORRIGAN INSTRUCTING VENIREPERSON MACHA SMULLS "THEORETICALLY" WAS NOT REQUIRED TO PROVE HE SHOULD BE SENTENCED TO LIFE AND TO MOVE TO STRIKE THE PANEL OR REQUEST OTHER RELIEF AFTER VENIREPERSON HIRSCH WAS STRICKEN FOR CAUSE, BUT STILL ALLOWED TO BE QUESTIONED WHILE EXPRESSING DEATH WOULD BE THE ONLY APPROPRIATE PUNISHMENT FOR INTENTIONAL KILLING.

Belcher v. State,801S.W.2d 372(Mo.App.,E.D.1991);

State v. Smulls,935S.W.2d 9(Mo.banc1996);

U.S. ex rel. Free v. Peters,806F.Supp.705(N.D.Ill.1992),rev'd.,12F.3d 700(7thCir.1993);

State v. Storey,901S.W.2d886(Mo.banc1993); and

U.S. Const., Amends. 6, 8, and 14.

XV. RIGHT TO TESTIFY

O'BRIEN CLEARLY ERRED REJECTING COUNSEL WAS INEFFECTIVE IN DIRECTING SMULLS NOT TO TESTIFY AT RETRIAL BECAUSE SMULLS WAS DENIED EFFECTIVE ASSISTANCE, HIS RIGHT TO TESTIFY, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. 5, 6, 8, AND 14, AS REASONABLE COUNSEL WOULD NOT HAVE SO DIRECTED AFTER SMULLS' FIRST TRIAL'S JURY HUNG ON THE MURDER CHARGE WHEN HE TESTIFIED AND A REASONABLE PROBABILITY EXISTS HE WOULD NOT HAVE BEEN CONVICTED IF HE TESTIFIED AT RETRIAL.

Whitfield v. Bowersox, No. 4:97-CV-1412CAS

(E.D.Mo.Jan.24,2001);

Rock v. Arkansas,483U.S.44(1987);

Jones v. Barnes,463U.S.745(1983);

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

U.S. Const. Amends. 5, 6, 8, and 14.

ARGUMENTS

I. JUDGE CORRIGAN DID NOT FAIRLY DECIDE BATSON

O'BRIEN CLEARLY ERRED FAILING TO FIND SMULLS WAS DENIED A FAIR TRIAL ON GROUNDS CORRIGAN COULD NOT FAIRLY CONSIDER HIS BATSON CHALLENGE AND COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO DISQUALIFY CORRIGAN ON SUCH GROUNDS BECAUSE SMULLS WAS DENIED DUE PROCESS, EQUAL PROTECTION, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND EFFECTIVE ASSISTANCE, U.S. CONST., AMENDS. 6, 8, AND 14, AS SMULLS WAS TRIED BEFORE A JUDGE WHO MADE STATEMENTS AND ENGAGED IN CONDUCT DURING AND PRIOR TO HIS CASE ESTABLISHING HE CANNOT AND DID NOT FAIRLY DECIDE SMULLS' BATSON CLAIM.

O'Brien denied Smulls' claims he was denied a fair trial based upon Corrigan's inability to fairly consider the Batson challenge to striking Sidney and counsel was ineffective for failing to seek to disqualify him based on that inability. Smulls was denied due process, equal protection, freedom from cruel and unusual punishment, and effective assistance. U.S. Const., Amends. 6, 8, and 14. O'Brien rejected Smulls claims because: (1) Corrigan's Batson hearing statements reflected unwillingness only to judicially notice race (O'B.Rem.L.F.271); (2) this Court found no direct appeal Batson violation (O'B.Rem.L.F.271); (3) he was unable to determine whether the "barbecue

joke" was made and if so by whom (O'B.Rem.L.F.252); and (4) Corrigan's attorney friends good "reputation" testimony (O'B.Rem.L.F.253,274-75).

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, Smulls must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466 U.S. 668,687(1984).

A. Claims Pled

The amended motion alleged Corrigan was unable to fairly serve and consider the Batson challenge to striking Sidney and counsel was ineffective for failing to seek to disqualify Corrigan on that ground (R.L.F. 185-89;App.A3-7). The pleadings specifically alleged Smulls would rely on other criminal cases tried before Corrigan (R.L.F. 185-89;App.A3-7). He specifically identified an expert witness by name and occupation, Professor Galliher, who reviewed other criminal casefiles and found differential harsher treatment accorded African-Americans based on their race (R.L.F. 186;App.A4). Galliher also had identified other Corrigan statements and actions evidencing racial bias (R.L.F.186;App.A4).

The pleadings also alleged Smulls would rely on racially discriminatory statements Corrigan made to other judges (R.L.F. 185-89;App.A3-7). They alleged the date and exact title of a newspaper article containing one such statement and quoted it: '"We can't hold a barbecue because we don't have a black judge to do the cooking'" (R.L.F.186-87;App.A4-5). The article's author, Emory S. Evans, would testify

(R.L.F.187-88;App.A5-6). St. Louis County judges who heard the statement would testify (R.L.F.187;App.A5).

The motion specifically alleged Smulls was unable to have his Batson objection to striking Sidney fairly decided and counsel was ineffective because of Corrigan's long-standing racially biased offensive behavior (R.L.F.189;App.A7). Smulls also alleged he would present evidence of other occurrences of racially offensive behavior and statements by Corrigan establishing he was unable to serve at all phases of a case involving an African-American defendant and counsel was ineffective for failing to disqualify Corrigan (R.L.F.185-89;App.A3-7).

Counsel failed to act reasonably because they did not conduct adequate investigation to disqualify Corrigan because he has made statements evidencing racial bias against African-Americans (R.L.F.188-89;App.A6-7). Smulls was prejudiced because he was tried before a judge who was unable to fairly consider his Batson challenge as a result of a history of actions evidencing racial bias (R.L.F.188-89;App.A6-7). Smulls also alleged prejudice should be presumed (R.L.F.189;App.A7).

B. Unwillingness To Do What Batson Requires - One Aspect Of Corrigan's Racial Bias

Addressing Corrigan's Batson hearing actions, this Court stated:

> The trial judge's gratuitous statements raise serious questions about his willingness to do what Batson requires. His words

> suggest an inability or hostility to taking notice of a venireperson's race, no matter how obvious it is.

State v. Smulls,935S.W.2d9,26(Mo.banc1996)(footnote omitted). Both sides had already acknowledged Sidney was black when Corrigan made his racially offensive comments. Id.26,n.6. The statements this Court referenced occurred on November 11, 1992, and were:

- "I don't know what it is to be black. I don't know what constitutes black."
- "no matter what any appellate court may say, I never take judicial notice that anybody is black"
- Corrigan requires "direct evidence as to who is black and who is white"
- it is "counsel's responsibility to prove who is black and who isn't"
- "I don't know what constitutes black. Years ago they used to say one drop of blood constitutes black."
- "I think of them as people."
- "I'm merely telling you that for the record. I'd rather not even discuss it on the record."

(Tr.II 380-82;Smulls,935 S.W.2d at 25).

Sidney testified, identified pictures of herself, identified herself as African-American/black, and recounted having been introduced to this Court at oral argument

(Rem.R.Tr.301-05;Exs.4,5; App.A1-2). Respondent objected because it "stipulated" at trial Sidney was black, but she was allowed to testify (Rem.R.Tr.303-04). Counsel Ms. Kraft, as an offer of proof, utilized photograph Ex.5 to identify Sidney as black in response to respondent's objection it had "stipulated" to her race (Rem.R.Tr.1242-44). Sidney's pictures establish Corrigan's hostility to acknowledging race no matter how obvious it is. To any reasonably sensitive observer, Sidney is obviously African-American. (App.A1-2;Exs.4,5).

The question of who is black "rarely provokes analysis; its answer is seen as so self-evident that challenges are novel and noteworthy." Gotanda, A Critique of "Our Constitution Is Color Blind",44Stan.L.Rev.1,23-24(1991); Ginsburg, J. – J.E.B. v. Alabama ex rel. T.B.,511U.S.127(1994) argument report 54 Cr. L. 3060 (unlike religion or national original "gender or race is immediately noticeable") and Davis v. Minnesota,511U.S.1115,1115(1994) (endorsing '"[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender'"). Sidney's pictures reveal her race is self-evident and what occurred is noteworthy because it demonstrates Corrigan's inability to meaningfully, sensitively consider Batson challenges.

Corrigan's professed inability to identify a person's race simply does not square with his statements in other contexts. There, Corrigan has willingly and openly acknowledged his belief as to individuals' races. Particularly noteworthy is a statement Corrigan made to one of Smulls' attorneys, Mr. Cooper. Corrigan said to Cooper that "he thought I was the best black attorney that had ever tried a case in front of him." (Rem.R.Tr.680-81)(emphasis added). This statement shows not only is Corrigan able to

acknowledge Cooper as an African-American, but he also is able to acknowledge many attorneys as being African-American since Corrigan's comparison would not otherwise be possible.

On September 9, 1993, after the amended motion was filed, Corrigan conducted a conference on Smulls' 29.15 and refused to allow a court reporter to attend (R.L.F.854-71;Rem.R.Tr.854-56). Ms. Leftwich was then one of Smulls' attorneys (Rem.R.Tr.853). Because Corrigan refused to allow a reporter, Leftwich did an affidavit recounting Corrigan had asked undersigned counsel whether he was aware Ms. Goodwin, who successfully sued him for gender discrimination, was "white" (Rem.R.Tr.853-62;Ex.23).[2] Goodwin is a white female (Ex.60).

On August 17, 1993, Corrigan conducted a hearing on objections to Smulls' 29.15 requests for admissions (Exs.21,22;R.L.F.41-42,822-53). The requests sought admissions: (1) the victim family is white; (2) all retrial jurors were white; (3) Smulls is black (Ex.21;R.L.F. 41-42). Corrigan sustained respondent's objections (Ex.22 at 23;R.L.F.98,849) stating:

> This Court won't take the position that people are white or black. It is the Court's position that you can't look at people and determine what their race is, okay, because I don't know what constitutes white and what constitutes black or any other race, for that matter.

[2]Whenever Smulls references excluded evidence, such as Ex. 23, he has asserted infra independent claims those rulings were erroneous.

(Ex.22 at 19;R.L.F.845)(emphasis added). Corrigan again stated he did not care whether the appellate courts agreed with him (Ex.22 at 19;R.L.F.845).

On the trial judge's report, Corrigan identified Smulls as "Black" (Ex.24 at 4). In response to: "Estimate the percentage of the population of your county that is the same race as the defendant", Corrigan marked "10 to 25" (Ex.24 at 7). The report asked: "Were members of the defendant's race represented on the jury" and Corrigan marked "No" (Ex.24 at 7). Corrigan marked "No" in response to questions asking whether the defense raised race as an issue and whether race otherwise was an issue (Ex.24 at 7).

On August 14, 1990, Corrigan heard a Batson challenge in State v. Goldsby (Goldsby Tr.57-64 and Index;Sent.Tr.2-3;Exs.19,20). Goldsby is white (Goldsby Tr.58 and Sent.Tr.2;Exs.19,20). Corrigan refused to accept defense counsel's statements certain venirepersons were African-American whether or not the prosecutor was willing to acknowledge defense counsel's identifications (Goldsby Tr. 57-64;Ex.19). Corrigan directed the attorneys to ask the venirepersons to identify their race (Goldsby Tr.61;Ex.19). At sentencing on September 21, 1990, while discussing whether a white defendant should be able to object to removing black venirepersons under Batson, Corrigan commented: "If the court wants to go off on another deep end, they can go off." (Goldsby Sent.Tr.3;Ex. 20)(emphasis added). The only "deep end" that then existed was Batson itself. Johnson, The Language And Culture (Not To Say Race) Of Peremptory Challenges,35Wm. & Mary L.Rev.21,36-40(1993) (chronology showing Batson not expanded in 1990). Describing Batson as a "deep end," highlights Corrigan's racial insensitivity.

On March 23-24, 1992, Corrigan heard a Batson challenge in State v. Mahaney (Mahaney Tr.182-94 and Index;Ex.18). Corrigan refused to accept the prosecutor's and defense's **stipulation** as to who were potential African-American venirepersons stating: **"Any agreement that you two make I don't accept it."** (Mahaney Tr.183-84;Ex.18) (bold typeface added).

When Corrigan chooses to acknowledge individuals' race he can and does. However, he consistently refuses to acknowledge what he believes a venireperson's race to be in Batson proceedings no matter how obvious that venireperson's race is and even when the parties agreed. In fact on the trial judges' report, he answered the very matter he professed he could not during the Batson hearing--the racial makeup of Smulls' jurors. Corrigan's "prove your race" policy, no matter how obvious a person's race is and when the parties have agreed, establishes he cannot fairly decide a Batson claim. Professor Galliher's findings included relying on Corrigan's false and unforthright statements and "one drop" statement. Point X.

At the 29.15 hearing before Corrigan, Leftwich objected to Waldemer leaving the courtroom to run a young black male witness' arrest record on the grounds he was doing so because the witness was a young black male (Ex.39 at 44-45). Before Waldemer responded, Corrigan stated as a judge he "resent[ed]" the objection.
(Ex.39 at 44). That he "resent[ed]" the objection demonstrates his hostility, insensitivity, and inability to fairly consider race discrimination claims.

Enforcement of Batson's benevolent purposes is plagued by prosecutors' "blatant lying". Kennedy, Race, Crime and the Law,208-10(1997); Stevenson & Friedman,

Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice,51Wash. & Lee L.Rev.509,524(1994) (trial courts repeatedly give seal of approval to "manifestly fabricated explanations"). The "'successes' [in lying] indicate not only misconduct on the part of prosecutors but also failure or, worse, corruption, on the part of judges." Kennedy, Race, Crime and the Law,210. Corrigan's behavior undermines the processes intended to protect African-American defendants and venirepersons from racial discrimination. This is a case where there is a significant reason to believe Waldemer blatantly lied since the "postal worker" reason was facially false and demeanor reasons are denied by Sidney. See infra this Point and Point VIII.

In re Ferrara,582N.W.2d817(Mich.1998), ordered a judge removed from the bench. There the judge's ex-husband made public private tape recordings years before where she employed racial epithets. Id.819-20. She denied statements she obviously made and at the resulting disciplinary hearing presented an intentionally misleading lack-of-racial-bias character witness. Id.822-26. She was removed not because of her racial slurs, but because conduct by a judge "which mislead[s], misrepresent[s], and deceive[s] with respect to evidence and facts in legal proceedings, so seriously undermine[s] [the public's] trust and [is] so fundamentally contrary to judicial temperament . . . ." Id.827. The court noted:

> Judges, occupying the watchtower of our system of justice, should preserve, if not uplift, the standard of truth, not trample it underfoot or hide in its shady recesses. This is precisely why judges should be exemplars of respectful, forthright, and appropriate conduct.

Id.827.

Corrigan's false and unforthright professing he is unable to acknowledge race and disputing Sidney was African-American clearly undermines confidence in the reliability of Batson proceedings and the public's trust in the courts' fairness. Corrigan's behavior tramples underfoot Batson's truth-seeking processes intended to protect Smulls and potential jurors like Sidney. The Batson ruling here is not reliable because a judge who made false and unforthright professions about race was given the critical responsibility of deciding whether Waldemer discriminated and then lied.

In Dyer v. Calderon,151F.3d970,972-81(9th Cir.1998), the conviction was reversed because a juror "lied" about having been a crime victim. An untruthful juror was incompatible with the truth seeking process because: "How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity?" Id.983. The same is true of Corrigan. Someone who has engaged in such false, unforthright behavior on matters of race should not have been responsible for judging Waldemer's Batson veracity.

The "one drop of blood" rule originated in racist notions of white racial purity. Hickman, The Devil And The One Drop Rule: Racial Categories, African-Americans, And The U.S. Census,95Mich. L.Rev.1161,1163(1997). To have any amount of black blood meant a person was regarded as black, and therefore, "unalterably inferior". Higginbotham, Shades of Freedom,41(1996). A Critique of "Our Constitution Is Color Blind",44Stan. L.Rev.1 at 6,26-27 ("one drop of blood" constitutes assertion of racial dominance).

If the fraction of a person's blood was contested, it was difficult to litigate and to adjudicate and encompassed "undertak[ing] a kind of human title search." The Devil And The One Drop Rule,95Mich. L.Rev. at 1225,1227. What Corrigan seeks to do is to return to the time of litigating a person's race. That is why Corrigan stated he would require "direct evidence as to who is black and who is white" and counsel had the "responsibility to prove" who was black (Tr.II 381).

A particularly compelling example Corrigan's assertion he cannot acknowledge what he believes a person's race to be is false and unforthright was: "I don't know what black means. Can somebody enlighten me of what black is? I don't know; I think of them as people." (Tr.II 380-82)(emphasis added). Corrigan did not say: "I think of us all as people." Instead, he said: "I think of them as people." Corrigan, like virtually all other Americans, drew a distinction between his race and other races and referred to blacks as "them". This ability to distinguish peoples' races explicitly contradicts Corrigan's representations he did not know what black "is," "constitutes," or "means" (Tr.II 380-82).

O'Brien found Corrigan's Batson hearing statements reflected only unwillingness to judicially notice race (O'B.Rem.L.F.271). Corrigan, however, was never asked to judicially notice Sidney's race. (Rem.R.Tr.1219). Kraft understood Corrigan's comments regarding Sidney were: "he wasn't going to say she wasn't black, but he wasn't going to say she was." (Rem.R.Tr.1240). When counsel affirmatively identified Sidney as black, Corrigan challenged and disputed that characterization, even though the State had already acknowledged she was black. Most significantly, Corrigan stated he

would never acknowledge what he believed a person's race to be **"no matter what any appellate court may say"** (Tr.II 381) (bold typeface added).

Because of society's strong interest in racially fair legal proceedings, courts should embrace a "zero tolerance" policy for racially offensive conduct. Armour, Negrophobia and Reasonable Racism The Hidden Costs of Being Black In America,149(1997). Judges who hold racially offensive views "are unlikely to conceal them completely from the jury because their demeanor, tone, and emphasis may convey racial messages." Johnson, Racial Imagery In Criminal Cases,67Tul. L.Rev.1739,1748,1748 n.29(1993). More particularly:

> A racist remark or insinuation by a judge or prosecutor acts as a signal, triggering and mobilizing a host of attitudes and assumptions that may be consciously held, or unconsciously harbored, by the judge, jury, and lawyers in the courtroom. The effect of the racist act or statement can be felt beyond its immediate context: it acts to trip additional racist assumptions at other junctures….

Higginbotham, Shades of Freedom,130. The obvious fact Sidney is black, Corrigan's false professions, disputing her race when there was no dispute, and the "one drop of blood" statement was such racially offensive conduct that cannot and should not be tolerated. Corrigan's behavior here is simply one aspect of his racial bias. Moreover, the effect of Corrigan's behavior was not limited. Rather, evidence was presented about

reactions of fear to the mere presence of two black males at the Honickmans' store. Point XI.

According to O'Brien, because Cooper testified it is a personal decision what racial group a person chooses to designate themselves as belonging to and Corrigan's "acceptance" of the parties determination of Sidney's race, Corrigan did not display racial bias (O'B.Rem.L.F.271). While Cooper believes the racial classification people designate themselves as belonging to is a personal decision, he would not question a venireperson as to the racial group that person considers themself to belong to if the person's race is "glaringly obvious" (Rem.R.Tr.682-83). Corrigan "refused" to acknowledge Sidney's race (Rem.R.Tr.684). It was "obvious" to Cooper Sidney was African-American and it was unnecessary to be an expert to tell (Rem.R.Tr.705-07). What racial classification a person designates themself as belonging to is an entirely different issue from whether Corrigan is capable of acknowledging what he believes a venireperson's race to be. The trial transcript and Smulls' attorneys' testimony show Corrigan did not "accept" the parties' statements about Sidney's race.

Justice O'Connor has observed: "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." Georgia v. McCollum,505U.S.42,68(1992)(dissenting). She also feels "there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury." Id.68. Justice Thomas believes black defendants would want every device available to them to promote black jurors on their cases because "conscious and

unconscious prejudice persists in our society" and may impact a jury's verdict. Id.61 (concurring).

The death penalty is much more likely to be imposed by all-white juries than more racially diverse juries. Bright, Discrimination, Death And Denial: The Tolerance of Racial Discrimination In Infliction Of The Death Penalty,35 Santa Clara L.Rev.433,458(1995). Racial diversity on capital juries makes a difference because of conscious or subconscious negative racial stereotypes and assumptions about blacks. Id.458. Different results "are reached when a capital case is tried before an all-white jury in a white-flight suburban community and when one is tried before a more racially diverse jury." Bright, The Politics Of Crime And The Death Penalty: Not "Soft On Crime", But Hard On The Bill Of Rights,39St. Louis U.L.J.479,482-83(1995). Smulls was tried twice in a predominantly white county. When he had a racially diverse jury containing African-Americans and he was not convicted (Tr.I 318). On retrial, an all-white jury convicted and sentenced him to death (Tr.II 367,376). It was especially important to have a judge who was able to fairly consider the re-trial Batson challenge where only one African-American, Sidney, was eligible (Tr.II 367).

The first trial's holdout, Ms. Stueck, was an African-American woman (Ex.51 at 764). Point VIII. She refused to convict Smulls because she did not believe Mrs. Honickman's testimony he was responsible for the shooting and questioned whether he was physically able to fire a gun with his disabled and deformed hand (Ex.51 at 764-65,890). Her rationale suggests every reason exists to believe that considerations such as those Justices Thomas and O'Connor identified supra were operative in Smulls' case.

Smulls did not have the benefit of a judge who could fairly consider his Batson challenge. It was as though no judge was present. People v. Toliver,652N.Y. Supp.2d 728,729(N.Y. Ct. App. 1996) (conviction reversed, judge absent during prosecutor's voir dire).

The prejudice is readily apparent. Waldemer's "postal worker" explanation was facially false because Sidney worked for Monsanto in management not the U.S. Postal Service. (Tr.II 377). No sensitive fact-finder was present to rule on the legitimacy of Waldemer's demeanor/clothing allegations that defense counsel asserted were false and pretextual (Tr.II 370-71) and Sidney denies. Point VIII. Subjective demeanor matters are particularly susceptible to the abuse Batson prohibits. U.S. v. Scott, 26F.3d1458, 1466(8th Cir. 1994). There was not a judge present to conduct a sensitive inquiry to protect Smulls' and Sidney's rights.

Under Batson, the trial court is required to engage in a "sensitive inquiry" of evidence of intent to discriminate based on race. Batson v. Kentucky, 476U.S.79, 93(1986). Deference to trial court Batson findings is appropriate because the trial court is in the best position to assess the prosecutor's demeanor and credibility. Hernandez v. New York, 500U.S.352,365,367(1991). Deference is only proper when there has been "sensitive" consideration. In re Harrell v. State,555So.2d263,268(Ala.1989). Corrigan's treatment of the Batson challenge here and other challenges to racially discriminatory conduct demonstrates an insensitivity to eliminating racial discrimination.

Respondent's witness, Wolff, was acquainted with the "one drop of blood" notion (Rem.R.Tr.1274). From Wolff's familiarity with this case, he believed Corrigan's invocation of "one drop of blood" was "insensitive" (Rem.R.Tr.1275-76).

Batson requires a sensitive inquiry. Corrigan's "insensitive" comment in a hearing requiring sensitivity destroyed all integrity. The whole context shows Corrigan's comment was racially offensive -- although Sidney is obviously black, Corrigan disputed her race when the parties did not and made false, unforthright professions he is incapable of acknowledging what he believes a person's race to be.

The nature of review of Batson challenges has fostered a "Don't say race/Say it wasn't race" rule. Johnson, Batson Ethics For Prosecutors And Trial Court Judges,73Chicago-Kent L.Rev.475,487(1998). That means:

> For the prosecutor who acts in bad faith, the message is clear: Say something, but don't say race. For the indifferent or racist trial court judge, the message is also clear: Say it wasn't race.

Id.487. That is in fact all we had here because Corrigan could not fairly consider the Batson challenge.

Before someone can profess not to consider race, he must recognize it. A Critique Of "Our Constitution Is Color Blind",44Stan. L.Rev. at 6,16-17. The Constitution is color conscious "to prevent discrimination being perpetuated and to undo the effects of past discrimination." U.S. v. Jefferson County Board Of Education, 372F.2d836,876 (5thCir.1966). That is what Batson seeks to promote - preventing racial discrimination

that has historically plagued jury-selection. The Constitution is color blind only in the sense "a classification that denies a benefit, causes harm, or imposes a burden must not be based on race." Id.876. Corrigan refused to engage in a sensitive inquiry on an issue that demands color consciousness not color blindness.

Structural errors "requir[e] automatic reversal of the conviction because they infect the entire trial process." Brecht v. Abrahamson,507U.S.619,629-30(1993). Judge bias is structural error. Arizona v. Fulminante,499U.S.279,309(1991). Peremptory removal of a venireperson because of race is structural error. Miller v. Lockhart,65F.3d676,680-82(8thCir.1995) (reversing-Swain violation);Ford v. Norris,67F.3d162,165-71(8th Cir.1995)(same). Rosa v. Peters,36F.3d625,634n.17 (7thCir.1994) (Batson violation-- structural error). Certainly, if such removal is structural error, the lack of a judge who can fairly rule on a Batson claim must be structural.

In evaluating prejudice as to either Corrigan's unwillingness to do what Batson requires or counsel's ineffectiveness, Peters v. Kiff,407U.S.493(1972) and Vasquez v. Hillery,474U.S.254(1986) control. In Peters, the Court held a white defendant had standing to challenge African-Americans were systematically excluded from grand and petit juries. Any uncertainty about harm fell on the government because:

> proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case.

Peters,407U.S. at 503-04. Moreover, "when a petit jury has been selected upon improper criteria. . .we have required reversal of the conviction because the effect of the violation cannot be ascertained." Vasquez,474U.S. at 263. The petit jury was improperly selected because Corrigan cannot fairly decide Batson claims.

C. "Prove Your Race"--One Instance of Other Racially Biased Behavior

Corrigan's "prove your race" policy is just one instance of his racially biased, insensitive behavior. Other instances further demonstrate why he could not fairly decide the Batson claim and counsel was ineffective for not moving to disqualify.

One stereotype is the perception African-American attorneys are not as competent as white. Baker, Waiting and Wondering, ABA Journal Feb.1999 at 53. Besides demonstrating the falsity of Corrigan's professed inability to identify race, his comment on Cooper's ability was racially insensitive (Rem.R.Tr.680-81).

Cooper considers Corrigan's "qualification" to be the "thorns" to be expected from "a Caucasian man." (Rem.R.Tr.680-81). He had no strategic reason for failing to move to disqualify Corrigan on racial bias grounds (Rem.R.Tr.697-98). Whether to disqualify Corrigan on any grounds was not Cooper's final decision because he was associate, not lead, counsel. (Rem.R.Tr.600,699-700). Cooper did not move to disqualify Corrigan on any bias grounds because he feared antagonizing him (Rem.R.Tr.698-99). He did recognize filing a disqualification motion that was unlikely to succeed had preservation value (Rem.R.Tr.709).

The legal ability "qualification" indicates in Corrigan's courtroom, race matters. The clear import is there are two categories of attorneys - black and white. Black

attorneys are something less than white because evaluating their abilities necessarily includes considering their race. Cooper, in Corrigan's mind, happens to be the best attorney within the group black attorneys - a group that does not measure up to the group white. Cooper either is a good attorney or he is not with his race having nothing to do with his ability. Corrigan's link of attorney ability to race contrasts drastically from: "[i]n our profession, we must respect and treat all lawyers as equals, irrespective of race or gender." Pinder, When Will Black Women Lawyers Slay The Two-Headed Dragon; Racism and Gender Bias?,20 Pepperdine L.Rev.1053,1069(1993). The most analogous comparison to what Corrigan said would be for a judge to tell a woman attorney she was the best woman attorney who had ever appeared in that judge's courtroom.

It is not surprising Cooper did not act to remove Corrigan when he made his Batson hearing statements. When attorneys are urged to move to disqualify a judge or prosecutor on grounds of their racism the typical response is "'I've got to live here'". Conference The Death Penalty In The Twenty-First Century, 45Amer.U.L.Rev. 239,298(1995). This Court's original opinion recognized the "I've got to live here" syndrome when it stated trial counsel should have moved to disqualify Corrigan even though doing so posed "a Hobson's choice" that "risk[ed]" incurring Corrigan's "wrath". Ex.65 at 32[3]; Report Of The Missouri Task Force On Gender And Justice,338 (white

[3]The record and this Court's opinion show Corrigan cursed at and threatened undersigned counsel with disciplinary action for alleging the bias claims. (R.L.F. 677-84,864-67); Smulls,935 S.W.2d at 25.

attorney objecting to judge employing racial epithet subsequently encountered hostile adverse treatment from several judges). Cooper still has to live and practice in St. Louis County and he admitted he did not move to disqualify because he feared antagonizing Corrigan.

Kraft considered Corrigan's "one drop of blood" comment "[a]mong other things" racially offensive (Rem.R.Tr.1108,1217). It did not occur to Kraft to move to disqualify Corrigan on racial bias grounds and she had no strategic reason for not doing so when he invoked "one drop" (Rem.R.Tr.1108-09).

Contrary to respondent's last arguments, counsel did not testify they left Smulls' case before Corrigan because of any supposed reluctance he might have expressed about imposing death if the jury hung on punishment. They both testified that "If it [not imposing death where jury hangs] were true" that would be a factor among others to weigh in deciding whether to leave a case in front of a judge (Rem.R.Tr.651,1163) (emphasis added). Counsels' testimony questioned the truth of any purported representation Corrigan might have made - clearly reasonable in light of Corrigan's false and unforthright professing on race.

Smulls' case is not the first instance of Corrigan's insensitive conduct violating someone's rights. Goodwin obtained a civil rights verdict against Corrigan for gender discrimination in May, 1982 with the Hon. Clyde Cahill presiding (Ex.60). Goodwin v. The Circuit Court Of St. Louis County,555 F.Supp.658,659 (E.D.Mo.1982). Cahill is African-American (Rem.R.Tr.1369-70); First Black Federal District Judge Here, St. Louis American, June 26, 1980(front page) (describing himself as black.)

Mr. Evans authored a Post article on October 30, 1983, reporting Corrigan had recently joked at a judge's meeting a judicial barbecue could not be held for legislators because there was no black judge to do the cooking (Ex.2)(Rem.R.Tr.280-82). Evans' testimony and his business record article were not offered for their truth, but to demonstrate counsel should have been on notice of the reported statement (Rem.R.Tr.280-82,1111-15). Evans' article was published only seven years before Smulls was charged (Ex.2;L.F.15-17). Judge Campbell testified he was present at that meeting and Corrigan had joked such a barbecue was not possible because there were no black judges to do the barbecuing, he "definitely heard it", and Corrigan said it (Ex.53 at 4-10,33,38). Cf. Goodwin,555 F.Supp at 661(Corrigan's statement "'[t]his court will never run well so long as there are women in charge'"). Corrigan made the racially offensive judicial "barbecue joke" approximately one year after Goodwin's case was presided over by an African-American judge. The barbecue comment further evidences racially insensitive behavior demonstrating an inability to fairly consider a Batson challenge.

Evans' article reported Corrigan's defenders saw no evidence of in-court racial bias (Ex.2). One defender, the St. Louis County First Assistant Prosecutor, was quoted: '"He gets upset whenever an attorney tries to bring up race in court."' (Ex.2). In fact, Corrigan stated at Smulls' Batson hearing he would rather not discuss matters pertaining to racial fairness on the record (Tr.II 382) and at the 29.15 hearing stated, he "resent[ed]" Leftwich's claim.

Before Smulls' trials, Kraft was unaware Corrigan had told the "barbecue joke" and made no investigation (Rem.R.Tr.1109-10,1115-16). Kraft, as an offer of proof, testified if she had known it was asserted Corrigan had made the barbecue comment, she would have considered moving to disqualify him (Rem.R.Tr.1116-17). Kraft conducted no investigation to support a motion to disqualify Corrigan on racial bias grounds and had no strategic reason for not doing so (Rem.R.Tr.1117). Kraft had no strategic reason for proceeding to trial without moving to disqualify Corrigan on racial bias grounds even though she was aware of Goodwin's gender discrimination judgment (Rem.R.Tr.1119-20). Because prejudice against legally protected classes tends to be a generalized attitude, counsel's inaction was unreasonable in light of her knowledge about the gender discrimination judgment. See Allport, The Nature Of Prejudice,66-68(1958).

While Corrigan's friends attested to his good "reputation" on issues of race, a pattern of behavior is apparent. Corrigan continually engages in offensive behavior of a constitutionally prohibited nature against protected groups in settings where he would not expect those behaviors to be exposed. The "barbecue joke" and statements underlying Goodwin's civil rights judgment were made at meetings with judicial colleagues. It did not matter in Ferrara, "many" character witnesses, who were racial minorities, were called to testify they had not observed racially discriminatory behavior by the judge and there were no charges of misconduct on the bench against her because it was her lack of forthright behavior about her racially offensive conduct that required removal. Ferrara,582N.W.2d at 820-21. The same is true as to Corrigan's false professions he is incapable of acknowledging what he believes a person's race to be. The attorney

"reputation" opinions are themselves clearly erroneous because of Corrigan's false and unforthright professions on race.

In U.S. v. Jones,159F.3d969,975(6thCir.1998), the defendant alleged a race-based selective prosecution claim. One arresting police officer sent him a postcard with a picture he interpreted meant he was a monkey carrying bananas. Id.977. The picture intended the perceived racial insult because of "the history of racial stereotypes against African-Americans and the prevalent one of African-Americans as animals or monkeys ...." Id.977; Negrophobia and Reasonable Racism The Hidden Costs of Being Black In America, 5,145,149(1997) (references to blacks as animal-like or subhuman resonates strongly with prevailing black stereotypes undermining confidence in courts' fairness).

At sentencing in State v. Frazier, on January 11, 1991, Corrigan told the black defendant he was "an animal" (Ex.28 at 6-7;Sent.Tr. at 1,10; Frazier L.F.6,21;Ex.27). When the defendant replied: "Your Honor, I'm not an animal," Corrigan countered "Yeah, you are." (Ex.28 at 7;Sent.Tr.10;Ex.27). Besides this name calling, Corrigan engaged in other personal attacks on Frazier (Ex.28 at 6-8;Sent.Tr. at 10-12,22-23; Ex.27). The Court of Appeals described Corrigan's behavior:

> The judge's statements show a lack of tact and judicial reserve.
>
> "Absolute impartiality, both in speech and conduct, is not only expected, but is demanded of a trial judge." [citation omitted]

(Ex.28 at 8)(emphasis added).

O'Brien rejected as evidence of racial bias Corrigan's manner of addressing Frazier and other African-American defendants at sentencings when compared to how he addressed white defendants at sentencings (O'B.Rem.L.F.254-55). Point X. According to O'Brien, Corrigan's comments were "reasonable" in light of the seriousness of the offenses (O'B.Rem.L.F.254-55). The Frazier findings are clearly erroneous because the Court of Appeals had already found Corrigan's comments were not "reasonable". Denying racial bias exists for conduct in criminal cases is facilitated because "finding a nonracial reason is particularly easy to do: one cites the guilt of the suspect." Johnson, Unconscious Racism And The Criminal Law,73Cornell L.Rev.1016,1030-31(1988). Referring to an African-American defendant as "an animal" is offensive because of the history of animal racial stereotypes.

Counsel should have been aware of Corrigan's inability to fairly consider Batson claims from other cases in which he had made similar statements during Batson hearings to those he made during Smulls' Batson hearing. Counsel should have been aware of Corrigan's inability to fairly consider Batson claims because of the importance of having a racially diverse jury in a death penalty case in which the defendant was black, the victim was white, and the trial occurred in a predominantly white county. Reasonably competent counsel under similar circumstances would have been aware of the reports of the "barbecue" joke and Corrigan's treatment of African-American defendants at sentencings. Reasonably competent counsel would have moved to disqualify Corrigan when he made his false, unforthright assertions he could not acknowledge what he believed Sidney's race to be and invoked "one drop of blood". Reasonably competent

counsel who was offended by "one drop of blood" would have moved to disqualify Corrigan. Reasonable counsel would have moved to disqualify Corrigan based on all of these considerations and occurrences. Smulls was prejudiced because he was tried before a judge who could not fairly consider his Batson challenge, and he thereby, was deprived of the opportunity for a racially diverse jury for which a reasonable probability exists he would not have been convicted. Prejudice is apparent because, when Smulls had a racially diverse jury he was not convicted, but when the jury was all-white he was convicted and death sentenced. See O'Connor and Thomas, J.J. supra. Prejudice is also presumed. Peters and Vasquez.

Judge Campbell recounted Corrigan's practice is to dispose of cases by "not do[ing] so with any justice." (Ex.53 at 37). That is how both Mr. Smulls and Ms. Sidney were treated. A new trial is required.

II. JUDGE O'BRIEN COULD NOT FAIRLY SERVE

HARTENBACH ERRED FINDING O'BRIEN WAS ABLE TO FAIRLY SERVE BECAUSE SMULLS WAS DENIED FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, DUE PROCESS, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14, AS O'BRIEN WAS WITH CORRIGAN WHEN CORRIGAN CONDEMNED THIS COURT'S CALLING HIM "A RACIST" AND O'BRIEN MAY HAVE PARTICIPATED IN CRITICIZING LANGUAGE THAT PRODUCED LOBBYING AGAINST THIS COURT THEREBY CREATING AN APPEARANCE OF IMPROPRIETY AND O'BRIEN'S RULINGS THROUGHOUT ESTABLISH ACTUAL BIAS.

FURTHER, HARTENBACH ERRED DENYING RENEWED MOTIONS TO DISQUALIFY ALL ST. LOUIS COUNTY JUDGES BECAUSE SMULLS WAS DENIED THE NOTED RIGHTS AND HIS INTERNATIONAL LAW RIGHT TO A FAIR HEARING AS HARTENBACH'S "TORTURED HISTORY" COMMENT ESTABLISHES WHY ST. LOUIS COUNTY SHOULD BE DISQUALIFIED.

This case was remanded for a hearing to determine whether O'Brien could fairly serve. Smulls v. State,10S.W.3d497(Mo.banc2000). Judge Hartenbach ruled O'Brien was able to fairly serve (O'B.Rem.L.F.208-15) which denied Smulls due process, freedom from cruel and unusual punishment, and a full and fair hearing, U.S. Const., Amends. 8 and 14.

Due process requires a fair hearing. Thomas v. State,808 S.W.2d364,367 (Mo.banc1991); In re Murchison, 349U.S.133,136(1955). "The test" and standard of review for disqualification is: "whether a reasonable person should have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." State v. Smulls,935S.W.2d9,17(Mo.banc1996); Aetna Life Co. v. Lavoie, 475U.S.813,825(1985) ("justice must satisfy the appearance of justice"). The benefit of any doubt is accorded a litigant, not a judge. Smulls,935S.W.2d at 26-27. Bias warranting disqualification must come from an extrajudicial source and not from what a judge learned from serving on the case. State v. Nicklasson, 967S.W.2d596,605 (Mo.banc1998). When reviewing a disqualification claim, it is relevant to consider "all that has been said and done in the presence of the judge." Haynes v. State, 937S.W.2d199,203(Mo.banc1996).

O'Brien was with Corrigan when Corrigan condemned this Court's original opinion for calling him "a racist" and Corrigan's statements reflected it was not Corrigan's "favorite opinion" of this Court (O'B.Rem.Tr.134-35,140). O'Brien is "sure" he heard Corrigan make statements about the original opinion, he just cannot now remember exactly what Corrigan said (O'B.Rem.Tr.136). Corrigan did express "an overall displeasure with the opinion" (O'B.Rem.Tr.146-47). O'Brien believed "[i]t would stand to reason" the original opinion was significant to Corrigan (O'B.Rem.Tr.163-64). O'Brien cannot recall whether he made any statements about the original opinion, but if he did they were directed at language calling into question Corrigan's ability to continue to serve as a judge (O'B.Rem.Tr.121,123-24). That was more appropriate for the Commission On Discipline (O'B.Rem.Tr.123-24). Bardgett's

(Ex.68 at 9) and Farris' (Ex.70 at 2) rehearing motions and a Post editorial (Ex.77) expressed similar views that matters relating to Corrigan's fitness as a judge should be left to the Commission on Discipline and Removal of Judges.

An appearance of impropriety existed. O'Brien was present when Corrigan expressed "an overall displeasure" about being called "a racist." A reasonable person would have factual grounds to find such an appearance because Corrigan addressed the issue of his racial bias and the pleadings alleged he could not fairly decide Smulls' Batson claim because of racial bias. O'Brien's exposure to Corrigan's views occurred before O'Brien was assigned Smulls and sometime before the modified opinion issued (O'B.Rem.Tr.159-61), and thus, his bias was extrajudicial. Nicklasson, supra. Moreover, that O'Brien found Corrigan has "**steadfastly**" denied telling the "barbecue joke" (O'B.Rem.L.F.252-53), when the record contains no denial admitted into evidence, shows O'Brien relied on some extrajudicial source for that finding. Point V. There was an appearance of impropriety when all that was said and done in O'Brien's presence related to the merits of Smulls' racial bias claim against Corrigan. Haynes, supra. Further, that O'Brien may have expressed views like those of the lobbying campaign waged against this Court also created an appearance of impropriety.

During respondent's examination, O'Brien testified: (1) he formed his opinions of the Corrigan race bias claims only after hearing evidence; and (2) when the case was assigned to him he did not recall specific comments he heard Corrigan make (O'B.Rem.Tr.175-77). Hartenbach found O'Brien properly served because he: (1) did not express any opinion about the merits of the original opinion; (2) did not express any

opinion about the Corrigan racial bias claims; and (3) no opinions on the merits were formed before hearing evidence (O'B.Rem.L.F.213-14).

While O'Brien can profess to hold and believe the views he stated, that is not the standard. The standard is whether there is an appearance of impropriety. Corrigan's discussing in O'Brien's presence the merits of the original opinion and the related claims created an appearance of impropriety. It is irrelevant O'Brien was unable to recall Corrigan's exact comments. O'Brien knew Corrigan condemned this Court for calling him "a racist" when the issue was Corrigan's racial bias.

The appearance of impropriety is even more apparent when Hartenbach's statements are accounted for. Hartenbach volunteered he never discussed with Corrigan or O'Brien the original opinion, the modified opinion, and anything to do with Corrigan (O'B.Rem.Tr.29-31). Hartenbach also "dispute[d]" Corrigan's deposition statement he had discussed this Court's handling of the case with all or almost all judges (O'B.Rem.Tr.29-31). Thus, this case could have been heard by a judge who had not been exposed to Corrigan's one-sided views.

Judge Satz attended the evidentiary hearing's first morning (Rem.R.Tr.597-98). At its conclusion, undersigned counsel stated co-counsel was to be called to testify to statements Satz directed at counsel (Rem.R.Tr.1408-23). Satz's statements were offered on the issue of Smulls' inability to obtain a fair hearing in St. Louis County, for the fact Satz made the statements, and not their hearsay truth (Rem.R.Tr.1408-23). State v. Sutherland,939S.W.2d373,377(Mo.banc1997) (if statement's relevance lies in fact it was made without reliance on its truth not hearsay). O'Brien not only refused to allow co-

counsel to testify, but also **expressly ordered** undersigned counsel could not state for the record what co-counsel's testimony would be (Rem.R.Tr.1408-23). Respondent objected on hearsay grounds and Smulls would then have these matters part of the record which this Court could again use to reverse and O'Brien agreed (Rem.R.Tr.1408-23). O'Brien engaged in the same behavior as Corrigan when he refused to allow Smulls to present this Court with a complete record. Point IV. Smulls,935S.W.2d at 25 (Corrigan's refusal to conduct record proceedings). If O'Brien and the St. Louis County judiciary could fairly serve, what was O'Brien hiding? O'Brien's admitted purpose for refusing to allow any record establishes he could not fairly serve.

O'Brien refused to allow Smulls to get answers to certified questions at Corrigan's February, 1998, deposition (Corr.Depo.43-51;Rem.R.L.F.549-52) and refused to answer 1997 voir dire questions directed to him (Rem.R.L.F.74-76,211-14; Rem.R.Tr.41; Rem.R.L.F.336-63;Rem.R.L.F.280,480-81) - all of which dealt with O'Brien's ability to fairly consider the race bias claims against Corrigan, the surrounding controversy, and O'Brien's role in that controversy. O'Brien cannot now recall the specifics of what Corrigan said (O'B.Rem.Tr.134-36), but agreed as a general proposition his memory of what Corrigan said would have been better in 1996 and 1997 (O'B.Rem.Tr.147-51). When O'Brien could have allowed Smulls to obtain timely answers to his questions, when O'Brien's memory was better and Corrigan was testifying, he would not allow them. This Court should not allow O'Brien to hide behind his lack of memory to defeat his disqualification when O'Brien was afforded a timely opportunity to disclose, but would not. O'Brien's refusal to then be forthcoming is especially illuminating in light of

Corrigan telling Rule counsel to ask O'Brien about his views of this Court's original opinion (Corr.Depo. at 43-44).

At the first proceeding before O'Brien, on May 9, 1997, it was apparent he was pursuing a biased agenda. Many of the attacks on this Court focused on the Evans "barbecue" article (Ex.75). When O'Brien was asked to take judicial notice of the entire casefile, he responded:

> I am not sure what you mean by that. Are you asking me to take judicial notice of matters attached to pleadings as exhibits? Are you asking me to take judicial notice of newspaper articles that are contained in your various motions?

(Rem.R.Tr.12) (emphasis added). Injecting newspaper articles, on his own motion, demonstrates this was a judge who was going to serve because he wanted to vindicate his across-the-hall colleague (Rem.R.L.F.292;Rem.R.Tr.25;O'B.Rem.Tr.101).

O'Brien's inability to fairly serve is demonstrated by how he allowed respondent to turn the evidentiary hearing into a forum to attempt to make a record trial counsel's supplemental Batson record was untimely – something this Court clearly had decided was timely. According to the Findings, Smulls' trial attorneys acknowledged that, when Corrigan made his racially offensive comments, their supplemental Batson record was untimely (O'B.Rem.L.F.270). Smulls objected to respondent's cross-examination of trial counsel about timeliness (Rem.R.Tr.687,1212-15). Cooper did not know if the record was timely, but believed it all was (Rem.Tr.689). Kraft did not know if the record was timely (Rem.R.Tr.1215-16). Counsel never acknowledged their objections were

untimely and O'Brien's actions are significant because he allowed respondent to turn the hearing into a forum to challenge timeliness, something this Court already decided was timely. O'Brien's rulings throughout, Points IV, V, VI, VII, VIII, IX, X, XI, show he could not fairly serve.

At the September 9, 1993, conference, Corrigan stated the claims involving his bias "pisses him off" and dismays him from a "union standpoint" (R.L.F.677-78,860-61,867). O'Brien is part of the judicial "union standpoint" - friends of Corrigan who are committed to obstructing the efforts to prove claims of racial bias against another St. Louis "union" member. O'Brien's courtroom is located directly across from Corrigan's courtroom (Rem.R.L.F.292;Rem.R.Tr.25; O'B.Rem.Tr.101). O'Brien sometimes has weekly or daily contact with Corrigan for "anything imaginable" including speaking about evidentiary issues and obtaining case authority (O'B.Rem.Tr.102-05). O'Brien sometimes lunches with Corrigan more than once a week (O'B.Rem.Tr.105-06).

This Court rejected Smulls' claim O'Brien should be disqualified because his son is an Assistant St. Louis County Prosecutor who McCulloch employed (Rem.R.L.F.336), Waldemer is the Chief Trial Attorney (Rem.R.L.F.275,337;R.L.F.419), O'Brien formerly employed McCulloch at his 15 attorney firm (Rem.R.L.F.337), and the evidence would include O'Brien's former law partner's daughter (Leritz/Endicott) when she was a St.

Louis County Prosecutor, and before she became a judge, violated Batson for using the same "postal worker" racial pretext Waldemer used here (Rem.R.L.F.338,467; Rem.R.Tr.151). Smulls, 10S.W.3d at 500-01. Smulls was denied a hearing and discovery on his race bias claims against McCulloch and Waldemer because they employ O'Brien's son and O'Brien formerly employed McCulloch. Points VIII, XI. Smulls was also denied a hearing on the claim against Waldemer because it included presenting evidence of Batson race discrimination by one of O'Brien's former law partner's daughter who is now a judge. Point VIII. There clearly is an appearance of impropriety for O'Brien to be ruling on these race claims and related discovery.

This Court's original June 25, 1996 opinion was highly critical of Corrigan (Rem.R.L.F.158; Ex.65). That opinion was itself much criticized among the media, bench, bar, and public (Rem.R.L.F.158; Exs.67,68,69,70,71,72, 73,74,75,76,77,78,79, 80,81,82,83,84,85,86; O'B.Rem.Tr.20-44).[4] Point III. Judge Drumm reportedly "expressed astonishment" (Ex.75).

[4] Hartenbach admitted the rehearing motions/"letters" filed on Corrigan's behalf and Post publications (O'B.Rem.Tr.20-26,32-43) as to matters seeking to disqualify all St. Louis County judges, but refused to admit these to show bias in O'Brien's testimony. See Point III.

Corrigan's two friends and former members of this Court Judges Bardgett[5] and Simeone,[6] each filed rehearing motions on Corrigan's behalf (Rem.R.L.F.159; Exs.68,69). Several pages attached to Bardgett's rehearing showed they originated from the Attorney General's fax machine on July 3, 1996 (Rem.R.L.F.291; Rem.R.Tr.31-33;Ex.68). Throughout Smulls' case, the County Prosecutors and Attorney General have sought to distract this Court from the issues at hand alleging ethical misconduct and personally attacking Smulls' counsel for litigating the unpopular claims this case presents (See, e.g., R.L.F.348-50;Resp.Br. SC No.75511 at 29-30). Smulls expects this to continue and this Court should not lose sight of that it was the Attorney General who facilitated and assisted Bardgett's filing.

---

[5]This is not the only recent occurrence where Bardgett has sought to employ the prestige of his former position to assert he is more astute than this Court's present members. Virginia Young, Gambling opponents criticize ads featuring former Missouri justice, St. Louis Post Dispatch, September 27, 1998 at D9 (describing Bardgett's television ad appearance representing gaming clients wanting this Court's Akin decision reversed and Bardgett's statement why Akin was incorrect).

[6]When Goodwin obtained her gender discrimination judgment against Corrigan, Judge Simeone authored a letter to the editor criticizing the Post's coverage for having "inflicted upon Judge Corrigan an injustice." St. Louis Post Dispatch of May 18, 1982 at 18A.

One media attack referred to this Court's members as "the seven stooges" who "after an uproarious, slapstick deliberations scene - there's a lot of eye-poking and headknocking – the stooges vote, 5-2, to rebuke Judge Corrigan" (Ex.76). The most inflammatory attack accused this Court of behavior not motivated by promoting fairness to African-Americans, but because Democratic appointee Corrigan "has long been an outspoken critic of the Republican dominated Supreme Court" (Ex.80). That attack claimed Judge Robertson "dominates the court" and should be given "credit" for having "orchestrated" the criticisms (Ex.80).

Smulls renewed all motions to disqualify all past and present St. Louis County judges and filed supplemental motions that were denied (O'B.Rem.L.F.35-51,63-87,88-139,179-84,186-87). Those motions urged Smulls could not obtain a fair hearing in St. Louis County because of the nature of the claims against Corrigan and the St. Louis lobbying campaign waged on Corrigan's behalf (O'B.Rem.L.F.35-51,63-87,88-139,179-84,186-87). Conducting any proceedings in St. Louis County denied Smulls due process and freedom from cruel and unusual punishment and a full and fair hearing, U.S. Const., Amends. 8 and 14, and denied Smulls a fair hearing guaranteed under Art.14 para.1 International Covenant on Civil and Political Rts., Art.8 para.1 American Convention on Human Rts., and Art.6 para.1 European Convention Protection of Human Rts. And Fund. Freedoms.

This Court previously rejected the claim to disqualify St. Louis County. Smulls, 10 S.W.3d at 500. That should be reconsidered. Hartenbach commenced the first proceeding noting this case has "a tortured history" (O'B.Rem.Tr.2). That "tortured

history" includes Corrigan's deposition testimony that all his St. Louis County judicial colleagues condemned this Court's original opinion and its treatment of the racial bias allegations (Corr.Depo. at 43,45). It is this "tortured history" that requires the disqualifications requested.

In U.S. v. Claiborne,870F.2d1463,1464(9th Cir.1989), criminal defendant Claiborne was a U.S. District Court judge. On appeal, Claiborne argued the Ninth Circuit's Chief Judge should not have removed all the District Court and Court of Appeals judges within his circuit without having polled them all. Id.1465-67. To poll all would have imposed an "onerous" burden. Id.1466. That Court reasoned:

> given the extent to which circuit and district judges within a circuit deal with each other on professional and personal levels, Chief Judge Browning's apparent conclusion that the appearance of justice would be served by having appellant's appeals heard by impartial judges from outside the Ninth Circuit seems eminently reasonable.

Id.1467(emphasis added); U.S. v. Jordan,49F.3d152,160 n.18(5thCir.1995) (same). This case's "tortured history" establishes why Smulls' motions should have been granted.

At one motion hearing, Judge Drumm was a spectator (Rem.R.Tr.122-25). When Corrigan's expert reputation friend Margulis testified, Judge Goldman was present (Rem.R.Tr.1423). The judicial turnout, including Satz, was to display support for Corrigan, and O'Brien certainly was aware why they were there and what was expected.

This Court should reverse for a new hearing outside St. Louis County.

III. JUDGE O'BRIEN'S BIAS - EXCLUDED EVIDENCE

HARTENBACH CLEARLY ERRED REFUSING TO ADMIT AND/OR CONSIDER JUDGES CALVIN'S AND SHAW'S TESTIMONY (EXS.91-92), THE REHEARING MOTIONS/"LETTERS" FILED ON CORRIGAN'S BEHALF (EXS.67-70), AND POST PUBLICATIONS DOCUMENTING THE CONTROVERSY SURROUNDING THE ORIGINAL OPINION AND ONE CONTROVERSY SOURCE (EXS.74-78 AND 80-86) BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST. AMENDS. 8 AND 14, AS THIS ALL ESTABLISHED THERE WAS A SUBSTANTIAL CONTROVERSY SURROUNDING SMULLS' CASE FOCUSED ON DEFENDING CORRIGAN WHICH WAS RELEVANT TO DEMONSTRATE BIAS IN O'BRIEN'S TESTIMONY.

Hartenbach refused to admit and/or consider to show O'Brien's bias: (1) Judges Calvin's and Shaw's testimony (Exs.91-92); (2) rehearing motions/"letters" filed on Corrigan's behalf (Exs.67 through 70) and; (3) Post-Dispatch publications recounting the controversy surrounding the original opinion and one controversy source (Exs.74 through 78 and 80 through 86)(O'B.Rem.L.F.211-12). Smulls was denied due process, freedom from cruel and unusual punishment, and a full and fair hearing. U.S. Const. Amends. 8 and 14. Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993).

This Court has recognized '"the interest or bias of a witness and his relation to or feeling toward a party are never irrelevant matters….'" State v. Johnson,700S.W.2d

815,817(Mo.banc1985)(quoting State v. Edwards, 637S.W.2d27,29(Mo.1982)). A party is permitted to prove a witness' "bias, prejudice or hostility through the use of extrinsic evidence." Johnson,700S.W.2d at 817. A party is allowed to contradict his own witness, whether friendly or hostile, by independent evidence to show facts are different than testified to by that witness. State v. Street,732S.W.2d 196,200(Mo.App.,W.D.1987).

A statement offered to explain the subsequent conduct of the person who heard it is not inadmissible hearsay. State v. Ray, 945S.W.2d462,468-69(Mo.App.,W.D.1997); State v. Murray,744S.W.2d 762,773(Mo.banc1988). Likewise, if the relevance of a statement lies in the mere fact it was made and not its truth the statement is not hearsay. State v. Sutherland,939S.W.2d373,377(Mo.banc1997).

O'Brien could not say whether this Court's original opinion had any significance for St. Louis County judges (O'B.Rem.Tr.161-62). O'Brien testified he was never aware of any efforts by anyone at any time to try to get this Court to modify its original opinion (O'B.Rem.Tr.177-78).

On August 23, 1996, Judge Calvin, a St. Louis City judge, wrote to this Court (Ex.91-depo.Ex.1). He remembered this Court's original opinion resulted in "a great deal of discussion, heated discussion…." (Ex.91 at 10-11). He wrote because he understood letters were being sent and calls being made to this Court on Corrigan's behalf (Ex.91 at 11-12,22-23). He also heard Corrigan was encouraging members of the bench and bar to contact this Court (Ex.91 at 24). He thought there was an improper attempt by the bar to influence this Court (Ex.91 at 13). The "fallout" of the opinion "seemed to take a life of its own somewhat personally…." (Ex.91 at 17). Talk about the opinion did not involve

an "intellectual discourse," but instead was "pretty much personal" with people "defend[ing] their position" (Ex.91 at 18). The resulting controversy occurred because there were people who viewed the opinion as a personal attack on a judge (Ex.91 at 18,22). The opinion generated both a lot of discussion and controversy (Ex.91 at 20-21). He talked to both St. Louis City and County judges (Ex.91 at 16). Because the opinion involved a County judge, there was "a great deal" of discussion in the County (Ex.91 at 21).

Judge Shaw, also a St. Louis City judge, wrote to this Court on August 14, 1996 (Ex.92-depo.Ex.1). He understood a "highly irregular" telephone call and letter writing "campaign" was being waged on Corrigan's behalf (Ex.92 at 10 and depo.Ex.1). He understood the letters defended Corrigan as not being a "racist" and personally attacked Judge White (Ex.92 at 12).

Exhibits 74 through 78 and 80 through 85 were all Post articles/letters/editorials describing the controversy surrounding this Court's original opinion. Ex.74, a front page article, titled: "State's High Court Chides Trial Judge For Racial Remark" described this Court's opinion as "a biting attack" that "blister[ed]" Corrigan and reported reliance on Evan's "barbecue" article. Ex.75, a front page article, titled: "Corrigan's Backers Call Him 'Wild Bill' - But Not Racist" reported judicial colleagues and lawyers said this Court was "out of line" for calling Corrigan a "racist," Judge Drumm had "expressed astonishment," McCulloch did not intend to criticize the opinion '"no matter how illogical it is,'" and contained criticism for relying on the "barbecue" article. Ex.76, B section front page, contained the characterization of this Court's members as "the seven stooges."

Point II. Ex.77 was an editorial attacking the opinion. Ex.78 was an attorney's letter to the editor attacking this Court. Ex.80 was a B section front page article alleging this Court's criticisms were based on partisan political party politics and Judge Robertson had "orchestrated" the opinion. Point II. Ex.81 was a letter to the editor defending Corrigan based on personal social acquaintanceship. Ex.82, a front page article, titled: "Nixon Wants High Court To Hear Case Again Earlier Opinion Called Trial Judge Racist" described "a firestorm of controversy," Bardgett's and Simeone's rehearing motions, and criticism of reliance on the "barbecue" article. Ex.83 was an article reporting on the controversy surrounding the opinion. Ex.84 was an editorial discussing the modified opinion and that Corrigan and his friends had "mounted a campaign" to get the original opinion changed. Ex.85, an editorial, described the original opinion as "controversial." Ex.86 was the "barbecue" article.

Exs.68 and 69 were the Bardgett and Simeone rehearing motions/"letters" Bardgett's motion contained eleven pages of legal argument and personal defense of Corrigan accompanied by pages that originated from the Attorney General's fax. Point II. Simeone's rehearing motion was six pages, handwritten, and addressed to this Court's then Chief Justice as "Dear Judge John" (Ex.69).

Ex.70 was a "letter" of Attorney Clyde C. Farris purportedly written "as a concerned private citizen." Farris' "letter" argued why Corrigan's statements during Smulls' Batson hearing did not show Corrigan is "a racist", that this Court had engaged in an "unconscionable" act of "destroy[ing]" Corrigan's reputation, and complained about use of Evans' article. Ex.67, a letter of Constance A. Klepper, accused this Court of

going on a "witch hunt", "slander[ing]" Corrigan by calling him "a racist", and accused this Court of "political motives."

Hartenbach refused to admit Judges Calvin's and Shaw's testimony on relevancy grounds (O'B.Rem.Tr.214-221; O'B.Rem.L.F.212). Respondent objected: (1) opinion (O'B.Rem.Tr.218); (2) hearsay (O'B.Rem.Tr.218)(Ex.91 at 17,23)(Ex.92 at 7); (3) O'Brien was not questioned about Calvin and Shaw's testimony (O'B.Rem.Tr.218-19); and (4) irrelevant (Ex.91 at 7-8)(Ex.92 at 7).

Hartenbach also refused to admit the rehearing motions (O'B.Rem.R.Tr.185-93,209-12,222;O'B.Rem.L.F.212). Respondent objected: (1) irrelevant (O'B.Rem.Tr.186); (2) hearsay (O'B.Rem.Tr.186); and (3) O'Brien was not questioned about them (O'B.Rem.Tr.186). Hartenbach ruled the rehearing motions were irrelevant unless O'Brien had seen or was familiar with them and were hearsay (O'B.Rem.Tr.193-94).

At the hearing Hartenbach conducted, he ruled the Post items would be admitted for the limited purpose there were a number of items published at or near the time of the opinion to show the case received a lot of attention and notoriety, but that O'Brien's testimony did not include having read all the articles (O'B.Rem.Tr.199,201,204-05). Hartenbach's findings declined to consider the Post materials as irrelevant based on O'Brien's testimony (O'B.Rem.L.F.211-12). Respondent objected to the Post items on the same grounds as the rehearing motions (O'B.Rem.Tr.195-96,198-99).

All this evidence was offered to establish the substantial controversy surrounding this Court's original opinion and its magnitude and for its biasing impact on O'Brien's

remand testimony (O'B.Rem.Tr.185,187,188-889,191-94,208-09,215-16,220) (Ex.91 at 8-9,24)(Ex.92 at 7-9). Ex.86, the "barbecue" article, was offered as one source of the controversy (O'B.Rem.Tr.207-08). Smulls' evidence was not offered for the truth of the statements, but for the fact the statements were made (O'B.Rem.Tr.188-89,192,216-17,220). The evidence was all offered as extrinsic evidence to establish bias in O'Brien's testimony (O'B.Rem.Tr.187,215-16). Also, Judges Calvin's and Shaw's testimony was offered, in response to hearsay objections, to explain why they took their subsequent actions of writing this Court (O'B.Rem.Tr.216-17,220)(Ex.91 at 23-24)(Ex.92 at 8-9).

O'Brien was questioned about Post items Exs.74,75, and 82 (O'B.Rem.Tr.110-15). O'Brien sometimes reads the Post (O'B.Rem.Tr.114). O'Brien did read Post items about Smulls' case, but could not say whether he had read them all (O'B.Rem.Tr.114-15). O'Brien's familiarity with the original opinion might have been based on reading the Post, but he could not recall (O'B.Rem.Tr.115). O'Brien heard courthouse talk about the original opinion that may have been based on Post items (O'B.Rem.Tr.122-23). There is no requirement a witness be questioned about extrinsic evidence. Moreover, Smulls was not required to ask O'Brien about his familiarity with each Post item because he testified he did not know which ones he read.

This evidence was all offered to show bias in O'Brien's testimony generally. More particularly, showing that bias was essential because O'Brien would not say whether the original opinion had any significance for St. Louis County judges and he knew of no efforts to get this Court to alter that opinion. Johnson, supra. The relevance of all this evidence was to show a significant controversy existed and did not depend on

the truth of any particular statements. Sutherland and Ray, supra. This Court should reverse for a new hearing.

IV. REFUSAL TO ACKNOWLEDGE RACE - EXCLUDED EVIDENCE

O'BRIEN CLEARLY ERRED REFUSING TO ADMIT EX.21 (SMULLS' ADMISSIONS REQUESTS), EX.22 (REQUESTS TRANSCRIPT) AND REFUSING TO CONSIDER FORMER 29.15 COUNSEL LEFTWICH'S TESTIMONY CORRIGAN ASKED CO-COUNSEL WHETHER HE WAS AWARE THE WOMAN ATTORNEY WHO OBTAINED A GENDER DISCRIMINATION JUDGMENT AGAINST HIM WAS "WHITE" AND EX.23 (LEFTWICH'S CONTEMPORANEOUS AFFIDAVIT - CORRIGAN'S QUESTION) BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14, BECAUSE THEY WERE NECESSARY TO ESTABLISH CORRIGAN'S FALSE AND UNFORTHRIGHT PROFESSING HE IS INCAPABLE OF IDENTIFYING ANYONE'S RACE AND THEREFORE DID NOT FAIRLY RULE SMULLS' BATSON CLAIM AND NONE WOULD HAVE BEEN NECESSARY EXCEPT CORRIGAN REFUSED TO ALLOW HIS COURT REPORTER TO RECORD THE PROCEEDINGS.

O'Brien refused to admit: (1) Ex.21 - Smulls' Requests For Admissions; (2) Ex.22 - Transcript hearing on admission requests a private court reporter recorded; (3) former 29.15 counsel, Leftwich's testimony, that at the September 9, 1993 conference, Corrigan asked undersigned counsel whether he was aware the woman who obtained a gender discrimination judgment against him was "white"; (4) Ex.23, Leftwich's

contemporaneous September 28, 1993, affidavit, recounting Corrigan's question. These matters were offered to demonstrate Corrigan has falsely and unforthrightly professed he is incapable of acknowledging anyone's race and therefore cannot fairly rule on Batson claims. This evidence was offered to show, when Corrigan chooses, he can acknowledge what he believes to be individuals' races. The evidence was not offered for the hearsay purpose any individual actually belonged to a particular racial group.

On August 5, 1993, Smulls moved for all proceedings to be conducted on the record because the Attorney General had argued in 29.15 death penalty appeal State v. Wise claims were not reviewable because non-evidentiary hearings were not conducted on the record (R.L.F.64-70). That motion was heard August 17, 1993 (R.L.F.819-53). Smulls furnished a private certified court reporter because it could not be anticipated whether Corrigan would allow his official reporter to record the proceedings (R.L.F.822-26,830). Corrigan refused to make his court reporter available and denied the motion (R.L.F.99,830,835-36). Corrigan allowed the private certified reporter to sit in the courtroom and record those proceedings and that transcript was filed (R.L.F.835-36;Rem.R.Tr.1391-93). Because of Corrigan's ruling, he was apprised on August 23, 1993, a private reporter would be supplied for the September 9, 1993, conference (R.L.F.101). That reporter was not allowed to be present on September 9, 1993, and Corrigan yelled he "didn't give a shit" a reporter had been furnished (R.L.F.677-84,857);State v. Smulls,935 S.W.2d9,25(Mo.banc1996).

Ex.21, Smulls' First Requests For Admission, sought: (1) the Honickmans' race; (2) all retrial jurors were white; (3) Smulls is black. Ex.22 was the transcript of

proceedings conducted on August 17, 1993, during which respondent's objections (R.L.F.51,843-44) were heard. The Requests and August 17, 1993, transcript were part of the first appeal's Legal File (R.L.F. 41-42, 827-53). In ruling on the Requests, Corrigan commented:

> This Court won't take the position that people are white or black. It is the Court's position that you can't look at people and determine what their race is, okay, because I don't know what constitutes white and what constitutes black or any other race, for that matter.

(Ex.22 at 19). O'Brien sustained respondent's objections the requests were a filing it was never required to answer and the transcript was not prepared by the official reporter and the reporter who prepared the transcript was not called to establish a foundation (Rem.R.Tr.1387-94). Exs.21 and 22 were offered jointly to prove Corrigan's false and unforthright assertions he is incapable of acknowledging a person's race (Rem.R.Tr.1387-94).

Leftwich testified that, at the September 9, 1993, conference Corrigan asked undersigned counsel whether he was aware the woman attorney who successfully sued him for gender discrimination was "white" (Rem.R.Tr.861-62). Exhibit 23, Leftwich's affidavit, executed on September 28, 1993, recounted Corrigan's statement.[7] The

[7]That affidavit was part of the Legal File filed in the original appeal (R.L.F. 807). Undersigned counsel completed a similar affidavit on September 28, 1993, that was also part of the same Legal File (R.L.F. 805-06).

affidavit was necessary because Corrigan refused to allow the proceedings to be recorded (Rem.R.Tr.861-62). It was offered to establish why Leftwich did a contemporaneous affidavit, and thus, she was not recounting Corrigan's statement for the first time in 1997 (Rem.R.Tr.855,858,860-62).

O'Brien excluded all this evidence as hearsay and irrelevant (Rem.R.Tr.857-62). The affidavit was also excluded because Leftwich orally testified in an offer of proof (Rem.R.Tr. 1394-97). Smulls' evidence was not offered to prove and for the truth Goodwin was in fact white, but rather Corrigan had made that statement, while he falsely and unforthrightly professes he cannot acknowledge a person's race (Rem. R.Tr.856-57,861).

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). An individual sentenced to death is entitled to a full transcript for appeal. Dobbs v. Zant, 506U.S.357,358-60(1993). A complete transcript and record are needed to avoid arbitrariness and caprice. Id. "[M]eaningful appellate review" is required to ensure death is not imposed arbitrarily or irrationally. Parker v. Dugger,498U.S.308,321(1991); Stopher v. Conliffe,1997W.L. 297479(Ky.Ct. App. June 6, 1997) (where death might be sought defendant was entitled to all proceedings on record).

While Rule counsel did not have any citations to offer O'Brien such a foundational requirement did not exist as to the transcript when asked (Rem.R.Tr.1393-94), that is the law. Rule counsel argued that it was fundamentally unfair to refuse to admit the transcript because it was not prepared by the official reporter when Corrigan had refused to allow the official reporter to record the proceedings (Rem.R.Tr.1393-94).

In Owen v. State,776S.W.2d467,469(Mo.App.,E.D.1989), the claim it was error to refuse to suppress the defendant's guilty plea transcript in the 24.035 action on the grounds the court reporter had not certified the transcript's accuracy, as required by Rule 24.03, was rejected. A transcript was prepared from the deceased reporter's notes by another reporter. Id.469. The reporter who prepared the transcript certified to the best of his/her ability he/she had transcribed the proceedings based on the notes of the official reporter. Id.469. The Court noted that "a party complaining about the adequacy of a transcript must specifically show how he is prejudiced by the inadequacy of the transcript before he is entitled to any relief." Id.469.

In Bayte v. State,599S.W.2d231,233(Mo.App.,W.D.1980), the 27.26 movant moved to suppress the guilty plea record hearing because it was not transcribed by a certified court reporter. The prosecutor's secretary took short-hand notes and the plea was audiotape recorded. Id.233. The prosecutor's secretary then generated a typed transcript. Id.233. Admission of this transcript was upheld because the prosecutor's secretary had served as a temporary court reporter. Id.234. While so holding, the court observed: "[i]t is ultimately the responsibility of the judge to see to it that the record of proceedings in his court is faithfully kept." Id.234.

In Johnston v. Johnston,573S.W.2d406,408-09(Mo.App.,K.C.D.1978), the trial court refused to grant counsel's request proceedings on the motion for new trial and attorney's fees and costs be recorded. Counsel filed an affidavit stating that in response to his request, the trial court had stated recording the proceedings would be a waste of the reporter's time and excused her. Id.409. The judgment was reversed because of multiple

errors. Id.411-13. Discussing the refusal to conduct the requested record proceedings, the Court stated: "[t]he making of such a record, if requested, is not a matter for judicial discretion and the denial of a request to record proceedings, because it would waste the reporter's time constitutes an abuse of discretion." Id.411. Denial of such a request "effectively and completely forecloses [a party's] right to meaningful appellate review." Id.

All the matters sought to be presented were not part of a transcript on appeal that was prepared by the official court reporter because Corrigan refused to let the official court reporter transcribe both proceedings. Respondent last argued these matters were properly excluded because they were not part of any pleading. Smulls, however, would not have been forced to offer these as items of evidence if Corrigan had followed long recognized rules on record making and they would have been now before this Court as part of an official transcript. O'Brien's refusal to allow Smulls to present this evidence was fundamentally unfair because Corrigan had refused to allow the official reporter to transcribe both proceedings. (Rem.R.Tr.1394). Dobbs, supra. Respondent did not show how it was prejudiced through using the transcript the private reporter generated. Owen, supra. Using a private reporter was at least as good if not better than using the prosecutor's secretary. Bayte, supra. Refusing to make the official reporter available was an abuse of discretion. Johnston, supra.

This Court has recognized: "[a] hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." State v. Sutherland,939S.W.2d373,376 (Mo.banc.1997).

However, "'If the relevance of the statement lies in the mere fact that it was made, no reliance is placed on the truth of the statement or the credibility of the out-of-court declarant, and the statement is not hearsay.'" Id.377 (quoting O'Brien & Goldman, Federal Criminal Trial Evidence,345(1989));State v. Mallett, 732 S.W.2d 527,536(Mo. banc.1987) (pawn tickets not offered to prove defendant pawned items, but to establish defendant at crime scene).

The evidence here was not offered to prove any individual in fact belonged to a particular racial group. It was offered for the mere fact Corrigan made these statements. All the evidence was offered to demonstrate Corrigan's pattern of conduct of falsely and unforthrightly professing he is incapable of acknowledging anyone's race, and therefore, cannot fairly rule Batson claims. Further, this evidence was offered to show that, when Corrigan chooses, he will acknowledge what he believes to be an individual's race. Further, Leftwich's affidavit was significant because it established she had made a sworn contemporaneous record and was not recounting Corrigan's statement for the first time in 1997. In the case of Goodwin, now Tubbesing, the truth of the matter asserted, that she is "white", was set forth in her affidavit with her picture attached. (Ex. 60). Point VII.

These rulings were prejudicial because they denied Smulls the opportunity to prove Corrigan did not fairly consider his Batson claim. This Court should reverse for a new hearing before a judge who will fairly consider this evidence or consider the evidence and order a new trial.

V. NO BLACK JUDGES TO DO BARBECUING

O'BRIEN CLEARLY ERRED DISMISSING EVIDENCE OF CORRIGAN'S "BARBECUE JOKE", RELYING ON IRRELEVANT HEARSAY COURT EN BANC MINUTES TO DISPUTE CORRIGAN TOLD THE "JOKE", RELYING ON CORRIGAN'S HEARSAY DENIAL, AND SUSTAINING RESPONDENT'S OBJECTION TO KRAFT'S TESTIMONY IF SHE HAD BEEN AWARE CORRIGAN WAS ALLEGED TO HAVE TOLD THIS "JOKE" THEN SHE WOULD HAVE CONSIDERED DISQUALIFYING HIM, AND FOUND CORRIGAN WAS ABLE TO FAIRLY RULE ON BATSON BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, A FULL AND FAIR HEARING AND EFFECTIVE ASSISTANCE, U.S. CONST., AMENDS. 6, 8, 14 AS JUDGE CAMPBELL TESTIFIED CORRIGAN TOLD THE "JOKE" AND THAT TESTIMONY WAS OFFERED FOR THE NON-HEARSAY PURPOSE CORRIGAN MADE THE STATEMENT, EVANS, THE AUTHOR OF AN ARTICLE ABOUT THE "JOKE" TESTIFIED ABOUT HIS REPORTING WITH THE REPORTING OFFERED TO SHOW COUNSEL SHOULD HAVE BEEN AWARE OF IT, AS THE "JOKE" IS HIGHLY PROBATIVE OF CORRIGAN'S INABILITY TO FAIRLY DECIDE SMULLS' BATSON CLAIM AND WHETHER COUNSEL WOULD HAVE MOVED TO DISQUALIFY CORRIGAN RELEVANT TO INEFFECTIVENESS WHILE INADMISSIBLE HEARSAY WAS USED TO DISMISS CORRIGAN TOLD THE "JOKE."

O'Brien dismissed evidence presented to support Corrigan could not fairly decide the strike of Sidney. Evidence was rejected as hearsay Corrigan had joked at a judges' meeting a judicial barbecue could not be held to lobby legislators for pay raises because there were no black judges to do the barbecuing (O'B.Rem.L.F.252-53). O'Brien also relied on irrelevant hearsay Circuit Court en banc minutes (Resp.Ex.AAAA) and Corrigan's hearsay newspaper reported denial to dispute Smulls' evidence (O'B.Rem.L.F.252-53). O'Brien refused to allow evidence Kraft would have considered moving to disqualify Corrigan if she had been aware of the "barbecue" joke. Smulls was denied due process, freedom from cruel and unusual punishment, a full and fair hearing, and effective assistance. U.S. Const. Amends. 6, 8, and 14. Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993).

Judge Campbell attended a 1983 Circuit Court en banc meeting that was a special meeting to discuss pay raises (Ex.53 at 4-10,20-21). All judges were present because pay raises were the subject (Ex.53 at 21). Campbell heard Corrigan joke they could not hold a judicial barbecue to lobby legislators for a pay raise because there were no black judges to do the barbecuing (Ex.53 at 4-10). Campbell's testimony was offered for the fact Corrigan made the statement and not to prove its hearsay truth that there were no black judges available to do any barbecuing (Ex.53 at 10). Campbell remembered the meeting was held in the court en banc room, Judge Ruddy led it, and former Lieutenant Governor Rothman was present (Ex.53 at 19-20). Pay raise matters would not have appeared on any court meeting agenda (Ex.53 at 20).

Evans wrote an October 30, 1983 Post article reporting Corrigan's "joke" (Rem.R.Tr.280-82;Ex.2). The article was offered and received as a business record Smulls' counsel should have known about (Rem.R.Tr.280-82,1109-15;Ex.2). When the article was admitted, O'Brien expressly stated it was not admitted for the truth of its contents and was admitted solely for counsel's unfamiliarity (Rem.R.Tr.1109-15).

O'Brien found: (1) as to the evidence from Judge Campbell and Evans "Movant was unable to overcome the hearsay objections to this testimony"; (2) Campbell testified the statement was "an attempt at humor"; (3) it could not be determined whether the statement was made and if so by whom; (4) Corrigan "has steadfastly denied" the statement in newspaper articles not admitted into evidence; (5) court en banc minutes after February, 1983 do not reflect Corrigan, Ruddy, and Campbell all present at a meeting together and no 1983 minutes mention Rothman's presence; (6) if or by whom the remark was made has no bearing on a judge's in-court treatment of racial minorities; and (7) Corrigan's good "reputation" among attorneys respondent called (O'B.Rem.L.F.252-53,274-75).

Judge Campbell's testimony was offered to prove the racially offensive joke was made and Corrigan made it (Ex.53 at 10). A statement is not excludable as hearsay if it is relevant to show a statement was made and there is no reliance on the statement's truth. State v. Sutherland,939S.W.2d373,375-77(Mo.banc.1997). Point IV. That is how Campbell's testimony was offered. It was not offered for the truth that in fact no black judges were available to do any barbecuing. Sutherland. Smulls' claims would not be advanced by proving no black judges were available to cook, but his claims were

advanced by showing Corrigan had told such a "joke." Similarly, Evans' testimony and his article were offered to prove what counsel could and should have known about the statement and not for their truth.

Judge Campbell did not testify the statement was "an attempt at humor" (O'B.Rem.L.F.252). Campbell testified the statement was: "His [Corrigan's] type of humor, yes." and was of a nature comparable to other comments of a gender biased nature Corrigan had made (Ex.53 at 23-24)(emphasis added). Campbell did not testify Corrigan has an impeccable reputation of fairness regardless of race (O'B.Rem.L.F.274). Campbell testified he had no opinion on the issue of racial bias on the part of Corrigan (Ex.53 at 18).

O'Brien refused to consider Evans' testimony and his article reporting the "barbecue joke" because it constituted hearsay. However, O'Brien adopted as true Corrigan's denial reported in Evans' article, a clearly hearsay matter, finding Corrigan "has steadfastly denied making the alleged remark." (O'B.Rem.L.F.252-53). The fact O'Brien would state Corrigan has "**steadfastly**" denied telling the "barbecue joke" also demonstrates O'Brien relied on extrajudicial sources of information requiring his disqualification. Point II. The Bardgett and Simeone rehearing motions complained this Court's original opinion relied on Evans' hearsay article (Rem.R.L.F.175-79,197). Those judicial colleague friends of Corrigan, among them O'Brien, have no difficulty embracing the article for Corrigan's hearsay denial, but complain it is hearsay as to the reporting of Corrigan's "barbecue joke." To that extent, the article is especially

noteworthy because Corrigan's denial must be contrasted with the article's statement "[a]t least half a dozen judges" reported Corrigan told the "joke" (Ex. 2).

Likewise, the court en banc minutes were considered to prove who was and was not present at meetings. In fact, Judge Campbell testified all of the judges were present because the meeting's subject was pay raises. (Ex.53 at 21). Moreover, those minutes are totally irrelevant because Campbell testified the meeting was likely not a regular court en banc meeting, any agenda would not reflect pay raise matters, and all the judges were present (Ex.53 at 20-21). The issue at hand was whether Corrigan told the "barbecue joke" not who else was present. Collateral impeachment evidence that impugns credibility, as done here, is always prejudicial. State v. Beck, 785S.W.2d714,717 (Mo.App.,E.D.1990). It is noteworthy that while O'Brien refused to admit a transcript of proceedings prepared by a private reporter for which Corrigan refused to make the official reporter available, Point IV, O'Brien wholeheartedly embraced relying on hearsay court en banc records.

O'Brien's handling of the court en banc minutes further demonstrates his bias and inability to fairly consider the claims against Corrigan. O'Brien treated the court minutes as though Smulls had offered them (O'B.Rem.L.F.253). In fact, they were objected to as hearsay and irrelevant (Rem. R.Tr. 1425-29). Smulls subpoenaed the minutes only after Waldemer, through a letter of February 24, 1998, had supplied minutes for 1983, pursuant to a discovery request (Rem.R.L.F.673-74; Rem.R.Tr.1425). What Waldemer supplied did not include the months May, July, and August and did not include any minutes after the October 17, 1983 meeting. In response to Smulls' subpoena, the

Circuit Court's Administrator filed a motion to deliver the records in camera and under seal, but delivered them under seal without ever having that motion heard (Rem.R.L.F.1-12,673-74;Rem.R.Tr.1426). This Court's October 5, 1999, order indicates Ex.AAAA is neither attested to nor certified by the Circuit Clerk, and therefore, not admissible as official/public records under § 490.130. Further, since there was no evidence these documents were kept or prepared under a public duty, they were not admissible as public records. State v. Weber,814S.W.2d298,303(Mo.App.,E.D.1991). The treatment these subpoenaed records received demonstrates further how Smulls was unable to have his claims fairly decided in St. Louis County and by O'Brien. Court minutes were furnished to Waldemer, but not to Smulls' attorneys even when they were subpoenaed. From the specificity of arguments Waldemer made as to the reasons for respondent offering the minutes, it is obvious they were furnished to him (Rem.R.Tr.1425-29). Further, O'Brien allowed them to be filed under seal even though when Smulls sought to file documents under seal he refused because his "practice" is not to seal court file documents (Rem.R.Tr.132-39;Rem.R.L.F.468).

Kraft testified, in an offer of proof, if she had known it was asserted Corrigan told the "joke," then she would have considered moving to disqualify him (Rem.R.Tr.1116-17). O'Brien sustained respondent's objection that Kraft was asked to speculate on a statement not proven to be true (Rem.R.Tr.1116). That ruling was contrary to State v. Tokar,918S.W.2d753,768(Mo.banc1996) which requires 29.15 counsel to question trial counsel on reasons for not objecting. Kraft's testimony was offered as to her mental processes as to whether she would have sought to disqualify Corrigan (Rem.R.Tr.1116).

This evidence was relevant to proving ineffectiveness for failing to seek to disqualify Corrigan because counsel has a duty to make a complete investigation. Kenley v. Armontrout,937F.2d1298,1304(8thCir.1991). Moreover, there was evidence the "barbecue" statement was true.

The "joke" evidences a longstanding hostility and insensitivity to issues of racial fairness and impacted Corrigan's ability to fairly decide the Batson claim. It likewise evidences his general lack of respect for African-American attorneys which manifested itself here with "best black attorney" comment. Point I. The "joke" is something Smulls' counsel could and should have known about and would have acted upon had they known. The "reputation" evidence was improper. Point X. This Court should reverse for a new hearing before a judge who can fairly consider Smulls' evidence, while excluding respondent's improper evidence. Alternatively, this Court should order a new trial.

VI. JUDGE O'TOOLE'S DEPOSITION - IMPROPERLY STAYED

O'BRIEN CLEARLY ERRED STAYING JUDGE O'TOOLE'S DEPOSITION BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14, AS THIS COURT WAS CLEAR SMULLS WAS TO HAVE A HEARING ON CORRIGAN'S RACIAL BIAS, INCLUDING HIS "BARBECUE JOKE", THE RULING DENIED ACCESS TO A WITNESS WHO SMULLS HAD REASON TO BELIEVE HEARD CORRIGAN'S "JOKE" AND WHO COULD, AS PRESIDING JUDGE, BE EXPECTED TO KNOW ABOUT THE ST. LOUIS COUNTY JUDICIARY'S LOBBYING AGAINST THIS COURT AND SMULLS WAS ONLY ALLOWED TO PROCEED WHEN O'TOOLE WAS TOO ILL AND DIED.

In response to respondent's motion to quash Judge O'Toole's June 18, 1997 deposition subpoena, O'Brien ordered it stayed. Seven months later, the stay was vacated. When O'Toole's deposition could be reset, he was so ill that he died the day it was reset for. Smulls was denied due process, freedom from cruel and unusual punishment, and a full and fair hearing. U.S. Const., Amends. 8 and 14. Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993).

A May 12, 1997 letter was sent to O'Toole recounting informal efforts to speak to him were attempted, and declined by O'Toole (Rem.R.L.F.251-53, 257-58).[8] O'Toole's

[8] All referenced documents undersigned counsel authored and establish due diligence.

deposition was set for June 18, 1997 (Rem.R.L.F.253-54,259). Smulls waited five weeks to accommodate O'Toole's schedule (Rem.R.L.F.253-54). On June 4, 1997, respondent moved to quash because: (1) there was no ruling granting a hearing; and (2) an "undue burden" was imposed on the Twenty-First Circuit removing O'Toole from his duties (Rem.R.L.F.230-32).

Smulls' argued: (1) Evans had identified O'Toole as someone who very probably was a source for his "barbecue" story (Rem.R.L.F.251-52); (2) O'Toole had knowledge he could, as the Presiding Judge, be expected to have supporting disqualifying the St. Louis County judiciary because of lobbying on Corrigan's behalf (Rem.R.L.F.238-41,250); (3) this Court's final opinion, Smulls, 935 S.W.2d at 25, clearly indicated it intended a hearing on the "barbecue" statement (Rem.R.L.F.240,252); (4) respondent lacked standing to move to quash because it could not claim to represent the State, O'Toole, and the Twenty-First Circuit (Rem.R.L.F. 251); and (5) throughout, Smulls' interrogatories were opposed on the grounds the Prosecutor's Office represented the State (Rem.R.L.F.202-03,251,260-76;R.L.F.52,319-20).

On June 6, 1997, four days after certiorari was denied, Smulls v. Missouri, 117S.Ct.2415 (June 2, 1997)[9], O'Brien stayed O'Toole's deposition, and on June 16, 1997, he stayed it until there was a ruling on holding a hearing (Rem.R.L.F.277,281).[10]

On December 22, 1997, Rule counsel received a December 17, 1997 order setting a hearing for February 26, 1998 (Rem.R.L.F.484-88,497-99). An overnight letter was sent to O'Brien on December 29, 1997, requesting he rule on taking O'Toole's deposition (Rem.R.L.F.486-88,497-99). The stay was vacated January 5, 1998 (Rem.R.L.F.492-94).

On December 29, 1997, a letter was sent to O'Toole at the courthouse apprising him Smulls intended to depose him (Rem.R.L.F.524). An overnight letter was sent on January 13, 1998, to the courthouse apprising O'Toole the stay was vacated and he would be contacted to reschedule (Rem.R.L.F.525). On January 16, 1998, a letter was sent to O'Toole at home noting counsel had been apprised O'Toole was on extended sick leave and asked O'Toole to apprise counsel when his deposition could be rescheduled (Rem.R.L.F.526).

---

[9] Contrary to what respondent last argued, O'Brien never granted Smulls' request to stay the proceedings until certiorari was decided. Further, certiorari was decided when O'Brien stayed O'Toole's deposition.

[10] Respondent also moved to stay Judge Block's deposition which was treated the same (Rem.R.L.F.230-32,277,281).

On January 29, 1998, a continuance motion was filed requesting a continuance until O'Toole's deposition could be obtained or to hold open the evidence until his deposition could be obtained (Rem.R.L.F.518-26). Rule counsel had called O'Toole's residence on January 23, 1998 and spoke to a woman who said O'Toole was hospitalized and expected to be discharged on either January 25th or 26th, 1998 (Rem.R.L.F.519). On January 27, 1998, counsel spoke to O'Toole, who stated he was confined to bed rest until March 1, 1998, but anticipated he could be available after March 1, 1998 (Rem.R.L.F.519). A continuance was requested because it was believed O'Toole had knowledge of the "barbecue joke" and other relevant matters that were critical to have before a hearing (Rem.R.L.F.519).

The continuance motion was denied February 10, 1998 (Rem.R.L.F.542). O'Brien ruled he would allow the evidence to remain open for a reasonable time to obtain O'Toole's deposition (Rem.R.L.F.542). At respondent's request, O'Brien also ruled it would not be required to proceed with its evidence until that reasonable time elapsed or O'Toole's testimony was obtained (Rem.R.L.F.542;Rem.R.Tr.237-38,248).

On February 11, 1998, a letter was sent to O'Toole's home seeking to re-schedule (Rem.R.L.F.543). On February 18, 1998, an overnight letter was sent to O'Toole's home stating his clerk had been contacted regarding the February 11, 1998 letter, and that he had not furnished possible dates (Rem.R.L.F.545). The February 18, 1998 letter stated that, if O'Toole did not furnish possible dates by February 28, 1998, then a date would be selected (Rem.R.L.F.545).

On February 24, 1998, an overnight letter was sent to O'Toole's home (Rem.R.L.F.591). It indicated O'Toole had told respondent he would make himself available on April 15, 1998 and Rule counsel did not believe O'Brien would consider that reasonable (Rem.R.L.F.591). O'Toole's deposition was set for March 9, 1998 (Rem.R.L.F.590-91).[11]

On March 9, 1998, counsel appeared, but O'Toole did not (Rem.R.L.F.676). Counsel called O'Toole's home and was told he would not appear (Rem.R.L.F.676). The next day, March 10, 1998, the Post-Dispatch reported O'Toole had died (Rem.R.L.F. 676,683). A verified record with specific detailed questions O'Toole would have been asked was filed March 16, 1998 (Rem.R.L.F.676-83). Areas of inquiry included: (1) personal knowledge of the "barbecue" comment; (2) knowledge of the lobbying campaign on behalf of Corrigan; and (3) O'Brien's role in that lobbying (Rem.R.L.F.676-82).

On March 27, 1998, a supplemental verified record in light of O'Toole's death was filed (Rem.R.L.F.684-90). Attached to the pleading was an affidavit from Senior St. Louis County Circuit Court Judge, the Honorable Robert G. J. Hoester (Rem.R.L.F.684-90). Judge Hoester had furnished Smulls' counsel information about a conversation he had with O'Toole that occurred after this Court first issued an opinion in Smulls (Rem.R.L.F.684-90). O'Toole told Hoester he heard Corrigan tell the "barbecue joke"

---

[11] O'Toole was served with separate subpoenas for each date (Supp.Rem.R.L.F.1-4) and respondent admitted service for the original date (Rem.R.L.F.230).

(Rem.R.L.F.684-90). The two verified records were filed to demonstrate prejudice to this Court (Rem.R.Tr.1433-35).

On April 27, 1998 when the hearing resumed from February, 1998, respondent moved to strike the pleadings and Hoester's affidavit (Rem.R.L.F.696-700). O'Brien never ruled.

This Court ordered the 29.15 cause "remanded for a new hearing before a new judge." State v. Smulls,935S.W.2d9,27(Mo. banc 1996)(emphasis added). This Court clearly indicated one of the matters warranting a hearing was Corrigan's racially offensive Batson hearing comments because they raised "serious questions about his willingness to do what Batson requires". Id.26. Part of the proof would include the "barbecue joke. " Id.25. This Court was clear about requiring a hearing on the "barbecue joke." O'Brien's ruling on respondent's motion denied access to a witness who heard the "barbecue joke" and who could, as the Presiding Judge, be expected to have knowledge of the St. Louis County judiciary's role in the lobbying campaign against this Court and that warranted disqualifying O'Brien and that Circuit.

Respondent's motion sought to quash the deposition subpoenas for Judges O'Toole and Block (Rem.R.L.F.230-32). To bring a challenge, a party must have standing. State v. Pizzella,723S.W.2d384,385-87(Mo.banc1987). Throughout, respondent opposed Smulls' interrogatories, stating it represented the State, supra. The Prosecutor's Office could not represent the State, O'Toole, Block and the Twenty-First Circuit (Rem.R.L.F.251). A prosecutor's authority, under §56.060, is limited to representing the county or the State and does not include representing judges. In fact,

Judge Block hired her own private attorney to move to quash (Rem.R.L.F.233-35). Waldemer initially represented to the court on February 10, 1998, until co-counsel Murphy corrected him, the State had not filed any motion to quash the deposition subpoenas of any judges because: "[w]e don't represent any judges." (Rem.R.Tr.246,255). Waldemer just cannot tell the same story. When Waldemer argued the motion to strike Smulls' filings intended to establish prejudice, on the last hearing day, April 29, 1998, he stated the record would reflect O'Toole had requested respondent move to quash his subpoena (Rem.R.Tr.1435- 36). The record does not.

Rule 56.01(c), which authorizes a "party" to seek protective orders from discovery, does not apply. Throughout the Prosecutor's Office objected to discovery claiming it was not a "party" (Rem.R.L.F.202-03,260-76;R.L.F.52,319-20).

Under Rule 56.01(b)(1), parties are entitled to discovery on any relevant matter. Smulls' ability to obtain a fair hearing in St. Louis County is clearly a matter relevant to the subject matter in light of the race bias claims against Corrigan and the St. Louis judiciary's conduct following the original opinion. Points II, III.

O'Brien's inability to fairly serve is apparent from his refusal to grant a continuance to obtain O'Toole's deposition prior to directing Smulls to begin presenting his case. It was O'Brien's order that had prohibited Smulls from taking O'Toole's deposition months before when under this Court's opinion he was clearly entitled to take it.

Rule 65.05 governs when a continuance is to be granted because of a witness' absence. It provides an action "shall be continued unless the opposing party will admit

that the witness, if present, would swear to the facts set out in the affidavit . . . ." (emphasis added). The continuance motion affidavit set out it was believed O'Toole would testify he heard Corrigan tell the "barbecue joke" (Rem.R.L.F.522). Respondent would not agree, if called, O'Toole would so testify (Rem.R.L.F.677). Even though O'Brien was required to grant a continuance, he refused and made Smulls proceed before he could have the benefit of taking O'Toole's deposition. In contrast, at respondent's request, it was not required to go forward with its case until the time for obtaining O'Toole's deposition lapsed (Rem.R.L.F.542;Rem.R.Tr.237-38,248). The State, unlike Smulls, was not required to proceed without the benefit of matters critical to its case. The differing treatment further demonstrates O'Brien's inability to fairly serve.

The continuance denial was contrary to O'Brien's representations on July 24, 1997 about the scheduling of a hearing and Smulls' need to take depositions. He stated: "I will give you sufficient time between the ruling [on holding an evidentiary hearing] and the hearing date to do whatever depositions you will be doing." (Rem.R.Tr.230) (emphasis added).

The prejudice is clear from Hoester's affidavit that Smulls was denied a second judge who would confirm he heard Corrigan tell the "barbecue joke", especially in light of O'Brien's dismissal of this evidence. This cause should be reversed for a hearing before a judge who can fairly consider Judge Campbell's "barbecue" testimony with the evidence Judge Hoester can now supply or this Court should consider the evidence before it and order a new trial.

VII. GENDER DISCRIMINATION JUDGMENT EVIDENCE

O'BRIEN CLEARLY ERRED EXCLUDING EX.60, THE AFFIDAVIT OF GOODWIN (TUBBESING), WHO SUCCESSFULLY SUED CORRIGAN FOR GENDER DISCRIMINATION AND EX.61, THAT ACTION'S DOCKET SHEETS, BECAUSE THE AFFIDAVIT IDENTIFIED GOODWIN AS WHITE, THE DOCUMENTS REFLECTED JUDGE CAHILL, WHO IS AFRICAN-AMERICAN, PRESIDED AND CORRIGAN DID NOT PAY THE JUDGMENT AGAINST HIM AND DENIED SMULLS DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 6, 8, AND 14 AS GOODWIN'S RACE WAS RELEVANT TO DEMONSTRATING CORRIGAN HAS FALSELY AND UNFORTHRIGHTLY PROFESSED HE IS INCAPABLE OF ACKNOWLEDGING RACE AFTER CORRIGAN INJECTED GOODWIN'S RACE AND CAHILL'S JUDICIAL ROLE WAS RELEVANT TO DEMONSTRATING AND PROVING WHY CORRIGAN APPROXIMATELY ONE YEAR LATER TOLD THE "BARBECUE JOKE", AND CORRIGAN NOT PAYING THE JUDGMENT WAS RELEVANT TO DEMONSTRATE WHY HE FELT HE COULD MAKE RACIALLY OFFENSIVE COMMENTS HERE WITH IMPUNITY.

O'Brien excluded Ex.60, the affidavit of Ms. Goodwin (Tubbesing), who successfully sued Corrigan for gender discrimination and Ex.61, that action's docket

sheets. The rulings denied Smulls due process, freedom from cruel and unusual punishment, and a full and fair hearing. U.S. Const., Amends. 6, 8, and 14.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). It is recognized "[e]vidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on a principal issue." State v. Richardson,838S.W.2d122,124(Mo.App.,E.D.1992). Likewise, "[t]he relevance threshold is satisfied when the truth of the offered fact makes probable the existence of a fact in issue." Stevinson v. Deffenbaugh Industries,870S.W.2d851, 860(Mo.App.,W.D.1993).

Goodwin's affidavit identified her as "white" and a color picture was attached. (Ex. 60).[12] Her affidavit and attachments indicated: (1) her action against Corrigan was presided over by Judge Cahill; (2) judgment was rendered May, 1982; (3) the State paid the judgment; and (4) her attorneys' fees and costs were paid by either St. Louis County or the State even though they were awarded against Corrigan. (Ex. 60). The docket sheets reflected Cahill presided and Goodwin's attorneys' fees and costs were awarded against Corrigan. (Ex.61).

Goodwin's "white" racial classification, as shown from her picture, was relevant to demonstrate Corrigan has falsely and unforthrightly professed he is incapable of

[12]Goodwin's deposition, in lieu of live testimony, was not taken based on respondent's representations it would not object to her affidavit on lack of opportunity to cross-examine grounds (Rem.R.L.F.527-31;Rem.R.Tr.1368,1371).

acknowledging race, and therefore, cannot fairly decide Batson claims (Rem.R.Tr.1369). Corrigan affirmatively injected Goodwin's racial classification when he asked Rule counsel whether he was aware she is "white." Point IV.[13]

That Cahill, an African-American, presided approximately only one year before the "barbecue joke", was relevant to demonstrating and proving why Corrigan told the "joke" (Rem.R.Tr. 1369-70). Likewise, the "joke" highlights Corrigan's general disrespect for African-American attorneys - evidenced here by his "best black attorney" comment. That Corrigan did not pay Goodwin's judgment, attorneys' fees, and costs was relevant to why he would perceive he could make racially offensive comments here with impunity (Rem.R.Tr.1370-73).

A motion court cannot deny the opportunity to present evidence and then deny claims because there was no evidence to support them. Taylor v. State, 728S.W.2d305,307(Mo.App.,W.D.1987). These exhibits were excluded as irrelevant (Rem. R.Tr. 1371-73). The rulings denied Smulls the opportunity to prove Corrigan could not fairly decide his Batson claim. This Court should reverse for a hearing at which this evidence is considered, or grant a new trial.

---

[13] Respondent last argued the Goodwin matters were not pled. This specific occurrence could not be pled because Corrigan injected Goodwin's race after the amended motion was filed when Corrigan was cursing at and threatening undersigned counsel and would have been part of the record except Corrigan would not allow record proceedings. Points I, IV.

VIII. WALDEMER LIED - WHY HE STRUCK SIDNEY

O'BRIEN CLEARLY ERRED DENYING WITHOUT A HEARING CLAIMS SMULLS WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO PRESENT EVIDENCE WALDEMER LIED ABOUT WHY HE STRUCK SIDNEY AND THE SUBSTANTIVE CLAIM WALDEMER LIED, REFUSED THE OFFERS OF PROOF, REFUSED TO COMPEL RESPONDENT TO ANSWER INTERROGATORIES AND QUASHED WALDEMER'S DEPOSITION SUBPOENA BECAUSE THOSE RULINGS DENIED SMULLS THE OPPORTUNITY TO DEMONSTRATE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, EQUAL PROTECTION, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST., AMENDS. 6, 8, AND 14 AND DENIED SIDNEY DUE PROCESS AND EQUAL PROTECTION, AS THE PLEADINGS ALLEGED FACTS WARRANTING RELIEF, THE OFFERS CONTAIN SOME OF THE EVIDENCE THAT WOULD ESTABLISH WALDEMER LIED, AND THE DISCOVERY WOULD PRODUCE ADDITIONAL EVIDENCE WALDEMER LIED.

O'Brien denied a hearing on the claim counsel was ineffective for failing to present evidence Waldemer lied about why he peremptorily struck Ms. Sidney and the related substantive claim he lied. O'Brien also denied discovery and rejected offers of proof. O'Brien's rulings denied Smulls his rights to demonstrate he was denied effective assistance of counsel, due process, equal protection, and freedom from cruel and unusual

punishment and denied Sidney due process and equal protection. U.S. Const., Amends. 6, 8, and 14.

To obtain a hearing a movant must allege facts, which warrant relief, and the matters complained of resulted in prejudice. Belcher v. State,801S.W.2d372, 375(Mo.App.,E.D.1991). Review is for clear error. Barry v. State,850S.W.2d348,350 (Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466U.S.668,687(1984).

Waldemer's purported reasons for striking Sidney were: (1) his policy to strike postal workers who "are very disgruntled, unhappy people with the system and make every effort to strike back" (Tr.II 369); (2) he has several disgruntled unhappy postal workers in-laws (Tr.II 369); (3) "the holdout for a hung jury" in another case he tried State v. Ruff was a mail carrier (Tr.II 369); (4) she "glared" at Waldemer, "her general attitude", her "outfit" of a beret one day and "a ball cap" with sequins another day (Tr.II 369).

O'Brien denied a hearing because this Court rejected the direct appeal Batson claim (O'B.Rem.L.F.228-29). That ruling is clearly erroneous. The Eighth Circuit has recognized that even an adverse direct appeal ruling on a Batson claim does not foreclose a claim counsel was ineffective in how they litigated that Batson claim. Murray v. Groose, 106 F.3d 812, 813-15 (8th Cir. 1997) (habeas petition of Missouri conviction in which Batson trial challenge was rejected and counsel's representation on that challenge was alleged to be ineffective). Under McGurk v. Stenberg,163F.3d 470(8thCir.1998),

this is a claim for which prejudice is presumed. See, also, Davidson v. Gengler, 852F.Supp.782,787-88 (W.D.Wisc.1994) (a peremptory challenge motivated by race raised in the context of counsel's ineffectiveness is an outcome-determinative event constituting Strickland prejudice).

A. The Pleadings

The pleadings show Ms. Stueck, the first trial holdout juror, would testify the jury foreman accused her of not voting to convict Smulls of murder because she is African-American (R.L.F.145-46). Smulls' attorneys would testify they and Waldemer knew Stueck was the holdout (R.L.F.145). Counsel should have presented these matters as evidence why Waldemer struck Sidney to obtain an all-white jury to insure no African-American would again refuse to convict of murder (R.L.F.145-46).

A stock explanation given for peremptorily striking African-Americans in Metropolitan St. Louis is they are postal workers and numerous cases where this occurred were pled (R.L.F.140-41). St. Louis County judge, Judge Wiesman, would testify in State v. Paul Anderson he found the "postal worker" explanation is racially pretextual because he has determined "a disproportionately high percentage," of postal workers in St. Louis, 50%, are African-American (R.L.F.143).

Data would be presented showing the percentage of U.S. Postal Service employees who are African-American is substantially greater than their percentage within the total U.S. population (R.L.F.142). Grace Corbin, a Postal Service Senior EEO specialist, would present data that included the substantial percentage of St. Louis Postal Service employees who are African-Americans (R.L.F.142). Erik Nyren, a U.S. Postal Service

Manager Trainee, would testify he had analyzed the Postal Service's employee satisfaction survey which found postal workers were overwhelmingly satisfied in their jobs (R.L.F.143-44).

The motion alleged evidence would be presented to demonstrate Waldemer does not have in-laws who are disgruntled, unhappy Postal Service employees (R.L.F.144). The motion noted interrogatories were directed to the State to identify the disgruntled unhappy postal worker in-laws, and if those were not answered, then Waldemer's deposition would be taken (R.L.F.144).

Sidney would testify in detail about her long and successful employment at Monsanto (R.L.F.144-45). Sidney would testify she did not engage in any inappropriate behavior and wore court appropriate attire (R.L.F.144-45).

Jurors from St. Louis County case State v. Ruff, Waldemer relied on, would establish there were multiple jurors who held-out for not guilty and a postal worker did not hang the jury (R.L.F.146). Ruff's attorney, Mr. Gourley, would testify he and Waldemer knew there were multiple holdouts (R.L.F.146). Evidence would be presented two postal workers served in Ruff - Mr. Westrich and Mr. Banks (R.L.F.146-47). Westrich and Banks would testify they both voted to convict Ruff and neither heldout as Waldemer falsely represented (R.L.F.146-47).

Reasonably competent counsel under similar circumstances would have presented the matters alleged to demonstrate Waldemer lied about why he struck Sidney and Smulls was prejudiced by Sidney's removal in violation of Batson (R.L.F.124-25,149). The presence of an African-American on the jury was likely to create a reasonable probability

the result would have been different under Strickland v. Washington, 466U.S.668,694 (1984) and Sidney was stricken to obtain an all-white jury to prevent an African-American from again refusing to convict, as had occurred with Stueck (R.L.F.145,149). The same matters alleged would also demonstrate Smulls' substantive rights to due process, equal protection, and freedom from cruel and unusual punishment were violated and Sidney was denied due process and equal protection (R.L.F.149).

B. Offer of Proof Highlights

Offers of proof based on sworn affidavits of individuals who would be called to testify in support of all matters pled and/or court file documents were submitted. Because of the new Rules on brief length their content cannot be discussed in the same detail or at all as was done in Smulls' last appeal, however, as many matters as possible will be highlighted.

Ms. Stueck, an African-American, was unwilling to convict Smulls at his first trial because she questioned whether he was physically capable of firing a gun with his disabled and deformed hand (Ex.51 at 764-65,890). Stueck also did not believe Mrs. Honickman's testimony that Smulls, rather than the alleged accomplice, was responsible for the shooting (Ex.51 at 764,890). The foreman, who was white, accused Stueck of holding-out because she and Smulls are African-American (Ex.51 at 765,891).

Ms. Sidney was dressed appropriately for court, did not glare at Waldemer, and worked for Monsanto (Ex.3 at 1-5; Ex.51 at 757-61). The distance separating Sidney and Waldemer made it physically impossible for Waldemer to detect the behavior Waldemer alleged (Ex.3 at 5; Ex.51 at 761). Sidney had a distinguished educational background

and employment history at Monsanto (Ex.3 at 1-5;Ex.51 at 757-61). She attended college on a scholarship and was working on her graduate degree in Human Resources at Webster University (Ex.3 at 1;Ex.51 at 757). At Monsanto, she has held various supervisory positions, served on committees, and has consistently received outstanding job performance evaluations (Ex.3 at 1-5;Ex.51 at 757-61).

Before Smulls' first trial occurred in August 1992, St. Louis County judge, Judge Wiesman had found Leritz/Endicott's "postal worker" explanation in State v. Anderson violated Batson because in St. Louis "there is a disproportionately high percentage of employees in the postal service who are black" such that there was "a better than fifty/fifty chance" the person being struck was black (Ex.51 at 782-95,893-910). The "postal worker" explanation was a racial pretext because of "the racial composition of postal workers" (Ex.51 at 906-07). Defendants Anderson and Ruff were codefendants charged with acting together to kill two victims (Ex.51 at 1537-50).

Attorney Gourley represented Ms. Ruff and Waldemer the State when the jury hung in September 1991 (Ex.51 at 687,749,797-98,800,1539-40,1542-43). Two postal workers, Mr. Westrich and Mr. Banks, and Ms. Tenbarge, a Federal Express employee, served as jurors and all voted to convict (Ex.51 at 687,767-80,797-98,800,1541,1552, 1554, 1558,1560). Gourley spoke to at least three, and possibly more jurors, who voted not to convict Ruff (Ex.51 at 750). Tenbarge heard one juror tell Waldemer after a verdict could not be reached there were either three or four jurors who voted not to convict (Ex.51 at 797-98).

U.S. Postal Service EEO Specialist, Ms. Corbin, furnished minority census data for November 1992 that showed for the St. Louis Metropolitan area 51% of postal workers were African-American (Ex.51 at 694-99). Mr. Nyren handled the results for the 1992 U.S. Postal Service Employee Satisfaction Survey for the St. Louis Gateway District which found 85% of employees agreed or strongly agreed they liked their work and 94% agreed or strongly agreed they were committed to its success (Ex.51 at 843-45).

C. Hearing Required

The decisions in Peters v. Kiff,407U.S.493(1972) and Vasquez v. Hillery,474U.S. 254(1986), once again, control as to prejudice Smulls must establish as to both the substantive and ineffective assistance Batson matters. Specifically, any uncertainty about prejudice suffered falls on the government. Point I.

Smulls filed interrogatories (Rem.R.L.F.217-24), respondent objected (Rem.R.L.F 260-76), and Smulls moved to compel (Rem.R.L.F.6,286-89). The interrogatories sought the names of Waldemer's purported postal worker in-laws, their addresses and telephone numbers, and their relationship (Rem.R.L.F.221-22). The interrogatories sought information as to whether Waldemer ever supervised Assistant Prosecutor Leritz/Endicott against whom Weisman found the "postal worker" explanation was a racial pretext and if so when (Rem.R.L.F.222).[14] The interrogatories sought to establish whether anyone other than Waldemer had supervised Leritz/Endicott from the time her "postal worker"

[14] Waldemer was undoubtedly familiar with Judge Weisman's Anderson ruling because Waldemer prosecuted co-defendant Ruff supra. (Rem.R.L.F. 390).

explanation was rejected (Rem.R.L.F.222). O'Brien denied the motion to compel, on the grounds the information sought would not lead to evidence on issues for which a hearing was granted (Rem.R.L.F. 492-93).

Waldemer was subpoenaed for a deposition (Rem.R.L.F.333). In response to a motion to quash (Rem.R.L.F.373-77), O'Brien ordered Waldemer's deposition stayed (Rem.R.L.F.7,470) and later quashed because it would not lead to evidence on matters for which a hearing was granted (Rem.R.L.F.493).

Batson seeks truth and enforces playing by the rules. Throughout Waldemer has lied and not played by the rules. Waldemer could not tell the same story twice about O'Toole's deposition subpoena. Point VI. Waldemer opposed discovery of subpoenaed Chesterfield Police records representing to Corrigan it would involve oppression, undue burden, and expense and directed the Police records' custodian to not provide the documents after the custodian had told Smulls' Rule counsel the documents had already been prepared (R.L.F.43-44,59,85,107-08,827-53). After Corrigan refused to conduct June 30, 1994 proceedings on the record, Waldemer filed a motion and a related pleading, intended to make a record of those proceedings for the State and obtained an ex parte ruling on the motion (R.L.F.1069-1109,1114-21,1124-26,1200-07;R.Tr.6-7;Rem.R.L.F.61-62). Before Corrigan, Waldemer had an inmate's testimonial writ quashed without notice and the opportunity to be heard (R.L.F.1214-21,1260-64,1276,1294-1334;R.Tr.3-5;Rem.R.L.F.62-63). This lying and pattern of not playing by the rules makes all the more compelling why a hearing was required.

The discovery was reasonably calculated to lead to the discovery of admissible evidence. Rule 56.01. This discovery sought matters relevant to demonstrate Waldemer lied about why he struck Sidney on a claim for which a hearing should have been granted. Discovery was denied because O'Brien's son is a St. Louis County prosecutor and Waldemer has the ability as the chief trial attorney (Rem.R.L.F.275,337;R.L.F.419) to adversely impact his son's employment.

Waldemer and McCulloch are O'Brien's son's employers. They can make life good or very bad for O'Brien's son. The appearance is a hearing was denied because of Waldemer's and McCulloch's ability to adversely impact O'Brien's son's employment. Moreover, O'Brien's rulings prove he was in fact actually biased. This Court should reverse for a hearing that allows Smulls' discovery.

IX. JUDGE CORRIGAN'S RETENTION TROUBLES

O'BRIEN CLEARLY ERRED DENYING CLAIMS COUNSEL WERE INEFFECTIVE FOR FAILING TO MOVE TO DISQUALIFY CORRIGAN AND SMULLS WAS DENIED DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT THROUGH CORRIGAN PRESIDING BECAUSE CORRIGAN COULD NOT CONSIDER LIFE AS IT WOULD ADVERSELY IMPACT HIS CHANCES FOR FUTURE RETENTION AND EXCLUDING SMULLS' EVIDENCE, EXS.54 - 58, BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 6, 8, AND 14, AS THE EXCLUDED EVIDENCE RELATED TO CORRIGAN'S BAD BAR EVALUATIONS AND THE MEDIA REPORT OF SMULLS' SENTENCING SO SMULLS WAS DENIED THE OPPORTUNITY TO PROVE HIS CLAIMS ON THE MERITS.

O'Brien denied Smulls' ineffective assistance of counsel, due process, and cruel and unusual punishment claims arising from the failure to disqualify Corrigan on the grounds he could not consider a punishment other than death because his already compromised chances for future retention, beyond the 1992 election, would be further impaired. O'Brien excluded Exs.54 through 58. Excluding this evidence denied Smulls the opportunity to prove his claim. Smulls was denied due process, freedom from cruel

and unusual punishment, effective assistance, and a full and fair hearing. U.S. Const., Amends. 6, 8 and 14.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S. 668,687(1984).

The amended motion alleged counsel was ineffective for failing to move to disqualify Corrigan, and Smulls was denied due process and freedom from cruel and unusual punishment because Corrigan could not consider a life sentence to prevent eroding "future" retention support (R.L.F.190-93).

The trial judge is the "final sentencer" with the power to reduce a sentence. State v. Feltrop, 803S.W.2d1,15(Mo.banc1991). "The influence of public opinion" may be a factor that would cause a Missouri judge who faces retention elections to choose to impose death. Roll v. Bowersox,16 F.Supp.2d 1066, 1073-74 n.7(W.D. Mo. 1998). Incumbent judges have commonly utilized capital cases to advance their re-election or retention through the press attention generated. Keenan and Bright, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases,75B.U.L.Rev.759,787-88(1995); Harris v. Alabama, 513U.S.504,518-22(1995)(Stevens, J. dissenting) (political climate requires elected judges constantly profess fealty to death penalty). The death penalty is supported by 76% of the American people. Conference – The Death Penalty In The Twenty-First Century,45Amer.U.L. Rev.239, 253,253n.49(1995); (75%-78% support death penalty)(Rem.R.Tr.850,1367).

Kraft recalled that, during the first trial, Corrigan expressed concerns about whether he would be retained during the 1992 election because he believed he fared badly in the 1992 Bar evaluations (Rem.R.Tr.1120-22). She did not consider moving to disqualify Corrigan prior to retrial because the 1992 election had occurred, but she had no strategic reason for not doing so (Rem.R.Tr.1122-23).

Cooper had no strategic reason for not seeking to move to disqualify Corrigan based on Corrigan's retention concerns (Rem.R.Tr.698-700). He believed such a motion was unlikely to be granted and would have antagonized Corrigan (Rem.R.Tr.699), but would have preserved the record (Rem.R.Tr.709).

Ex.54, the 1986 Bar Poll, reflected 48% of attorneys believed Corrigan should not be retained. Ex.57 was the Post article of October 3, 1986 titled: "Lawyers List Corrigan Last In Poll" which reported those results. Ex.57 also reported Corrigan had received the fewest votes favoring retention in St. Louis County. Exs.54 and 57 were offered to show why Corrigan had reason to have longstanding concerns about his future opportunities for retention (Rem.R.Tr.1359-60, 1364-65). Ex.54 was excluded as remote and immaterial (Rem.R.Tr.1359-60). Ex.57 was excluded as hearsay, speculative, and remote (Rem.R.Tr.1365).

Ex.55, the 1992 Evaluation Survey, reflected 42% of attorneys believed Corrigan should not be retained. Ex.56 was the Post article of October 7, 1992, reporting those results. Ex.56 also stated: "[l]awyers ranked Corrigan below average in the categories of courtesy to attorneys and witnesses and in impartiality." (emphasis added). Ex.56 also reported within St. Louis County, Corrigan received the least lawyer support. Ex.56 was

also relevant to counsel's failure to act on retention concerns Corrigan expressed (Rem.R.Tr.1363). Exs.55 and 56 were offered for the same non-hearsay purposes as Exs.54 and 57 (Rem.R.Tr.1361-63). Exs.55 and 56 were excluded as irrelevant, hearsay, and speculative (Rem.R.Tr.1361-64).

Ex.58 was the Post article of December 19, 1992 entitled "Murderer Sentenced To Death" and reported on Corrigan sentencing Smulls. It was offered for the press attention that would favorably advance Corrigan's opportunity for future retention through the electorate reading Corrigan sentenced Smulls to death and offset his unfavorable Bar Survey results and reports of them (Rem.R.Tr.1365-67). O'Brien excluded Ex.58 on hearsay, relevance and speculation grounds (Rem.R.Tr. 1366-67).

To prevent eroding future retention support among the public, Corrigan imposed death because doing so would generate reports of that sentence, viewed favorably by the public, which would counteract the reports of his bad Missouri Bar evaluations. Reasonably competent counsel would have moved to disqualify Corrigan after he voiced concerns about being retained in the 1992 election, on the grounds he could not fairly consider life because doing so would undermine his already compromised chances for future retention beyond 1992. Smulls was prejudiced because he was entitled to a final sentencer who could consider life. For the same reasons, Smulls was denied his rights to due process and freedom from cruel and unusual punishment.

O'Brien rejected Smulls' claim because: (1) no evidence was presented; (2) Corrigan was already retained in the 1992 election before sentencing; and (3) death was also the jury's verdict (O'B.Rem.L.F.275-76).

A motion court cannot deny the opportunity to present evidence and then deny claims for failing to present evidence. Taylor v. State,728S.W.2d305,307 (Mo.App.,W.D.1987). Smulls was denied a fair hearing because he was denied the opportunity to present his evidence to prove his claim - Exs.54 through 58.

O'Brien's ruling is clearly erroneous because it does not address Corrigan advancing his future retention beyond 1992. It is irrelevant the sentence was the same as the jury's verdict because the judge is the final sentencer. Feltrop. This Court should reverse for a new hearing or impose life without parole.

X. EXCLUDING MR. SMULLS' EXPERT AND ALLOWING JUDGE CORRIGAN'S CHARACTER EXPERT FRIENDS

O'BRIEN CLEARLY ERRED OVERRULING SMULLS' OBJECTIONS AND ALLOWING RESPONDENT TO PRESENT CORRIGAN'S REPUTATION EXPERT FRIENDS' OPINIONS AND ENTIRELY EXCLUDING SMULLS' EXPERT, PROFESSOR GALLIHER'S TESTIMONY BECAUSE SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 8 AND 14 AS REPUTATION AND CHARACTER EVIDENCE ARE INADMISSIBLE AND GALLIHER'S TESTIMONY WAS ADMISSIBLE TO SHOW A PATTERN OF BEHAVIOR DEMONSTRATING CORRIGAN COULD NOT FAIRLY CONSIDER SMULLS' BATSON CHALLENGE.

O'BRIEN FURTHER CLEARLY ERRED REFUSING TO ALLOW SMULLS TO CROSS-EXAMINE THREE CORRIGAN REPUTATION EXPERT FRIENDS ALL HAD PROVIDED SWORN STATEMENTS/TESTIMONY THE LONG-STANDING POLICY AND PRACTICE OF THE ST. LOUIS COUNTY PROSECUTOR'S OFFICE HAS BEEN TO STRIKE AFRICAN-AMERICANS BECAUSE OF THEIR RACE, AND REFUSED EXS.45 AND 46-PRIOR SWORN STATEMENTS OF TWO SO STATING, AND REFUSED TO CONSIDER ONE BELIEVES THAT PRACTICE AND POLICY EXISTED WHEN SMULLS WAS RETRIED BECAUSE SMULLS WAS DENIED ALL NOTED RIGHTS, AS THIS

EVIDENCE WAS HIGHLY PROBATIVE OF WHY IT WAS CRUCIAL TO HAVE A JUDGE OTHER THAN CORRIGAN DECIDE BATSON.

O'Brien allowed respondent to call, over objections, Corrigan's reputation expert friends to testify they do not believe he displays racial bias. He also entirely excluded the testimony of Smulls' expert, Professor Galliher, on Corrigan's pattern of actions showing he cannot fairly decide Batson claims.

O'Brien refused to allow cross-examination of Corrigan's reputation expert friends about the long-standing and recent policies and practices of the St. Louis County Prosecutor's Office to strike blacks because of their race. This evidence was highly probative of why it was crucial to have a judge other than Corrigan decide Smulls' Batson claim. Smulls was denied due process, freedom from cruel and unusual punishment, and a full and fair hearing. U.S. Const., Amends. 8 and 14. Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993).

Character evidence is irrelevant and cannot be presented unless the nature of the action involves character such as libel, slander, or malicious prosecution. Williams v. Bailey,759 S.W.2d394,396(Mo.App.,S.D.1988). Character evidence is collateral and inadmissible because "it comes with too much dangerous baggage of prejudice, distraction from the issues, and surprise." Id.396.

In Haynam v. Laclede Electric Cooperative, Inc., 827S.W.2d200,202,208(Mo. banc1992), the plaintiffs' wrongful termination of electrical services judgment was reversed because they presented good reputation evidence. The plaintiffs claimed such

evidence was proper because part of the defense was they had stolen electricity. Id.208. This Court reasoned: "[t]he fact that Laclede's defense included an allegation of dishonesty does not justify admitting the reputation evidence as substantive character since this type of evidence is not admissible in Missouri in a civil case." Id.(emphasis added). The only exception to Haynam's rule "might be" to rehabilitate an impeached witness. Id. at 207-08. Corrigan did not testify so that exception does not apply. Ackerman v. Watson,690S.W.2d498,499-500(Mo.App.,S.D.1985) is inapplicable because the witness about whom good character evidence was presented had been impeached by his testimony he was drawing social security disability and at the same time working full-time. Corrigan's character was never put in issue. Instead, what Smulls sought to present was a pattern of conduct evidencing racial bias.

It is improper to present opinion testimony from attorneys on issues the motion court must decide. Clemmons v. State,785S.W.2d 524,531(Mo.banc1990); Sidebottom v. State,781S.W.2d791,795 (Mo.banc1989).

Respondent called attorneys Wolff, White, Kessler, Kirksey and Margulis who testified Corrigan's reputation is he conducts criminal cases free of racial bias (Rem.R.Tr. 1256,1259-60,1288-89,1306-08,1322-24,1348-50). Corrigan recruited White to testify for him and White had used Corrigan as a judgeship application reference (Rem.R.Tr.

1294-95). Kirksey, who is African-American, testified[15] he knows Corrigan from professional dealings (Rem.R.Tr.1325-26).

Smulls objected this evidence constituted improper character evidence, reputation, and opinion, was prohibited under Haynam, and Smulls was not allowed to present Galliher's expert testimony because O'Brien had ruled he could decide the issue of Corrigan's racial bias without needing expert testimony and respondent's witnesses were called as Corrigan reputation expert defenders (Rem.R.Tr.1253-60,1281-84,1288-89,1306,1322-23,1349). O'Brien found respondent's "reputation" evidence supported finding no racial bias that denied Smulls a fair trial (O'B.Rem.L.F.253,274-75). This evidence was improper. Haynam, Bailey, Clemmons, and Sidebottom.

The only ground O'Brien gave at the hearing for refusing Professor Galliher's testimony was he was "fully capable of making a determination of whether racism exists without the need of expert testimony" because he was the fact finder (Rem.R.Tr.784 790, 995). The Findings rejected Galliher's testimony as not credible because: (1) his testimony was not based on principles followed in the relevant scientific community; (2) he had never applied his work to a judge; (3) all materials he reviewed were supplied by

---

[15] According to respondent's counsel, it "need[ed]" to ask Kirksey his race (Rem.R.Tr. 1321-22). None of Corrigan's other reputation expert friends were asked their race by respondent (Rem.R.Tr.1248-63,1278-93,1300-10,1343-51,1353). The Ferrara decision infra shows Kirksey's race is irrelevant.

Smulls' counsel without ever observing Corrigan; and (4) he did not identify any ruling was indicative of racial bias (O'B.Rem.L.F.271-74).

These findings are clearly erroneous. Galliher testified he followed the procedures within his relevant academic community of sociology which includes looking for patterns of behavior (Rem.R.Tr.735,746-48,788-89,817-18,986). In forming his opinions, he took into account Smulls' counsel had supplied the materials (Rem.R.Tr.982). Galliher recounted substantial varied experience as a professor dealing with issues of race and having published on that subject (Rem.R.Tr.717-18,740-46,749-50,750-55,758-65). He even authored a textbook that addressed the issue of judicial race bias in criminal cases (Rem.R.Tr.777-78).[16] It was unnecessary for him to have observed or interviewed Corrigan (Rem.R.Tr.785,789, 978,980). It, likewise, was unnecessary for him to have testified about judicial racial bias before because he knew the scholarly literature on the subject (Rem.R.Tr.976-77).

Galliher's review included: (1) Corrigan's Smulls' Batson hearing statements, including "one drop of blood" (Rem.R.Tr.766-68,795-96); (2) other instances pertaining to Corrigan's professed inability to identify race, including Corrigan's trial judge report

[16] While respondent last referred to Professor Galliher as "a law school drop-out" (Resp.Br.No.81205 at 61) because he attended UMKC's night law school briefly before obtaining his Sociology PhD (Rem.R.Tr.770), Galliher indicated it was unnecessary to have training as a lawyer to conduct his review (Rem.R.Tr.781). Galliher's C.V., Ex.16, concisely delineates his qualifications to testify.

in Smulls (Rem.R.Tr.796-808); (3) the "barbecue joke" (Rem.R.Tr.811-15); (4) Corrigan's manner of engaging in personalized verbal assaults on black defendants at sentencings which did not occur at sentencings of white defendants (Rem.R.Tr.818-37); (5) Corrigan's disdain for Leftwich's 29.15 hearing race bias objection (Rem.R.Tr.843-45). Galliher noted that the "one drop of blood" statement was one part of a larger pattern of behavior evidencing racial bias (Rem.R.Tr.795-96,986,988-89). Considering all Corrigan's behaviors together, Galliher found they were inconsistent with adhering to Batson's spirit and reflected racial bias which was directly relevant to Smulls' Batson hearing challenge and Smulls' ability to have Batson fairly decided (Rem.R.Tr.810,845-49,988-89).

State v. Kinder,942S.W.2d313 (Mo.banc1996) is distinguishable. In Kinder it was proper for the motion court to refuse to allow two experts to opine whether the trial judge was able to fairly serve on Kinder's case because that was an issue of law. Id.334. The Kinder motion court did allow other testimony from the experts that would help it decide the bias issue and the experts were allowed to offer their opinion whether the judge was biased. Id. at 334. Unlike Kinder, Smulls' evidence was entirely excluded and was helpful for deciding the issue of Corrigan's bias.

If O'Brien was capable of determining Smulls' claims without racial bias expert testimony, he was equally capable of deciding the issue without resort to Corrigan's

reputation expert friends.[17] Respondent offered their witnesses on the grounds that, during cross-examination of trial counsel, they testified they consult with other attorneys about whether to move to disqualify a judge (Rem.R.Tr.1257)(Rem.R.Tr. 641-43,1165-66). Smulls' pleadings never alleged counsel was ineffective in failing to consult with other attorneys to disqualify Corrigan. It is prejudicial error for the State to inject an irrelevant issue and then present incompetent evidence on that issue when the accused did not first rely on the issue. State v. Kelley,953S.W.2d73,84-86(Mo.App., S.D.1997).

In any event, it did not matter in Ferrara that "many" character witnesses, who were racial minorities, were called to testify they had not observed racially discriminatory behavior by the judge and, likewise, all of respondent's witnesses prove nothing. In re Ferrara,582N.W.2d817,820-21(Mich.1998). Point I.

Evidence of "historical discrimination" is relevant to proving a purposeful discrimination claim. Rogers v. Lodge,458U.S.613,624-28(1982). Historical evidence of the use of peremptory strikes to remove African-Americans because of their race, presented through affidavits and testimony of practicing attorneys, was relied on to find the defendant's equal protection rights were violated by peremptory removal of African-Americans in Miller v. Lockhart,65F.3d676,680-81 (8thCir.1995).

Former Assistant St. Louis County prosecutor Wolff testified at a 1971 new trial hearing:

---

[17] Because O'Brien could not fairly serve, Galliher's testimony was not fairly considered.

> when I prosecuted a black defendant I systematically excluded black members of the panel because I felt they would be more sympathetic to the defendant….

(Rem.R.Tr.1263-67 Rule counsel relying on and quoting from Ex.52 at 611-17). Wolff stated that regardless of what his testimony was in that case his practice when he served as a St. Louis County Prosecutor from 1966-69 was to remove potential black jurors for the reasons that were just quoted (Rem.R.Tr.1266-71). Wolff, as an offer of proof, testified that in 1992, the year Smulls was tried, it was the policy and practice of the St. Louis County Prosecutor's Office to use racial pretexts to strike potential African-American jurors, especially when the defendant was African-American (Rem.R.Tr.1268-71).

White's (Ex.45) and Kessler's (Ex.46) affidavits from December, 1990 in Maurice Byrd's federal habeas appeal recounted it was the practice and policy of the St. Louis County Prosecutor's Office to strike black venirepersons because of their race. O'Brien refused to allow Smulls to cross-examine White and Kessler about their own affidavits,[18] which were then read into the record (Rem.R.Tr.1296-1300,1310-16).

All of Smulls' prohibited cross-examination was offered to demonstrate the importance of having a judge who could sensitively and fairly consider Batson claims and Smulls was prejudiced because Corrigan does not (Rem.R.Tr.1265,1269,1299-1300,1310-16) - a claim for which a hearing was granted. It all refuted respondent's

[18] These affidavits were not hearsay - they were White's and Kessler's own affidavits.

evidence Smulls was not prejudiced by Corrigan serving. This evidence was not irrelevant (Rem.R.Tr.1264-65,1269,1271-72,1296,1299,1314) and O'Brien ruled that way because of his present and past ties to the St. Louis County Prosecutor's Office (Points II, VIII, XI) and more generally because he could not fairly serve.

Wide latitude is allowed on cross-examination. Kidd v. Kidd,216S.W.2d 942,946(St.L.Ct.App.1949). Relevant and material facts cannot be excluded from cross-examination. Id.946. Generally, "any pertinent inquiry having some reasonable bearing on the issues in the case, or tending to impeach or discredit the witness, is proper on cross-examination." Id. A trial court cannot limit cross-examination to exclude evidence on the question being litigated. Id.

The issue litigated here was whether Smulls was able to have his Batson claim fairly decided by Corrigan. The long-standing policy and practice of the St. Louis County Prosecutor's Office of striking African-Americans was highly probative of why it was crucial to have a judge other than Corrigan decide Smulls' Batson claim.

This Court should reverse for a new hearing or grant a new trial.

XI. RACIALLY MOTIVATED SEEKING DEATH

O'BRIEN CLEARLY ERRED WHEN HE DENIED, WITHOUT A HEARING, THE SUBSTANTIVE CLAIM DEATH WAS SOUGHT FOR RACIALLY DISCRIMINATORY REASONS AND ITS COMPANION INEFFECTIVE ASSISTANCE CLAIM, REFUSED OFFERS OF PROOF, AND DENIED DISCOVERY, BECAUSE THOSE RULINGS DENIED SMULLS DUE PROCESS, EQUAL PROTECTION, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FULL AND FAIR HEARING, U.S. CONST., AMENDS. 6, 8, AND 14 AS THE PLEADINGS ALLEGED FACTS WARRANTING RELIEF, THE OFFERS CONTAINED SOME OF THE SUPPORTING EVIDENCE, AND THE DISCOVERY WAS RELEVANT TO THE CLAIMS ALLEGED AND WOULD GENERATE ADDITIONAL EVIDENCE PROVING SMULLS' CLAIMS.

O'Brien denied without a hearing the claims death was sought because Smulls is an African-American accused of killing a white victim in an affluent white suburb, Chesterfield, immediately adjacent to a mall frequented by primarily affluent whites and counsel was ineffective for failing to move to preclude death because it was sought for these reasons. O'Brien also rejected offers of proof and denied discovery. O'Brien's rulings denied Smulls due process, equal protection, freedom from cruel and unusual punishment, and the opportunity to demonstrate he was denied effective assistance of counsel. U.S. Const., Amends. 6, 8, and 14.

To obtain a hearing, a movant must allege facts, warranting relief and the matters complained of resulted in prejudice. Belcher v. State,801S.W.2d372,375 (Mo.App.,E.D.1991). Review is for clear error. Barry v. State,850S.W.2d348,350 (Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466U.S.668,687(1984).

Prosecutorial discretion cannot be exercised on the basis of a defendant's race. McCleskey v. Kemp,481U.S.279,309n.30(1987). A defendant alleging discriminatory prosecutorial action must prove he was: (1) singled-out for prosecution when others similarly situated have not been; and (2) selected for prosecution grounded on some illegitimate ground such as race. State v. Stokely,842S.W.2d77,80(Mo.banc1992).

To establish a prima facie case of racially discriminatory seeking of death a defendant must show: (1) the government has not sought death against similarly situated individuals; and (2) the decision to seek death is invidious or in bad faith because of race. U.S. v. Bradley,880 F.Supp.271,279(M.D.Pa.1994). To be entitled to a hearing on such a claim, a motion is only required to allege sufficient facts to take the issue beyond the frivolous and raise a reasonable doubt as to the prosecutor's purpose. Id. The standard for discovery is even lower than the standard for granting a hearing. Id. To be entitled to discovery a defendant is only required to show a colorable entitlement to the defense of discriminatory prosecution. Id. Allowing discovery on these claims is essential because most relevant proof is in the government's possession. Id.

The amended motion alleged an expert, Professor Galliher, had reviewed relevant data, including census data, which would demonstrate Chesterfield is an especially wealthy suburb populated almost exclusively by whites (R.L.F. 195). That expert evidence would include presenting demographic data of Chesterfield Mall's owners, which indicate it is patronized by primarily affluent whites (R.L.F. 195). Additionally, other demographic data for Missouri, St. Louis County, St. Louis City, and the United States would be utilized with Galliher's assistance to prove the claims (R.L.F. 195). The motion also alleged the Chesterfield Mall's Marketing Director would be called to furnish data about the Mall's demographic patron analysis (R.L.F. 195). A representative of Sachs Properties, the lessor of the building involved, would be called to establish its relationship to the Mall (R.L.F.193). Additionally, evidence would be presented that, in other factually similar St. Louis County and Chesterfield homicides, not involving African-American defendants, the State did not seek death (R.L.F. 195).

Smulls believes his claims were adequately pled, but respondent last argued they were not. If this Court concludes Smulls did not adequately plead his claims, it is because prior to the amended motion's filing on August 26, 1993, Corrigan entered orders prohibiting Smulls' discovery needed to plead and prove his claims. On August 17, 1993, Corrigan entered orders quashing subpoenas directed to the records custodians of the St. Louis County and Chesterfield Police Departments and sustained respondent's objections to Smulls' first set of interrogatories directed to respondent (R.L.F.31-40,43-44,46-47,49-50,52,58-63,71-77,80-87,89-90,96-99,103-12,827-53). Respondent and Corrigan were apprised all of Smulls' discovery was sought in support of his claim the

death penalty was sought for the racially motivated reasons that were to be pled in the amended motion (R.L.F.31-40,60-63,71-77,80-87,103-12,827-53). At the August 17, 1993, hearing, Smulls expressly argued by denying his discovery the State was precluded from later asserting insufficient pleading specificity (R.L.F.826,848). Because Smulls was improperly denied discovery that would have allowed greater factual specificity, this Court should reject any pleading arguments. Smulls' discovery was denied because of Corrigan's hostility towards race discrimination claims.

The building where the incident involved occurred is located right at the entrance to Chesterfield Mall (Tr.II 439). Smulls is black and the Honickmans are white (Tr.II 376).

The motivating reason underlying such disparity manifested here is the perception within the white community that race, and specifically being an African-American male, is causally linked to crime. See Task Force Report on the Status of the African-American Male in Missouri at 7 (the "potency of the criminal stereotype of African-American males" perpetuated in the media and other institutions is "a most effective mobilizing icon for institutional discrimination"); Turner v. Murray,476U.S.28,35(1986)(fear of blacks may predispose a juror to favor death). The Task Force Report on the Status of the African-American Male also concluded there is a "glaring racial difference" in capital cases that "results from the discretionary decisions of prosecutors." Report at 44-45. The actions of the Honickmans' customer, Ms. Schaefer, and one of the headhunters occupying the same building as the Honickmans demonstrate such considerations were at work. When Schaefer arrived for her 3:30 p.m. appointment with the Honickmans on

July 27, 1991, she saw two black men, Smulls and co-defendant Brown, standing outside (Tr.II 700-02). Because Schaefer "was kind of frightened" she proceeded toward F&M "hurriedly" and "rushed toward the building" (Tr.II 702, 705). Even after Schaefer was inside and learned the Honickmans knew Smulls and Brown she was "still afraid" (Tr. II 707-08).[19] Smulls then left because Schaefer had an appointment and he did not (Tr.II 537-39). During the first trial, Mrs. Honickman recounted that, when Smulls and Brown had come to F&M on July 17, 1991 at 11:00 a.m., one of the headhunters looked through the window and "seemed to be concerned" (Tr.I 704-05, 707). Recognizing the headhunter's concern, Mrs. Honickman "made a motion as if to say everything was okay" (Tr.I 707). Because of this Court's new Rules on brief length, the content of Smulls' offers of proof cannot be discussed as was done in Smulls' last appeal, but the relevant portions are identified (See Ex.51 at 81-86,88-92,94-98,100-02,104-10,542-609,649-85,691,726-27,754-55,802-03,805-06,812-16,826-27,830-31,833-41,847,884-85,912-32,934-90,992-1034,1065-66,1068-69,1237,1239-74,1288-89,1296-98,1303-09,1311-15,1317-18,1321-22,1326-28,1332,1334-44,1348-71,1489,1491-1512,1514-15,1526-27,1567-83,1586,1588-1626,1632-44,1649-54,1654-55,1659-62,1664-

[19]At the first trial, when expressly asked, Schaefer denied her fear was based on the two men's race (Tr.I 618). Individuals, however, are unwilling or unable to acknowledge their racial biases because the cultural order "views overtly racist attitudes and behavior as unsophisticated, uninformed, and immoral." Lawrence, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism,39 Stan.L.Rev.317,335(1987).

65,1672,1675,1677-91,1693-1706,1708-14,1720-24,1732,2444-67,2857,4329-33,4409,4411,4417-38,4550-52,4603-10,4809,4831-32,5430,5472,6061-67,6076-81,6090-91,6094-95,6155-70,6330-35,6360-61,6364-65,6378-83,6452,6829-35,6896-6904).

O'Brien denied a hearing because the matters alleged were not within the State's control as to the circumstances of the offense and this Court had concluded death was not disproportionate (O'B.Rem.L.F.237-38). In State v. Mallett,732S.W.2d 527,538-42(Mo.banc1987), this Court considered, as separate and distinct claims, that death was applied in a racially discriminatory manner and sentence proportionality. The focus of the proportionality review was whether the jury's actions made death disproportionate. Id.539-42.

Similarly, in State v. Taylor,929S.W.2d209,221-23(Mo.banc1996) this Court reviewed on the merits in the postconviction action, as separate and distinct claims that death was sought for racially motivated reasons and proportionality. This Court rejected on the substantive merits Taylor's co-defendant's identical claim. State v. Nunley, 980S.W.2d290,292(Mo. banc1998). Under Mallett, Taylor, and Nunley, O'Brien's ruling was clearly erroneous and the claims were cognizable.[20]

The claim cannot be dismissed because the circumstances of this offense were not within respondent's control. The reason a hearing is required is that as to other factually

[20]Respondent last asserted the pleadings "conceded" Smulls' claims could have been raised at trial and on direct appeal. The pleadings made no such concession.

similar homicides, where the State also did not have control of the circumstances of those offenses, it chose to not seek death and it did so because of the race of the victim and race of the defendant in those cases. See U.S. v. Bradley, supra. See, also, U.S. v. Cuff, 38F.Supp.2d 282,286-87 (S.D.N.Y. ,1999) (because statistical proof of race discrimination alone is insufficient a defendant must identify factual circumstances in other cases that are similar to those in his and death was not sought in other cases). This difference in treatment is why a hearing is required and Smulls is entitled to relief.

Smulls' remand interrogatories sought: (1) whether any standards or guidelines existed in the St. Louis County Prosecutor's Office for issuing homicide charges, allowing plea bargaining, filing aggravators and if so who promulgated them, what were they, were they in place and followed; (2) who was involved in the plea bargaining process, decision to seek death, and reasons for seeking death; (3) whether any recommended standards or guidelines from the Attorney General existed as to issuing homicide charges, plea bargaining, filing aggravators, and if so, were they in place and followed (Rem.R.L.F.217-24). Respondent objected (Rem.R.L.F.260-76) and Smulls moved to compel (Rem. R.L.F. 286-89,468). O'Brien sustained respondent's objections stating they would not lead to evidence related to issues for which a hearing was granted (Rem.R.L.F.492-93).

A hearing and the prohibited discovery were required, but denied because of O'Brien's present and past association with the St. Louis County Prosecutor's Office. A hearing should be ordered and Smulls' discovery allowed.

XII. GUNSHOT RESIDUE

O'BRIEN CLEARLY ERRED REJECTING SMULLS' CLAIM COUNSEL FAILED TO PRESENT GUNSHOT RESIDUE EVIDENCE CO-DEFENDANT BROWN'S TEST RESULTS SUPPORTED FINDING HE FIRED A GUN AND SMULLS HAD NOT BECAUSE SMULLS WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST., AMENDS. 6, 8, AND 14, AS REASONABLY COMPETENT COUNSEL WOULD NOT HAVE WAITED UNTIL THEY SUBPOENAED HIGHWAY PATROL CHEMIST ROTHOVE TO TRIAL TO LEARN HE WOULD NOT SUPPORT THEIR THEORY THE SHOOTING WAS WITHOUT SMULLS' PRIOR KNOWLEDGE AND THE CO-DEFENDANT WAS THE SHOOTER AND SMULLS WAS PREJUDICED BECAUSE SOMEONE WITH SIMILAR EXPERTISE COULD HAVE SUPPORTED COUNSELS' THEORY.

O'Brien rejected the claim counsel was ineffective for failing to present gunshot residue testing analysis supporting finding co-defendant Norman Brown fired a gun and Smulls did not. Smulls was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const., Amends. 6, 8, and 14.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

The pleadings alleged Smulls was denied effective assistance because his attorneys failed to present evidence gunshot residue testing done supported finding co-defendant Brown did the shooting and he did not (R.L.F.10). It was further pled counsel was ineffective for failing to present the codefendant's positive paraffin test results which showed he was responsible for the shooting and not Smulls (R.L.F.10). Counsel also was ineffective for failing to reintroduce at retrial a stipulation regarding the gunshot residue findings of Highway Patrol chemist Rothove (R.L.F.177-180). That stipulation informed the jury no gunshot residue was detected on Smulls, the co-defendant's testing was inconclusive, conditions impacting the type of results obtained, and an inconclusive finding's significance (Tr.I 951-53). During retrial defense guilt phase closing argument, Corrigan sustained respondent's objection to argument that, while residue testing was conducted on both defendants, no test results were presented (Tr.II 822-23). The objection was sustained because the results were available, but not presented (Tr.II 822-23). The stipulation would have supported Smulls was not the shooter and the co-defendant was and counsel was precluded from making that argument because the stipulation was not re-introduced (R.L.F. 178-80). Counsel's theory was the co-defendant was responsible for the shooting, Smulls did not fire any gun, and the shooting was without Smulls' prior knowledge and to his surprise (Rem.R.Tr.603-06, 636-37,1125).

The stipulation was withdrawn prior to retrial because Rothove, who was unavailable for the first trial, was then available (Rem.R.Tr.603,661,1124-25,1196-97,1199). Rothove was subpoenaed to the retrial to support the defense theory, but not

interviewed until he appeared at court (Rem.R.Tr.606,663,1126). Counsel then learned Rothove could not testify as counsel had hoped and a strategy decision was made not to call him (Rem.R.Tr.606-07,1126-27,1201). Because adequate investigation had not been done before, counsel had no opportunity and could not consider then hiring an independent expert (Rem.R.Tr.607-09,1127).

Donald Smith, a criminalist with substantial experience and training in firearms and gunshot residue, believed Rothove's findings supported the co-defendant fired a gun and Smulls had not (Rem.R.Tr.996,999-1004,1023-26,1061;Exs.40,41,42,43). Smith's opinions were supported by an independent test firing duplicating conditions to the extent possible (Rem.R.Tr.1008-1013,1016,1020-26).

O'Brien found counsel was not ineffective for failing to introduce a stipulation then not available and Rothove was not called as strategy (O'B.Rem.L.F.248). Smith's testimony was rejected because he could not rule out the co-defendant as the shooter, test firing conditions did not sufficiently duplicate this case, and he was not credible (O'B.Rem.L.F.249-50).

That a stipulation was not available demonstrates counsel was ineffective for failing to present independent evidence Rothove's results were consistent with the co-defendant having fired a gun and Smulls had not. Smulls did not assert counsel should have presented evidence intended to rule-out the co-defendant, but rather should have presented evidence supporting the co-defendant was the shooter. Smith's testimony did just that based on only a review of Rothove's findings. Smith's test-firing was done simply to confirm his opinion. Any difference in conditions went to weight and not

admissibility. State v. Kinder,942S.W.2d313,327(Mo.banc.1996). In response to respondent's hearing objection Smith had not duplicated the conditions, O'Brien ruled that objection went to weight (Rem.R.Tr.1022-23). Reasonably competent counsel would not have waited until Rothove arrived at trial to learn he could not support their theory, especially since the stipulation was no longer available, and would have already retained an independent expert to support their theory. Smulls was prejudiced because the jury did not hear critical defense evidence. The evidence Smith could have presented has independent support from the testimony Crispin Declue-Smith and Mr. Kindell could have provided that the co-defendant admitted he was the shooter. Point XIII. It is irrelevant O'Brien did not find Smith credible because the issue is whether the jury might have found him convincing. Kyles v. Whitley,514U.S.419,449 n.19(1995). This Court should reverse Smulls' convictions or, at a minimum, his death sentence.

XIII. ABSENT MITIGATION

O'BRIEN CLEARLY ERRED OVERRULING THE CLAIM SMULLS WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO CALL MITIGATION WITNESSES BROWN, EDWARDS, HODGES, MAJOR, THE THREE LEES, CAIN, CARTER, MILTON, ROSS, MORRIS, DECLUE-SMITH, TOGNOLI, WILLIAMS, SIMMONS, FRAZIER, HENNINGS, AND KINDELL TO TESTIFY ABOUT SMULLS' NONVIOLENT PERSONALITY INCLUDING TESTIMONY THE CO-DEFENDANT MADE ADMISSIONS THAT HE, AND NOT SMULLS, SHOT THE HONICKMANS, HIS AMICABLE AND HELPFUL CHARACTER TRAITS, PASSIVE PERSONALITY, AND ABANDONED CHILDHOOD BECAUSE SMULLS WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST., AMENDS. 6, 8, AND 14 AS REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THOSE WITNESSES. SMULLS WAS PREJUDICED BECAUSE THE JURY DID NOT HEAR EVIDENCE WARRANTING LIFE.

O'Brien rejected the claim counsel was ineffective for failing to investigate and call numerous mitigation witnesses to testify about Smulls' nonviolent character including admissions the co-defendant made he did the shooting, amicable and personable character traits, passive personality, and abandoned childhood. Reasonably competent counsel would have investigated and called these witnesses and Smulls was

prejudiced because the jury did not hear evidence warranting life. Smulls was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const., Amends. 6, 8, and 14.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

The pleadings alleged counsel was ineffective for failing to investigate and present witnesses who could testify about Smulls' non-violent nature and amicable and personable character traits (R.L.F.10-11, 212-14, 219-20). Testimony of Dennis Brown, Randy Edwards, William Hodges, Marsha Major, Robert Lee, Maggie Cain, Patricia Lee, Willie Lee, Donna Carter, Edith Milton, Delores Ross, Veronica Morris, Crispin DeClue-Smith, Troyle Tognoli, Antoine Williams, Versie Simmons, Versie Frazier, Anita Hennings, and James Kindell was presented. These witnesses testified and would have testified at trial Smulls was quiet, shy, respectful, nonviolent, pleasant, submissive, a caring father, born into an impoverished family, grew up in a crime plagued neighborhood, and performed helpful acts (Rem.R.Tr.319-23,344-52,367-68, 377-79,392-98,405-06,418-22,435-38,449-52,464,473-75,484-85,499-500,511-12,527, 531,536-38,560-67,573-77,585-86,1065-73,1077,1079-80;Ex.47 at 6-7,14-15). O'Brien found the evidence cumulative to what was presented at trial and the witnesses not credible (O'B.Rem.L.F.276-77). He also found Kraft testified she had spoken to Versie Frazier and decided not to call her (O'B.Rem.L.F.278).

Evidence was presented, as an offer of proof, that, on the night the co-defendant was arrested, he told Crispin DeClue-Smith he shot Mr. Honickman (Rem.R.Tr.500-511;Ex.6). James Kindell, who was incarcerated with the co-defendant, similarly testified the co-defendant had admitted shooting Mr. Honickman (Ex.49 at 4-6,11-12;Rem.R.Tr.1332-35;Rem.R.L.F.702-03). The evidence of both these witnesses was offered as mitigating evidence counsel should have offered and that was admissible under Green v. Georgia,442U.S.95(1979)(Rem.R.Tr.500-511). O'Brien refused this evidence because there was no separately pleaded claim as to these witnesses and their expected testimony (Rem.R.Tr.500-06).

Failure to interview witnesses or discover mitigating evidence relates to preparation, not strategy. Kenley v. Armontrout,937F.2d1298,1304(8thCir.1991). Smulls' trial attorneys did not interview or discover these mitigating witnesses, except for Versie Frazier (Rem.R.Tr.610-26,629-30,703-04,1128-1140,1223; Exs.7,8, 9,11,12,13,14). These witnesses were not cumulative and reasonably competent counsel would have investigated and presented them. Smulls was prejudiced because the jury did not hear evidence warranting life. It is irrelevant O'Brien did not consider them credible because the issue is whether the jury might have found them convincing. Kyles v. Whitley,514U.S.419,449 n.19(1995).

Counsel's theory was the co-defendant was responsible for the shooting, Smulls did not fire any gun, and the shooting was without Smulls' prior knowledge and a surprise (Rem.R.Tr.603-06,636-37,1125). Kraft would have wanted to present witnesses showing the co-defendant had made incriminating admissions he shot the victims (Rem.

R.Tr.1140-41). The amended motion alleged counsel was ineffective for failing to present a comprehensive mitigation phase, including witnesses who could attest to Smulls' non-violent nature (R.L.F.212-14,219-20). Testimony the co-defendant admitted he was responsible for the shooting and not Smulls, was of such a mitigating quality demonstrating his non-violent nature and was in fact pled. In State v. Phillips,940 S.W.2d512,516-18(Mo.banc1997), the death sentence was reversed because the State failed to disclose a witness' police statement during which the witness said the defendant's son had admitted dismembering the victim's body and not the defendant. Nondisclosure of this evidence was prejudicial, even though it constituted hearsay, because it was admissible under Green v. Georgia,442U.S.95,97(1979), and excluding hearsay testimony highly relevant to a critical issue violates due process. Phillips,940 S.W.2d at 517-18. Mrs. Honickman had testified Smulls was responsible for the shooting (Tr.II 547-48). Evidence of Smulls' non-violent nature, demonstrated by the co-defendant's mitigating admissions, would have been admissible mitigation. Reasonably competent counsel under similar circumstances would have presented this evidence and Smulls was prejudiced because the jury did not hear evidence co-defendant Brown did the shooting.

The pro se motion alleged counsel was ineffective for failing to call Smulls' biological mother, Versie Frazier, and to present evidence of the poverty in which Smulls was raised (R.L.F.10). She recounted the poverty she experienced working in Arkansas fields when Smulls was born (Rem.R.Tr.1065-1073). She relinquished Smulls to the Hawkins when he was three because she was unable to provide basic necessities

(Rem.R.Tr.1070-73). Kraft spoke to Ms. Frazier during the first trial (Rem.R.Tr.1139-40,1188) and decided not to call her because she had presented Smulls as a normal well-adjusted person (Rem.R.Tr.1234-35). Kraft did not discuss with Frazier Smulls being born into a life of poverty (Rem.R.Tr.1233). Kraft did not discuss with Frazier how before she gave Smulls to the Hawkins, he always wanted to be with her which may have been consistent with a passive personality (Rem.R.Tr.1233-35). The decision not to call Ms. Frazier was not a reasonable decision made after complete investigation. Counsel was ineffective. This Court should reverse Smulls' death sentence.

XIV. HEARING REQUIRED

O'BRIEN CLEARLY ERRED DENYING A HEARING ON MULTIPLE CLAIMS BECAUSE SMULLS ALLEGED FACTS WARRANTING RELIEF AS SMULLS WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, A FULL AND FAIR HEARING, EFFECTIVE ASSISTANCE, AND EQUAL PROTECTION, U.S. CONST., AMENDS. 6, 8, AND 14, AS THE PLEADINGS INCLUDED ALLEGATIONS OF COUNSELS':

A. PRESENTING PSYCHOLOGIST, DR. HIVELY, WHEN HE HAD NOT AUTHORED THE REPORT THAT WAS THE SUBJECT OF HIS TESTIMONY AND FAILING TO PRESENT A COMPREHENSIVE MENTAL HEALTH EXAMINATION;

B. GIVING A PENALTY PHASE OPENING STATEMENT CHARACTERIZING SMULLS' RESPONSE TO HIS HAND INJURY AS TAKING "THE EASY WAY OUT" BY GOING INTO A LIFE OF CRIME;

C. FAILING TO REQUEST A MISTRIAL OR ALTERNATIVELY TO RENEW THE MOTION TO REOPEN VOIR DIRE AFTER THE JURY'S NOTE, PRIOR TO PENALTY PHASE, WHICH SUGGESTED IT HAD ALREADY REACHED A PENALTY VERDICT;

D. FAILING TO OBJECT AND PRESENT EVIDENCE PENALTY PHASE INSTRUCTIONS DO NOT PROPERLY INSTRUCT;

E. FAILING TO OBJECT TO CORRIGAN INSTRUCTING VENIREPERSON MACHA SMULLS "THEORETICALLY" WAS NOT REQUIRED TO PROVE HE SHOULD BE SENTENCED TO LIFE AND TO MOVE TO STRIKE THE PANEL OR REQUEST OTHER RELIEF AFTER VENIREPERSON HIRSCH WAS STRICKEN FOR CAUSE, BUT STILL ALLOWED TO BE QUESTIONED WHILE EXPRESSING DEATH WOULD BE THE ONLY APPROPRIATE PUNISHMENT FOR INTENTIONAL KILLING.

O'Brien denied a hearing on multiple claims. Those rulings were clearly erroneous and Smulls was denied due process, freedom from cruel and unusual punishment, a full and fair hearing, equal protection, and effective assistance. U.S. Const., Amends. 6, 8, and 14.

To obtain a hearing, a movant must allege facts warranting relief resulting in prejudice. Belcher v. State,801S.W.2d 372,375(Mo.App.,E.D.1991). Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

A. Mental Health

Amended motion Claim XVIII alleged counsel was ineffective in calling psychologist Dr. Hively at penalty phase (R.L.F.207-09). Hively had not participated in preparing the report done on Smulls and had only interviewed him two weeks prior to

retrial (R.L.F.208). This claim was premised, in part, on cross-examination of Hively focusing on his non-participation in the evaluation and testing (R.L.F.207-08). When Hively's lack of participation was established the credibility of his favorable testimony was substantially undermined (R.L.F.209).

Claim XIX was linked to Claim XVIII, alleging counsel was ineffective for failing to present a comprehensive mental heath examination. This claim alleged a comprehensive examination would have allowed presenting: (1) Smulls' cognitive, attention, and concentration deficits manifested through his poor performance at school (R.L.F.210); (2) significant disparity between Smulls' verbal and non-verbal skills adversely impacting everyday functioning (R.L.F.211); (3) a functioning capacity allowing Smulls to only process concrete facts (R.L.F.211); and (4) Smulls' deficits would have made deliberation improbable (R.L.F.211-12).

Hively's testimony focused on an evaluation other members of his office conducted finding Smulls displays passive dependent personality (Tr.II 897-921). On cross-examination, Hively testified he had only met Smulls two weeks before re-trial and had not participated in findings made months before (Tr.II 925-26). He also conceded he was unfamiliar with the details of the acts alleged (Tr.II 930-31).

Dr. Duncan's office informed Kraft she was unavailable to testify and Hively was substituted (Rem.R.Tr.1143). Kraft wanted to call Duncan, rather than Hively, because it was Duncan who had prepared Smulls' report (Rem.R.Tr.1143,1224-26). Kraft believed cross-examination of Hively that he had seen Smulls just two weeks before trial and Duncan's report was done long before was harmful (Rem.R.Tr.1226-27). Kraft testified,

as an offer of proof, she intended to call a psychologist who had personal familiarity with Smulls and who had significantly researched his background and Hively's testimony did not accomplish those objectives (Rem.R.Tr.1230-31). Also, as an offer of proof, Kraft testified she "[a]bsolutely" did not make a strategy decision to call Hively, rather than Duncan, and she did not seek a continuance to call Duncan (Rem.R.Tr.1147).

Dr. Patricia Fleming personally evaluated Smulls for the Rule 29.15 action and her report, Ex.1, and prior Rule 29.15 testimony, Ex.39 at 136-181, were submitted as offers of proof (Rem.R.L.F.806). Smulls has a significant difference between verbal and nonverbal skills required to process, understand, and express information evidencing a learning disability (Ex.1 at 20; Ex.39 at 142-43). That discrepancy was significant because it indicated he has difficulty processing information, drawing proper conclusions, and making proper judgments (Ex.39 at 149). His conversation is often vague and tangential (Ex.1 at 20). He displays impaired verbal memory (Ex.1 at 20). The result of such deficits is frequently a misinterpretation of information that impacts daily functioning (Ex.1 at 20). A history of hyperactivity and longstanding attention/concentration problems were identified (Ex.1 at 20). Smulls has difficulty understanding, organizing, and making judgments when presented with abstract information (Ex.1 at 20). Fleming also found Smulls displays passive dependent behavior (Ex.1 at 20).

Fleming's testing differed from what Hively (Tr.II 897-932) testified about (Ex.39 at 163-64). Fleming performed neuropsychological testing measuring brain intactness, while Hively testified about only a cognitive organizational psychological evaluation

(Ex.39 at 163-64). The testing Fleming performed also revealed impairment in Smulls' ability to reason and comprehend (Ex.39 at 145). Smulls' memory was impaired (Ex.39 at 149). Smulls' limitations impact all aspects of his life and make it difficult for him to make logical judgments and integrate information (Ex.39 at 151-52).

When Smulls employed both hands to perform portions of the neuropsychological test battery Fleming administered, his coordination and speed were impaired because of his hand injury (Ex.39 at 146-47). Smulls' decreased speed and coordination, when utilizing both hands, was inconsistent with Mrs. Honickman's testimony Smulls had used both hands to fire a gun (Ex.39 at 146-47,166-67;Tr.II 548). Evidence regarding the extent and effect of Smulls' serious dominant right hand injury should have been presented (Ex.1 at 20).

Reasonably competent counsel would have investigated and presented neuropsychological testing such as Fleming did. Smulls was prejudiced because the jury did not hear evidence warranting a sentence less than death and it was unreasonable to believe Smulls was physically able to shoot the Honickmans.

O'Brien found Fleming's testimony would only be cumulative (O'B.Rem.L.F.240-42). That is clearly erroneous because Fleming's diagnosis was far more extensive than merely finding passive dependent behavior. Unlike Hively, she familiarized herself with all aspects of Smulls' case beginning from childhood through the time of the examination and analyzed them. (Ex. 1). Because Fleming performed testing different from what Hively testified about (Ex.39 at 163-64), the finding Fleming's testimony was cumulative was clearly erroneous. Moreover, counsel agreed she did not make a strategic choice to

call Hively, his testimony did not accomplish counsel's objectives, and a continuance was not sought to obtain Duncan's testimony.

B. "Easy Way Out"

Claim XII alleged counsel was ineffective because of statements counsel made during penalty phase opening statement (R.L.F.183-84). The motion recounted how counsel initially described Smulls had difficulty obtaining work because of his injured, deformed hand (R.L.F.183-84). However, Claim XII noted counsel informed the jury that, because of Smulls' employment problems he "'took the easy way out at that point in time; he went into a life of crime"' (R.L.F.183 relying on Tr.II 862). The motion further alleged counsel's statement caused the mitigating nature of Smulls' hand injury to be undermined. (R.L.F.183-84).

O'Brien found counsel's characterization was a reasonable use of mitigation (O'B.Rem.R.L.F.236-37). That finding is clearly erroneous because counsel's manner of characterizing the impact of Smulls' hand injury served only to demean its significance as a substantial mitigating factor.

C. Jury's Note

Claim XVI alleged counsel was ineffective for failing to rely on the jury's note inquiring about "the security precautions" that would be taken when the "verdict is read both times" as support for the motion to reopen penalty phase voir dire (R.L.F.196-200). Counsel should have then requested a mistrial (R.L.F.199). The motion relied on the note

as evidencing the jury had decided punishment before penalty phase occurred. (R.L.F.196-200).

This Court rejected the claims the trial court plainly erred for failing to declare a mistrial when the note was received and it was error to overrule the motion to impanel a separate penalty jury in light of the note. State v. Smulls,935S.W.2d 9,22(Mo.banc1996). The claims about the note's content were "speculative". Id. O'Brien denied a hearing based on the claim constituted speculation as to the meaning of the note and this Court's direct appeal decision (O'B.Rem.L.F.238-39). If Smulls' direct appeal arguments as to the meaning of the note was in fact "speculative," then that is precisely why a hearing was required. He should have been allowed to present evidence from the jurors about the note's meaning.

D. Penalty Instructions

Claim XXVI alleged counsel was ineffective for failing to object to and present evidence challenging the penalty phase instructions in an analogous manner to that in U.S. ex rel. Free v. Peters,806F.Supp.705(N.D.Ill.1992),rev'd.,12F.3d 700(7thCir.1993)(R.L.F.243-44), In Free, a study of the Illinois penalty phase instructions was conducted and concluded jurors did not understand the penalty instructions. Professor Wiener's Missouri penalty phase instructions study was submitted as an offer of proof (Ex.50 at 235-429). Wiener's study found jurors do not understand the penalty phase instructions and they could be improved (Ex.50 at 235-36,298-99). O'Brien found this Court has rejected similar challenges (O'B.Rem.L.F.243). The amended motion alleged counsel was ineffective for failing to present evidence to

challenge the instructions, something which has not been done before. This Court recently rejected a similar claim in State v. Deck,994S.W.2d527,542-43(Mo.banc1999). That decision should be reconsidered.

E. Voir Dire

Claim I C alleged counsel was ineffective for failing to object to Corrigan informing venireperson Macha, in the venire's presence, "theoretically" Smulls was not required to prove he should receive a sentence other than death (R.L.F.133-34). Counsel should have objected to Corrigan's statement because it lowered respondent's burden (R.L.F.133-34). The statement was prejudicial, even though Macha was stricken for cause, because it prejudiced the panel and resulted in conviction and death (R.L.F.134).

O'Brien found the statement, when considered with other statements, did not lower respondent's burden, Macha was removed, and any prejudice to the panel is "speculation" (O'B.Rem.L.F.226). The statement created the problem alleged and a hearing would disprove "speculation".

Paragraph E also alleged counsel was ineffective for failing to have Corrigan direct respondent not to question venireperson Hirsch after he was stricken for cause or to request he be removed from the venire before any further questioning (R.L.F.137-39). Counsel was ineffective for failing to move to quash when Hirsch, after having been stricken for cause and in response to respondent's questioning, stated death was the only appropriate punishment for intentional killing (R.L.F.137-39). O'Brien relied on this Court finding there was no plain error in failing to quash the panel in response to Hirsch's statement. (O'B.Rem.L.F.228). Smulls,935S.W.2d at 19. A finding a particular matter

did not rise to the level of plain error does not foreclose finding counsel was ineffective. State v. Storey,901S.W.2d886,900-03(Mo.banc1993).

All claims alleged facts warranting relief and a hearing is required.

XV. RIGHT TO TESTIFY

O'BRIEN CLEARLY ERRED REJECTING COUNSEL WAS INEFFECTIVE IN DIRECTING SMULLS NOT TO TESTIFY AT RETRIAL BECAUSE SMULLS WAS DENIED EFFECTIVE ASSISTANCE, HIS RIGHT TO TESTIFY, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. 5, 6, 8, AND 14, AS REASONABLE COUNSEL WOULD NOT HAVE SO DIRECTED AFTER SMULLS' FIRST TRIAL'S JURY HUNG ON THE MURDER CHARGE WHEN HE TESTIFIED AND A REASONABLE PROBABILITY EXISTS HE WOULD NOT HAVE BEEN CONVICTED IF HE TESTIFIED AT RETRIAL.

The pro se and amended motions alleged Smulls was denied effective assistance, his right to testify, due process, and freedom from cruel and unusual punishment because counsel directed him not to testify at his retrial (R.L.F.10,150-156). U.S.Const. Amends. 5, 6, 8, and 14. At Smulls' first trial, he testified (Tr.I. 867-939) and the jury hung on the murder charge (Tr.I. 1004-06). On retrial, he did not testify and was convicted of murder and death sentenced.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, Smulls must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

A defendant has an absolute right to testify. Rock v. Arkansas,483U.S.44,49-53(1987). The ultimate authority whether to testify belongs to the defendant. Jones v. Barnes,463U.S.745,751(1983).

O'Brien rejected Smulls' claim because Smulls did not testify at the evidentiary hearing and testimony counsel gave why they discouraged Smulls from testifying (O'B.Rem.L.F.244-47). However, O'Brien judicially noticed all prior proceedings in Smulls' case (Rem.R.Tr.1335-36). Those prior proceedings included Smulls' first trial's testimony (Tr.I. 867-939). In Whitfield v. Bowersox, No. 4:97-CV-1412CAS slip op. at 5-24(E.D.Mo.Jan.24,2001), counsel was found ineffective for failing to ensure Whitfield's right to testify at penalty phase was safeguarded. Respondent had argued, and this Court agreed, Whitfield's postconviction claim should be denied because he did not testify at the postconviction hearing. Id.14,16. There was, however, evidence in the trial record of how Whitfield would have testified. Id.21-22. Additionally, there was no evidence Whitfield waived his right to testify at penalty phase. Id.18.

The same is true here, Smulls testified at his first trial and the record reflects how Smulls would have testified had he testified at retrial. The record does not contain evidence Smulls waived his right to testify. This Court should find counsel did not act reasonably discouraging Smulls' testimony and Smulls was prejudiced because when he testified at his first trial the jury hung on the murder charge. A new trial is required.

CONCLUSION

Mr. Smulls requests: Points I, IV, V, VI, VII, X, XII, XV, a new trial; Points II, III, IV, V, VI, VII, VIII, IX, X, XI, XIV, a new hearing; XII, XIII a new penalty hearing; IX impose life without parole.

Respectfully submitted,

_____

William J. Swift, MOBar #37769
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

Certificate of Compliance

I, William J. Swift, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

_____
William J. Swift

Certificate of Service

I, William J. Swift, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were hand delivered, on the ____ day of _____ 2001, to the Office of the Attorney General, 4th Floor of the Broadway Building, Jefferson City, Missouri 65101.

_____
William J. Swift