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 REPLY BRIEF

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U.S. v. Kojayan,8F.3d1315(9thCir.1993);

State v. Boone,869S.W.2d70(Mo.App.,W.D.1994);

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State v. Weaver,912S.W.2d499(Mo.banc1995);

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ARGUMENT

I. JUDGE CORRIGAN DID NOT FAIRLY DECIDE BATSON O'BRIEN CLEARLY ERRED REJECTING SMULLS' CORRIGAN'S BATSON UNFAIRNESS CLAIMS AND DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED BECAUSE THE PLEADINGS CONTAINED THE CLAIMS NOW ARGUED AND THIS COURT ALREADY SO HELD THOSE CLAIMS WERE THE REMAND'S PURPOSE REASONING CONDUCT OF JUDGES RAISING QUESTIONS OF RACIAL FAIRNESS UNDERMINE THE JUDICIARY'S INTEGRITY AND CREDIBILITY AND THAT HOLDING IS THE LAW OF THE CASE.

Respondent's brief is devoted to meritless procedural arguments. That brief fails to address the merits because the record establishes Corrigan did not fairly rule Smulls' Batson v. Kentucky,476U.S.79(1986) challenge. This Court's prior holding in Smulls' case is the law of the case and respondent's arguments must be rejected.

Respondent asserts appellant "attempts to mislead this Court" substituting claims in the motion to recuse Corrigan[1] for those in the 29.15 motion (Resp.Br.32). Smulls' original brief sets out what was pled, and does so by referencing the Legal File pages of the amended motion and his brief's Appendix containing those same pages (App.Br.42-43). This Court can verify from Smulls' brief's Appendix it is respondent who is misleading this Court.

[1] Last names, even as to judges, are used throughout (See App.Br.13 n.1).

When this Court decided Smulls' case it referenced Corrigan's supplemental Batson hearing statements:

> Courts must be vigilant in enforcing the laws of this state and nation that prohibit overt acts of racial prejudice by public servants. Those laws have not eradicated prejudice. Rather, they have forced prejudiced persons to disguise their bias by hiding behind neutral-sounding language. Therefore, we may not simply accept ostensibly neutral language as showing an absence of prejudice. Statements must be considered in the context in which they are offered.

State v. Smulls,935S.W.2d9,26 (Mo.banc1996)(emphasis added). Referring to Corrigan's comments during Smulls' Batson hearing this Court noted: "The trial judge's gratuitous statements raise serious questions about his willingness to do what Batson requires." Id.26. Describing these gratuitous statements, this Court referred to Corrigan's use of "one drop of blood" as "codewords." Id.26. Those codewords represent "an offensive phrase because it is reminiscent of the manner in which slaveholders sought to increase the supply of slaves…." Id.26 n.7. This Court's opinion evidences it considered Smulls' pleaded claims to encompass Corrigan was unable to fairly decide Smulls' Batson challenge to striking Ms. Sidney and counsel's related ineffectiveness based on Corrigan's Batson trial statements.

The law of the case doctrine "governs successive appeals involving substantially the same issues and facts." State v. Phillips,324 S.W.2d693,694(Mo.1959). This Court's prior opinion recognized Smulls' pleadings encompassed Corrigan's statements during

Smulls' Batson challenge and counsel's related ineffectiveness. This Court's opinion is the law of the case and respondent's arguments must be rejected.

Smulls' pleadings were more factually specific than those in Hicks v. State,918S.W.2d385(Mo.App.,E.D.1996). The motion court had denied a hearing for failing to state facts and lack of prejudice on a racial discrimination claim. Id.386. The amended motion alleged only the movant had pled guilty because "counsel informed him that he, as an African-American, could not get a fair trial in St. Francois County." Id.386. This alone "that his counsel induced him to plead guilty by telling him that he could not get a fair trial in St. Francois County, contains sufficient facts to warrant an evidentiary hearing." Id.386-87. While Hicks' allegation was "broad" it was sufficient to warrant a hearing. Id.387. Smulls' pleadings were substantially more factually specific than those in Hicks and alleged, as this Court already recognized, the grounds advanced here.

Respondent contends this Court cannot review matters relating to Corrigan's Batson hearing statements here because they were not part of the pleadings (Resp.Br.42-43). The amended motion, however, alleged Professor Galliher would testify about Corrigan's differential harsher treatment accorded African-Americans based on race and other statements and actions of Corrigan evidencing racial bias Galliher had identified (App.Br.42;R.L.F.186;App.A4). In fact, Galliher's testimony addressed Corrigan's Batson hearing statements here (App.Br.127-28).

A claim is properly preserved and a hearing required even when the amended pleadings' language and the point raised "are not precisely the same." Buckner v.

State,995S.W.2d47,49(Mo.App.,W.D.1999). Smulls' claims alleged and evidence are precisely the same.

Respondent asserts Smulls' denial of a fair trial claim because Corrigan could not fairly decide his Batson claim is not cognizable (Resp.Br.47-48). Again, this Court already held, supra, and it is the law of the case, that Corrigan's gratuitous statements raised serious questions about his willingness to do what Batson requires reasoning:

> Conduct of judges during trial that raises questions of racial bias, even when the conduct may seem relatively minor in its manifestation undermines the credibility of the judicial system and opens the integrity of the judicial system to question.

Smulls,935S.W.2d at 26(emphasis added).

Respondent relies on such decisions as Mallett v. State,769S.W.2d77(Mo.banc 1989)(Resp.Br.47). This Court did hold Mallett's claim the trial judge's failure to recuse was not cognizable because he had previously affirmatively abandoned the identical claim as alleged in his new trial motion. Id.82-83. That did not occur here.

Where fundamental fairness requires, trial court errors are cognizable when exceptional circumstances exist. Clemmons v. State,785 S.W.2d524,531(Mo.banc1990). In State v. Phillips,940S.W.2d512,516-18 (Mo.banc1997), this Court granted the 29.15 claim respondent withheld exculpatory evidence. See, also, State v. Williams, 784S.W.2d276,280-81(Mo.App., E.D.1989) (granting post-conviction double jeopardy claim); Brookins v. State,575S.W.2d841,841-42(Mo.App.,St.L.D.1978) (post-conviction relief granted confrontation right violated). In Vidauri v. State,515S.W.2d562,570

(Mo.1974)(emphasis added), this Court upheld post-conviction relief on grounds of an involuntary confession because the purpose of post-conviction rules "is to provide a means of avoiding the perpetration of injustices of grave constitutional importance."

Smulls' claim is of grave constitutional importance, involves fundamental fairness, and presents exceptional circumstances: protecting African-American defendants and potential jurors from jury selection racial discrimination. Most importantly, this Court already indicated that at stake here is the integrity and credibility of the judiciary on the issue of whether Missouri courts treat African-Americans with dignity. Corrigan's false and unforthright professing he is unable to acknowledge a person's race and other racially offensive behaviors gravely undermines the judiciary's integrity and credibility.

Exceptional circumstances exist. When the claim was brought, Corrigan attempted to deny this Court the opportunity to review it - refusing to make his court reporter available and refusing to allow a private court reporter furnished to attend one proceeding because he "didn't give a shit" a reporter was furnished (App.Br.85). The record and this Court's final opinion reflect Corrigan cursed at and threatened undersigned counsel with disciplinary action for alleging the bias claims (App.Br.59 n.3). Corrigan also stated the claims involving his bias "pisses him off" and dismays him from a "union standpoint" (App.Br. 72). These are exceptional circumstances.

Respondent contends it was insufficient to plead Smulls was prejudiced on his Batson claim because he was tried before a judge who could not fairly decide his Batson challenge and Smulls was required to prove biased jurors served (Resp.Br.41-42).

Because Corrigan serving constituted structural error (App.Br.57) and Peters v. Kiff,407 U.S.493(1972) and Vasquez v. Hillery,474U.S.254(1986)(App.Br.57-58) do not require a showing biased jurors actually served, respondent's assertions have no merit. The Eighth Circuit has held Strickland prejudice is presumed when structural error occurs. McGurk v. Stenberg,163F.3d 470,474-75(8th Cir.1998).[2]

A peremptory challenge motivated by race raised in the context of counsel's ineffectiveness is an outcome-determinative event constituting Strickland prejudice. Davidson v. Gengler,852F.Supp.782,787-88(W.D.Wisc.1994). To require proof the jury's racial composition altered a trial's result is inherently inconsistent with "Batson's premise that a person's race is not relevant to serve as a juror." Id.786-87. There is no way to prove the outcome would have been different as inquiry into the deliberation process is prohibited. Id.787.

Respondent attacks Smulls' brief for relying on excluded evidence (Resp.Br.33). On the first occasion Smulls referenced excluded evidence, he informed this Court whenever excluded evidence was referenced he was asserting independent claims those rulings were erroneous (App.Br.46n.2). Respondent also complains Smulls' brief references portions of the pleadings which alleged Professor Galliher's testimony would be presented (Resp.Br.33). Smulls' brief, Point X, alleged as error excluding Galliher's testimony (App.Br.123-31).

[2] But see, Young v. Bowersox,161F.3d1159,1160-61(8thCir.1998).

Respondent asserts the differential harsher treatment of Corrigan towards African-Americans allegation was deficient (Resp.Br.36). This Court expressly identified this component of Smulls' claims against Corrigan as a "factual allegatio[n]." Smulls,935S.W.2d at 25. Contrary to respondent's representations (Resp.Br.39-40), Smulls' brief demonstrates how counsel failed to act as reasonably competent counsel when they failed to investigate matters evidencing Corrigan's racial bias (App.Br.64-65).

St. Francis College v. Al-Khazraji,481U.S.604(1987) is inapplicable (Resp.Br.46). The issue there was whether someone of Arab ancestry, born in Iraq, was considered white, and therefore, precluded from bringing a Federal Civil Rights race-discrimination claim. Id.606-07. According to respondent, Corrigan was conducting himself at Smulls' Batson hearing in a manner intended to "honor all" (respondent's emphasis) of a person's heritage (Resp.Br.46). Unlike the St. Francis plaintiff, everyone, except Corrigan, is able to acknowledge Ms. Sidney is black (App.Br.A1-2 photos). Corrigan's statement 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) reflects Corrigan has never been concerned about "honor[ing]" anyone's racial heritage much less "honor[ing] all" of that heritage.

Respondent repeatedly refers to counsels' supplemental Batson record as "untimely" (See, e.g.,Resp.Br.43,46). This Court already ruled that record was timely, because in discussing it, this Court found Corrigan's gratuitous statements raised serious questions about his willingness to do what Batson required. Smulls,935S.W.2d at 26, supra.

Invoking "one drop of blood" was not a "historical observation concerning the insensitivity of others" (Resp.Br.46). The statement typified Corrigan's racially biased conduct. He falsely and unforthrightly professes he is incapable of acknowledging a person's race for purposes of Batson, but in all other contexts is able to do so (App.Br. 45-48). Corrigan even refuses to accept parties' stipulation on the race of potential jurors (App.Br.47-48).

A new trial is required.

II. JUDGE O'BRIEN COULD NOT FAIRLY SERVE

HARTENBACH ERRED FINDING O'BRIEN WAS ABLE TO FAIRLY SERVE AND DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED BECAUSE CORRIGAN EXPRESSED TO O'BRIEN "AN OVERALL DISPLEASURE" ABOUT THE ORIGINAL OPINION LABELING HIM A "RACIST" AND THAT CONTACT BETWEEN CORRIGAN AND O'BRIEN CREATED AN APPEARANCE OF IMPROPRIETY BECAUSE O'BRIEN WAS REQUIRED TO RULE ON CORRIGAN'S RACIAL BIAS.

Contrary to respondent's misrepresentations (Resp.Br.50n.3), the record shows Exhibits 67 through 71 were admitted at the June 16, 2000 hearing and none are newspaper articles (O'B.Rem.Tr.20-28).

The test for whether a judge must be disqualified 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). Corrigan's contact with O'Brien established such an appearance.

Respondent asserts there was no evidence Corrigan condemned this Court for calling him a "racist" (Resp.Br.54). O'Brien could not specifically recall what Corrigan had said, but he had inferred it stood to reason if somebody is "called a racist that that wouldn't be their most favorite endearing opinion." (O'B.Rem.Tr.140)(emphasis added). O'Brien did recall Corrigan expressed "an overall displeasure with the opinion" (O'B.Rem.Tr.146-47). Since Corrigan had expressed "an overall displeasure with the opinion" that necessarily included Corrigan expressing unfavorable views about the

claims relating to his racial bias. That claim's treatment was the only claim about which Corrigan would have had any grounds to complain. See Original Opinion (Ex.65). That contact with Corrigan's views was the type of extrajudicial source that was not learned from serving on the case and required O'Brien's disqualification. See State v. Nicklasson,967S.W.2d596,605(Mo.banc1998). Corrigan's and O'Brien's contact created an appearance of impropriety.

State v. Owens,759S.W.2d73,74-75(Mo.App.,S.D.1988) and State v. Whitlow,988S.W.2d121,121-23(Mo.App.,W.D.1999) (Resp.Br.54) are inapplicable. Unlike those cases, Corrigan made known to O'Brien his displeasure with how this Court had treated him on the issue of his racial bias. The only issue about which Corrigan had cause to complain to O'Brien about was the matters relating to his racial bias. These matters were the very same ones O'Brien was required to decide.

According to respondent, O'Brien's finding Corrigan **"steadfastly"** denied telling the "barbecue joke" was part of a finding showing Smulls' evidence was unreliable and based on inadmissible hearsay (Resp.Br.55). That is untrue. The finding shows:

> From the evidence presented in this 29.15 action, this Court is unable to discern whether or not this alleged racial remark was made and if so by whom. From the newspaper articles offered by Movant, which were not admitted into evidence, it is clear that Judge Corrigan has steadfastly denied making the alleged remark.

(O'B.Rem.L.F.252-53). What these findings show, in fact, is O'Brien relied on Corrigan's hearsay newspaper denial to reject Smulls' claim. That O'Brien characterized

Corrigan as having "**steadfastly**" denied telling the "barbecue joke" evidences O'Brien had some extrajudicial sources requiring his disqualification because he could not otherwise have made a finding Corrigan had "**steadfastly**" denied telling the "joke."

Respondent seeks to mislead this Court about O'Brien ordering 29.15 counsel they could not make a record about Judge Satz's statements directed at them asserting "[t]he popularity of the case is not relevant" and the statements were hearsay (Resp.Br.55).

A representative portion of that record reflects:

> MR. SWIFT: Judge, certain statements that Judge Satz made, -- there have been various issues related to our concerns about having this hearing in St. Louis County because of the nature of the allegations and the statements made by Judge Satz in our presence. We want the record to reflect what those statements were. And we think they are appropriate for the Missouri Supreme Court to be on notice and aware of.
>
> * * * *
>
> (Tr.1412)
>
> MR. SWIFT: Judge, it goes to the issue of fairness of a hearing in St. Louis County because of the involvements and the concerns expressed by other judges in this area. And we think some of the statements that he [Judge Satz] made reflect that.
>
> THE COURT: What, did he call you a name?
>
> MR. SWIFT: He didn't call us a name. I mean, I was present. It was just myself and Mr. Mermelstein. And I do know what was said.

THE COURT: And under what basis would it not be hearsay, what Judge Satz said?

MR. SWIFT: Judge, it is not going to be offered for its truth, but for the fact he made these statements.

(Tr. 1413).

What is most significant about O'Brien's actions on Satz is he **expressly ordered** undersigned counsel could not state for the record what co-counsel's testimony would be because **this Court could use that record to reverse this case** (Rem.R.Tr.1408-23).

Respondent attempts to mislead this Court claiming O'Brien allowed Smulls to get answers to certified questions from Corrigan's deposition (Resp.Br.56). The only questions O'Brien allowed reopened were whether O'Brien and Corrigan socialize together outside the courthouse and whether they had carpooled (Rem.R.L.F.549-52). O'Brien did not allow Smulls to get answers from Corrigan as to the very issues about which this Court ordered the last remand - the controversy surrounding this case and O'Brien's role in it (Rem.R.L.F.549-52).

Respondent claims this Court's first published opinion did not decide the supplemental Batson record's timeliness (Resp.Br.57). That opinion did. (Point I, supra).

Respondent represents Smulls sought to disqualify all St. Louis County judges except Judge Campbell (Resp.Br.57n.4). The record actually shows:

[MR. SWIFT]: One of the matters we would like to point out for the Court, it's our position that the entire circuit should be disqualified from participating, all the members of the circuit.

But out position has been but if the circuit is not disqualified the case should have been returned to Judge Campbell because it's our position that his removal was done pursuant to a rule and the Missouri Supreme Court found does not involve post-conviction action, Thomas vs. State (sic). I think it's 51.05 (sic), I'm not exactly sure of the number.

But our position's been everyone should be disqualified. But if the entire circuit's not disqualified it should go back to him. And I understand now Judge Campbell's a retired judge, and for those purposes I'm not sure what affect that would have.

(O'B.Rem.Tr.17) (reporter added sics). What the record shows is Smulls wanted the entire Circuit disqualified, but if it was not, then the case more properly belonged in front of Judge Campbell. Smulls did not ask for the entire Circuit to be disqualified except for Campbell.

Respondent argues it was proper to deny the motions to disqualify all St. Louis County judges because this Court held Smulls was required to obtain the consent of all County judges in Smulls v. State,10S.W.3d497,499-500(Mo.banc2000)(Resp.Br.57). That requirement is contrary to federal standards and should not be followed (App.Br.76).

A hearing outside St. Louis County is required.

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

HARTENBACH CLEARLY ERRED REFUSING TO ADMIT AND/OR CONSIDER EXHIBITS 67-70, 74-78, 80-86, AND 91-92 AND DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED BECAUSE THIS EVIDENCE DOCUMENTED THE SUBSTANTIAL CONTROVERSY SURROUNDING THE ORIGINAL OPINION WHICH CONTRADICTED O'BRIEN'S TESTIMONY PORTRAYING A LACK OF CONTROVERSY, AND THEREFORE, SHOWED HIS BIAS. JUDGES CALVIN'S AND SHAW'S CONTROVERSY MAGNITUDE STATEMENTS WERE ADMISSIBLE TO EXPLAIN WHY THEY WROTE THIS COURT.

According to respondent, Smulls' Exhibits 67-70, 74-78, 80-86, and 91-92 were inadmissible because they were hearsay and irrelevant unless O'Brien knew their substance (Resp.Br.58-64).

O'Brien testified he 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).

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.2d196,200(Mo.App.,W.D.1987). There is no requirement O'Brien have known of these matters. All Smulls' exhibits documented a substantial controversy focused on defending Corrigan after this Court's original opinion (App.Br.78-81). These

exhibits contradicted O'Brien's representations. Street, supra. These exhibits' relevance lies in the fact the statements were made and not their truth, and therefore, they did not constitute hearsay. See State v. Sutherland, 939 S.W.2d 373, 377 (Mo.banc 1997).

According to respondent, Judge's Calvin's and Shaw's testimony was inadmissible because their testimony constituted hearsay and did not explain O'Brien's actions (Resp.Br.61-63). The background testimony Judges Calvin and Shaw provided explained their own subsequent conduct and why they wrote to this Court, and therefore, were not hearsay (App.Br.78,82).

Smulls was prejudiced because a witness' bias is never irrelevant. State v. Johnson, 700 S.W.2d 815, 817 (Mo.banc 1985). Smulls was not allowed to show O'Brien's bias at a hearing ordered to decide that issue.

A new hearing is required.

IV. REFUSAL TO ACKNOWLEDGE RACE - EXCLUDED EVIDENCE

O'BRIEN CLEARLY ERRED REFUSING TO ADMIT EXHIBITS 21, 22, 23, AND LEFTWICH'S TESTIMONY AND DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED BECAUSE CORRIGAN'S STATEMENTS AT BOTH PROCEEDINGS WOULD NOW BE BEFORE THIS COURT IN AN OFFICIAL TRANSCRIPT AS EVIDENCE OF HIS PATTERN OF FALSELY AND UNFORTHRIGHTLY PROFESSING HE CANNOT ACKNOWLEDGE ANYONE'S RACE AND CANNOT FAIRLY DECIDE BATSON EXCEPT CORRIGAN REFUSED TO ALLOW HIS REPORTER TO RECORD THOSE PROCEEDINGS.

Respondent contends Smulls' claim should be rejected because his pleadings did not include anything about Corrigan's statements made at the requests for admissions hearing (Resp.Br.66-67). Corrigan's statements were relevant to proving Smulls' claims Corrigan cannot fairly decide Batson. Part of Smulls' proof was Corrigan's false and unforthright assertions throughout he cannot acknowledge anyone's race, a matter Smulls pled. (Point I, supra). Corrigan's statements would have been part of an official record except he refused to allow his reporter to record the proceedings (App.Br.85,89).

Respondent contends Corrigan's statements at the admissions hearing were "cumulative" to statements Corrigan made during Smulls' supplemental Batson hearing (Resp.Br.67). Respondent defends Corrigan's Batson hearing statements describing them as "mus[ing] about how hard it was for judges to tell the race of individuals without direct evidence (Tr.381)" (Resp.Br.43). Respondent claims Corrigan's Batson hearing

statements were intended "to honor all" (respondent's emphasis) of people's racial heritage (Resp.Br.46). In light of respondent's attempt to defend Corrigan's Batson hearing statements, this claim does not involve an issue directed at only "cumulative" evidence (Resp.Br.67). This evidence's exclusion was prejudicial.

Respondent represents it is not required to show how it would be prejudiced by Ex. 22, the requests transcript, being admitted because respondent is not appealing its admission (Resp.Br.66 n.6). Owen v. State,776S.W.2d467,469 (Mo.App.,E.D.1989) did not recognize any such distinction (App.Br.88-89). Respondent never claimed any transcript inadequacy, Owen, and it was error to exclude Smulls' transcript necessitated only because Corrigan refused to allow the official reporter to record the proceedings.

Respondent argues Leftwich's testimony and her affidavit were irrelevant because they were not pled (Resp.Br.68). Smulls' amended motion was due August 27, 1993 and filed August 26, 1993 (R.L.F.27-28,114). Corrigan made the statements about Ms. Goodwin's race[3] Leftwich heard on September 9, 1993, after the amended motion was due (App.Br.85-87). These matters could not have been part of the amended motion, but were relevant to consider Corrigan's pattern of falsely and unforthrightly professing he cannot acknowledge anyone's race and thus could not fairly decide Batson - a claim pled.

[3] In Point VII, dealing with exclusion of the gender discrimination judgment against Corrigan evidence, respondent asserts Smulls' exhibits show the judgment was paid (Resp.Br.79). Smulls' evidence's point was Corrigan did not pay the judgment, even though the judgment was against him (App.Br.107).

Again, Corrigan's statements would have been part of the record, except he refused to allow the official reporter to record the proceedings.

A new hearing or a new trial is required.

V. NO BLACK JUDGES TO DO BARBECUING

O'BRIEN CLEARLY ERRED IN ALL RULINGS ON CORRIGAN'S "BARBECUE JOKE" AND DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED BECAUSE JUDGE CAMPBELL'S TESTIMONY WAS OFFERED ONLY FOR CORRIGAN HAVING TOLD THE "JOKE" AND THE COURT MEETING MINUTES WERE INADMISSIBLE AS PUBLIC RECORDS BECAUSE NO LAW IMPOSES A DUTY TO KEEP THEM.

Respondent claims Smulls offered Judge Campbell's testimony he heard Corrigan tell Corrigan's "barbecue joke" to show Corrigan's state of mind (Resp.Br.70). Smulls' brief clearly indicated Campbell's testimony was offered solely for the fact Corrigan told the "joke" and not for the truth there was in fact no black judges available to do any barbecuing (App.Br.93-94). Smulls has never contended this evidence was admissible to show Corrigan's state of mind.

Respondent represents O'Brien considered Judge Campbell's testimony as if it was admissible (Resp.Br.70). This is false. The findings show:

> b) Movant's next accusation asserts that trial counsel should have investigated Judge Corrigan's background to learn of an alleged racial slur attributed to Judge Corrigan made in the company of a few people at a social meeting of judges in 1983. As substantive proof, Movant has offered inadmissible hearsay as to the content of the statement and the circumstances surrounding its occurrence. The testimony Movant attempted to present in this regard came from a retired reporter from the

Post-Dispatch and Judge Robert Lee Campbell. In both regards, Movant was unable to overcome the hearsay objections to this testimony.

(O'B.Rem.L.F.252)(emphasis added).

Respondent claims the court meeting minutes were admissible to show Corrigan told his "joke" at "an unofficial meeting of judges" (Resp.Br.71-72). Whether the meeting was an official or unofficial meeting was irrelevant. The only relevant matter was Corrigan told his "joke" at **a judges' meeting**. The findings show O'Brien used the minutes to dispute Campbell's memory of who was present at the meeting and to then conclude he could not determine if Corrigan told the "joke" (O'B.Rem.L.F.252-53). Those findings were:

> This Court's review of the official minutes of the Court en banc meetings during 1983 received under seal after being subpoenaed by Movant, do not reflect the presence of Judges Corrigan, Ruddy and Campbell at the same meeting after the month of February. Nor do the minutes indicate the presence of Kenneth Rothman at any time during 1983.

(O'B.Rem.L.F.253).

Respondent contends the court meeting minutes were admissible under the hearsay rule's public records exception (Resp.Br.72). The court meeting minutes, however, were inadmissible hearsay. For documents to qualify under this exception they must be documents for which a public duty is "imposed by statute, ordinance, rule or regulation." State v. Weber,814S.W.2d298,302 (Mo.App.,E.D.1991). There is no statute, ordinance, rule, or regulation mandating the minutes of circuit judges' meetings be kept. Thus, the

public records exception cannot be applied. Additionally, Smulls' 29.15 counsel could not be expected to make objections other than those they did, because Smulls' attorneys have never been allowed to view the sealed documents.

Respondent again argues (Resp.Br.70) O'Brien relied on Corrigan's newspaper denial to establish Smulls' evidence was unreliable and hearsay (See Point II response, supra).

A new trial or hearing is required.

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

O'BRIEN CLEARLY ERRED STAYING JUDGE O'TOOLE'S DEPOSITION AND DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED BECAUSE SMULLS' BRIEF CONTAINS NO ARGUMENTS ABOUT O'BRIEN'S "PURPOSES" FOR STAYING O'TOOLE'S DEPOSITION AND THE ATTORNEY GENERAL'S ATTACKS ON SMULLS' COUNSEL BASED ON FACIALLY FALSE REPRESENTATIONS IS AN ATTEMPT TO DISTRACT THIS COURT FROM THE ATTORNEY GENERAL'S MISCONDUCT, SPECIFICALLY, ITS COMPLICITY IN BARDGETT'S FILING CHAMPIONING THE LOBBYING CAMPAIGN AGAINST THIS COURT. O'BRIEN NEVER STAYED THE CASE. RESPONDENT COULD HAVE, BUT DID NOT, OBJECT AT THREE HEARINGS TO SMULLS' DILIGENCE DOCUMENTATION.

Throughout respondent's brief it personally attacks Smulls' counsel. In addressing similar prosecutorial misconduct one Court has noted:

> Impugning opposing counsel's integrity is a very serious matter; it should be undertaken only after careful analysis, particularly when the alleged misconduct is used to explain or mitigate one's own.

U.S. v. Kojayan,8F.3d1315,1321(9thCir.1993).

Respondent alleges:

> Appellant claims on appeal that the motion court erred by staying the deposition of Judge O'Toole until after it was determined what claims

> appellant would be entitled to an evidentiary hearing. He argues that this was done for the improper purpose of insuring that Judge O'Toole died before he could testify (App.Br.98). This unsavory attack on the motion court and the prosecutors is unsupported by any evidence.

(Resp.Br.71). Respondent's Point Relied On makes the same claim (Resp.Br.74).

This Court can review Point VI (App.Br.98-105) and nowhere will it find any "purposes" argument. Respondent engages in these personal attacks to distract and to try to mitigate its own misconduct. Kojayan, supra. The record establishes the Attorney General Office's complicity in the attacks on this Court. The record shows it was the Attorney General's Office which assisted and facilitated Bardgett's filing (App.Br.74) championing the lobby campaign against this Court and on Corrigan's behalf. Nowhere does the Attorney General attempt to justify its conduct, because it cannot.

Respondent complains about Smulls' reliance on detailed diligence documentation filed with the motion court as to scheduling O'Toole's deposition (Resp.Br.74 n.10) citing cases standing for the proposition "[a]llegations in a post-conviction motion are not self-proving. . . ." State v. Boone,869S.W.2d70,78(Mo.App.,W.D.1993). The matters surrounding staying O'Toole's deposition are not "allegations" of the post-conviction motion. To refuse to accept this documentation would expressly contradict this Court's last Smulls' holding. While rejecting Smulls' claim O'Brien should be disqualified because his son was a St. Louis County prosecutor, this Court accepted Waldemer's motion hearing representations regarding the circumstances and terms of O'Brien's son's employment. Smulls v. State,10S.W.3d497,501 (Mo.banc2000)(relying on

Rem.R.Tr.148-49). Smulls' filings chronicled what 29.15 counsel did diligently pursuing O'Toole's deposition and are no different.

There were three hearings on O'Toole's deposition - motion to quash subpoena (Rem.R.Tr.71-126), continuance (Rem.R.Tr.233-48), and motion to strike Smulls' O'Toole's death filings (Rem.R.Tr.1429-37). Respondent could have challenged Smulls' diligence documentation at any hearing, but did not. Some of Smulls' diligence documentation was attached to and discussed in his continuance motion and not objected to (Rem.R.L.F.518-26). While respondent complains about Smulls' reliance on contemporaneous filings documenting his efforts to obtain O'Toole's deposition, it also relies on a letter Smulls' counsel wrote O'Brien on December 29, 1997 requesting he rule on outstanding matters including O'Toole's deposition (Resp.Br.75-76 relying on Rem.R.L.F.487-88).

Although respondent complains about Smulls' diligence documentation, it relies on arguments Waldemer made nearly one year after O'Toole's originally scheduled deposition that O'Toole was not served (Resp.Br.77). Respondent's motion to quash stated: "The Honorable Daniel J. O'Toole <u>was</u> <u>served</u> with a subpoena for his deposition to be taken in this Cause on June 18, 1997 at 11:00 a.m." (Rem.R.L.F.230)(emphasis added). Respondent's motion asked for an "order quashing the subpoenas <u>served</u> upon the Honorable Susan E. Block and the Honorable Daniel J. O'Toole <u>served</u> upon them for deposition. . . ." (Rem.R.L.F.230)(emphasis added). The court file reflects O'Toole was served with separate subpoenas for each deposition date (Supp.Rem.R.L.F.1-4). Any complaint about service was waived by admitting service and passage of nearly one year.

See State v. Stevens, 949S.W.2d257,258 (Mo.App.,S.D.1997)("no objection" constitutes affirmative waiver of right to complain).

Respondent also relies on Waldemer's representations O'Toole asked respondent to quash his subpoena and that the record would show that request (Resp.Br.77). The record contains no such evidence (App.Br.104).

Respondent attempts to mislead this Court to believe Smulls' request the proceedings be stayed until certiorari was decided caused Smulls to lose the opportunity to depose O'Toole. Contrary to respondent's representations, this case was not "remanded" June 25, 1996 (Resp.Br.75). The modified opinion did not issue until November 19, 1996. State v. Smulls,935S.W.2d9(Mo.banc1996).

On April 10, 1997, O'Brien set a prehearing conference for May 9, 1997 (Rem.R.L.F.69). On May 9, 1997, Smulls argued the U.S. Supreme Court had exclusive jurisdiction while certiorari was pending (Rem.R.Tr.1-10). O'Brien directed Smulls to address other matters including what claims required an evidentiary hearing (Rem.R.Tr.11-12,62-70). Three days later, on May 12, 1997, Smulls apprised O'Toole he wanted to depose him **during the next two weeks** (Rem.R.L.F.257). A mere three weeks later certiorari was denied. Smulls v. Missouri,117S.Ct.2415 (decided June 2, 1997). Four days after certiorari was denied, June 6, 1997, O'Brien heard respondent's motion to quash O'Toole's deposition subpoena, set for June 18, 1997, and ordered the deposition stayed (Rem.R.Tr.71; Rem.R.L.F.277). At that hearing, respondent argued until there was a ruling on whether an evidentiary hearing would be held, O'Toole's deposition should not be allowed (Rem.R.Tr.115-16). The stay was finally lifted seven

months later on January 5, 1998 (Rem.R.L.F.492-94). O'Brien never stayed the proceedings at Smulls' request.

Respondent represents that along with Smulls' O'Toole's death pleadings, a newspaper article about "Judge Corrigan" was filed (Resp.Br.76). Smulls did not file any newspaper article about Corrigan, but did file O'Toole's Post obituary (Rem.R.L.F.683).

Respondent claims O'Brien properly stayed O'Toole's deposition under Rule 56.01(c) authorizing a "party" to seek discovery protective orders (Resp.Br.77-78). Throughout the prosecutor's office objected to Smulls' discovery claiming it was not a "party" (Rem.R.L.F.202-03, 260-76;R.L.F.52,319-20). That prosecutor's office cannot choose to be "a party" for some matters, but not others. Rule 56.01(c) did not apply. That Rule also only allows a protective order upon a showing of "annoyance, embarrassment, oppression, or undue burden or expense. . . ." Respondent never satisfied that burden.

A new trial or hearing is required.

VIII. WALDEMER LIED - WHY HE STRUCK SIDNEY O'BRIEN CLEARLY ERRED DENYING ALL MATTERS RELATING TO SMULLS' CLAIMS ABOUT WALDEMER'S BATSON LIES AND DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED BECAUSE SMULLS' PLEADINGS ALLEGED FACTS WARRANTING RELIEF AND THE RECORD THROUGHOUT SHOWS WALDEMER HAS NOT PLAYED BY THE RULES.

Respondent claims the pleadings failed to allege any biased jurors served (Resp.Br.82). Point I, supra, addresses this.

Respondent claims Smulls' allegations were insufficient because they raise the theory the jury was more likely to convict with an all-white jury and that such "racial stereotyping" is "improper" and "speculation" (Resp.Br.82). Smulls' pleading allegations, however, reflect U.S. Supreme Court Justices O'Connor's and Thomas' views (App.Br.53-54).

Again, rather than respond to Smulls' brief, respondent personally attacks Smulls' counsel (Resp.Br.83-84). The record establishes Waldemer's repeated acts of not playing by the rules and lying.

Waldemer obtained an ex parte motion ruling. On June 30, 1994, Corrigan considered and denied multiple pleadings relating to his ability to fairly serve (Rem.R.L.F.61;R.L.F.1200-07). Waldemer had neither filed any responsive pleadings before the proceedings commenced nor before they adjourned (Rem.R.L.F.61; R.L.F.1114-15;R.Tr.6-7). On July 7, 1994, Smulls' counsel received two pleadings file

stamped June 30, 1994 (Rem.R.L.F.61;R.L.F.1115). Both lacked a certificate of service (Rem.R.L.F.61;R.L.F.1115,1124-26). One moved the State be allowed to "file its written objections in response to the oral argument respondent made in opposition to Movant's multiple Motions to Disqualify This Court" and had the signed notation **"SO ORDERED"** (Rem.R.L.F.61;R.L.F.1124). The second related the State's rendition of a statutory timeliness procedural argument it made on June 30, 1994 (Rem.R.L.F.61; R.L.F.1125-26). When Smulls' counsel received the certified legal file documents on appeal, there were documents related to the second pleading that were never served on them (Rem.R.L.F.61-62,R.L.F.1069-1109). The two pleadings were filed and ruled on ex parte (Rem.R.L.F.62;R.L.F.1114-21;R.Tr.6-7).

Chesterfield's Police Department's record custodian was subpoenaed for an August 5, 1993 deposition and to produce documents (R.L.F.43-44). Waldemer's motion to quash claimed allowing this discovery would be "oppressive," "unduly burdensome," and "expensive" (R.L.F.59). That custodian contacted Smulls' counsel and agreed to furnish the available subpoenaed documents to avoid appearing (R.L.F.85,107-08). On July 28, 1993, the custodian was preparing to mail the documents to Smulls' counsel and counsel informed him if the documents were timely received, it was unnecessary to appear (R.L.F.85,108). Smulls' counsel spoke to the custodian on August 3, 1993, when the documents were not received and was told the Prosecutor's Office had directed the custodian not to furnish the subpoenaed documents because it would be moving to quash (R.L.F.85,108). At the August 17, 1993, hearing, Waldemer represented to allow this discovery would be "burdensome and costly" (R.L.F.839). Smulls' counsel informed the

court at the motion hearing of the State's directive to the custodian (R.L.F.840-41) which Waldemer never denied (R.L.F.827-53). Under this Court's last Smulls opinion, and its treatment of Waldemer's O'Brien's son representations, this record establishes Waldemer's misconduct. Smulls v. State,10S.W.3d497,501 (Mo.banc2000)(relying on Rem.R.Tr.148-49)(discussed Point VI, supra). The record does not show Waldemer was "truthful" because all the records requested had not been found (Resp.Br.84). The record shows the custodian was directed not to provide documents he was able to furnish pursuant to the State's directive and Waldemer then represented to the court it would impose hardship to satisfy Smulls' document request.

Waldemer did have an inmate witness' testimonial writ quashed without notice and opportunity to be heard (App.Br.116). There was a hearing on this matter (R.Tr.3-5) and again under Smulls v. State,10S.W.3d at 501, supra, Smulls' counsel's arguments at that hearing establish the writ was quashed without notice and opportunity to be heard.

While respondent seeks to mislead this Court about what the record shows as to Waldemer's conduct throughout as to certain matters, it makes no attempt to respond to Waldemer's inability to tell the same story twice about O'Toole's deposition subpoena (App.Br.116).

A hearing is required.

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

O'BRIEN CLEARLY ERRED OVERRULING SMULLS' OBJECTIONS TO CORRIGAN'S REPUTATION EXPERT FRIENDS' OPINIONS AND IN PROHIBITING SMULLS' CROSS-EXAMINATION AND IN EXCLUDING SMULLS' EXPERT, PROFESSOR GALLIHER'S TESTIMONY, WHICH DENIED SMULLS ALL CONSTITUTIONAL RIGHTS THE ORIGINAL BRIEF ARGUED, BECAUSE SMULLS' EVIDENCE WAS LIMITED TO CORRIGAN'S PATTERNS OF BEHAVIOR ESTABLISHING HE COULD NOT FAIRLY DECIDE BATSON, DID NOT INCLUDE CORRIGAN'S CHARACTER, AND THE RECORD SHOWS SMULLS' CROSS-EXAMINATION ABOUT THE ST. LOUIS COUNTY PROSECUTOR'S OFFICE'S PRACTICES AND POLICIES TO STRIKE AFRICAN-AMERICANS BECAUSE OF RACE WAS OFFERED TO ESTABLISH WHY IT WAS CRUCIAL TO HAVE A JUDGE OTHER THAN CORRIGAN DECIDE BATSON.

Quoting a few words lifted out-of-context, respondent attacks the record's adequacy made as to why Smulls sought to cross-examine respondent's Corrigan reputation expert friends about the long-standing policy and practices of the St. Louis County Prosecutor's Office to peremptorily strike African-Americans because of their race (Resp.Br.97-99). A fair presentation of the record, in context, shows:

> MR. SWIFT: Judge, this goes to a claim that's been pled and a hearing granted. Judge Corrigan, as Mr. Wolff testified about Judge

Corrigan's fairness on cases with African-Americans, we think the issue of the striking of African-American jurors is a particularly important one as a policy of the Prosecuting Attorney's Office. And that goes to the other issue before, very issue before, Judge Corrigan's striking of a black juror from Mr. Smulls' case.

We should be able to inquire into the practices and policies of the St. Louis County Prosecutor's Office. But it ultimately goes to having a fair Batson hearing before Judge Corrigan.

(Rem.R.Tr.1265)(emphasis added).

* * * *

MR. SWIFT: Judge, it is my understanding from our communication with Mr. Wolff that he would testify -- that is my understanding that there was a practice and policy of the prosecutors in St. Louis County in 1992 of striking African-American jurors. And this goes to the issue of the importance of having a judge other than Judge Corrigan, because of the practices of the St. Louis County prosecutors, when you have these claims, Batson claims, present. Because of the policy and practice of the St. Louis County Prosecutor's Office it becomes that much more critical.

(Rem.R.Tr.1269)(emphasis added).

Smulls reasserted these same grounds whenever he sought to cross-examine respondent's witnesses about the St. Louis County Prosecutor's Office's long-standing policies and

practices (Rem.R.Tr.1299-1300;1310-16). All of Smulls' excluded evidence was intended to show why it was especially important in St. Louis County to have a judge other than Corrigan deciding Smulls' Batson claim (App.Br.130-31).

State v. Weaver,912S.W.2d499,510(Mo.banc1995) does not support presenting Corrigan character evidence on the grounds Smulls "opened the door" (Resp.Br.93). The evidence admitted in Weaver, in response to the defense's evidence of the victim possessing a loaded gun, was proper not as rebuttal to character evidence, but because "it was defense counsel's tactic to inject into the case the victim's state of mind." Weaver,912S.W.2d at 510.

Respondent characterizes Professor Galliher's testimony as "opinion that Judge Corrigan was unfit to be a judge" (Resp.Br.94). Galliher never testified about Corrigan's judicial fitness. Galliher did testify all of Corrigan's behaviors viewed together were inconsistent with adhering to Batson's spirit and were relevant to Smulls' ability to have Batson fairly decided (App.Br.128).

Cotner Productions Inc. v. Snadon,990S.W.2d92,101-02(Mo.App.,S.D.1999) does not support admitting Corrigan character evidence (Resp.Br.92-93). In a business transaction lawsuit, a defendant presented evidence he was an "ethical" businessman. Id.101. The plaintiff countered with evidence disputing that claim. Id.101-02. Smulls' claims had nothing to do with Corrigan's character such as whether he was an "ethical" person. Smulls' evidence did establish a pattern of conduct demonstrating Corrigan cannot fairly decide Batson (App.Br.125).

Respondent asserts Smulls' evidence was an "attempt to assassinate Judge Corrigan's character" (Resp.Br.93). Corrigan's repeated false and unforthright behavior professing he cannot acknowledge a person's race for Batson purposes establishes Smulls could not have his Batson claim fairly decided and does not address Corrigan's character.

A new trial or new hearing is required.

XI. RACIALLY MOTIVATED SEEKING DEATH

O'BRIEN CLEARLY ERRED IN ALL RULINGS ON SMULLS' CLAIM DEATH WAS SOUGHT FOR RACIALLY DISCRIMINATORY REASONS BECAUSE SMULLS' CLAIM WAS ADEQUATELY PLED, BUT IF NOT, THAT WAS BECAUSE RESPONDENT AND CORRIGAN IMPROPERLY BLOCKED DISCOVERY.

Respondent asserts Smulls failed to adequately plead his racially motivated seeking death claim and it does not matter respondent and Corrigan prevented Smulls from obtaining necessary discovery (Resp.Br.103-05). That is not the law.

In Williams v. Taylor,120S.Ct.1479,1492-95(2000), the Court held the death-sentenced petitioner was entitled to a federal evidentiary hearing. In state court, Williams filed a motion to investigate generalized allegations of jury improprieties. Id.1493. The Commonwealth opposed the motion and the Virginia Supreme Court dismissed. Id.1493. The Court noted the claims' "vagueness" was not Williams' fault and ordered a hearing, even under AEDPA. Id.1493. The Court went on to hold a hearing was required because Williams had made reasonable efforts to discover the substance of his claims. Id.1493-94. Smulls' claim was adequately pled, but if not, it was because of respondent's and Corrigan's actions denying his discovery (App.Br.134-35). More detailed pleading would have occurred if Smulls' discovery had been allowed. Under Williams, Smulls would be entitled to a federal evidentiary hearing.

Smulls' claims are cognizable (App.Br.137). Smulls has never "conceded" (Resp.Br.101) his claim could have been raised at trial and direct appeal.

A hearing is required.

CONCLUSION

Mr. Smulls' original and reply briefs request: 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,

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Certificate of Compliance

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

The attached reply 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 7,750 (25% of 31,000) words allowed for an appellant's reply 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 _____, 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