No. 84656

IN THE
SUPREME COURT OF MISSOURI

STATE EX REL. JOSEPH AMRINE,

Petitioner,

v.

AL LUEBBERS,

Respondent.

On Writ of Habeas Corpus to the Missouri Supreme Court

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

Petitioner was convicted in the Circuit Court of Cole County, Missouri, of murder in the first degree and sentenced to death. Petitioner is presently incarcerated at the Potosi Correctional Center located in Mineral Point, Missouri. The respondent, Al Luebbers, is no longer the Superintendent of the Potosi Correctional Center. Rather, Don Roper is presently the Superintendent of the Potosi Correctional Center. Petitioner petitioned this Court pursuant to Missouri Supreme Court Rule 91. This Court has jurisdiction over this petition for writ of habeas in the first instance since this involves a capital case. Missouri Supreme Court Rule 91.02(b).

STATEMENT OF FACTS

Petitioner was indicted for murder in the first degree on December 17, 1985. Section 565.020, RSMo 1984. The cause proceeded to trial on April 28, 1986 (Trial Transcript - - hereinafter "Tr." at 7).[1] The evidence adduced at trial, in the light most favorable to the verdict, was as follows: On October 18, 1985, Gary "Fox" Barber and Joseph Amrine were inmates at the Missouri State Penitentiary (Tr. 150-151). Approximately two weeks prior to this date, petitioner learned that Barber had told several inmates of homosexual encounter which had allegedly occurred between Barber and petitioner when they were cellmates (Tr. 264, 292, 495-460). In response to these rumors, petitioner threatened to stab Barber (Tr. 268, 432-435). On October 8, 1995, petitioner confronted Barber regarding the allegations of homosexuality. When Barber denied making these statements, a fight broke out between Barber and Jerry "Tat-tat" Russell (Tr. 271, 295-296, 417-418, 460).

On the evening of October 17, 1985, Clifford Valentine told Daryl Saddler to go upstairs and get a knife (Tr. 397-398, 419). After obtaining the knife, Saddler passed it on to Omar Hutchison. Following lunch on October 18, 1985, the inmates from Housing Unit 5A were permitted to go the multipurpose room for recreation (Tr. 276, 397-398, 419). Two guards, Officer Thomas Smith and John Noble, were on duty supervising approximately forty-

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[1] Respondent requests this Court to take judicial notice of the records filed with this Court during petitioner's direct appeal (Cause Number 68694) and appeal from the denial of petitioner's post-conviction relief motion (Cause Number 71826).

five to fifty inmates in the room that day (Tr. 155-156, 171). The door to the recreation area was locked (Tr. 156). The inmates were allowed to enter and exit the room only through the front door guarded by Officer Noble (Tr. 173).

Hutchison enters the recreational area and went to the window at the back of the room (Tr. 386). He removed the knife, given to him by Saddler, from the waistband of his pants and taped it to the outside of the window (Tr. 386). The knife was described as an ice pick type weapon (Tr. 386). Upon entering the room, petitioner went to the window and removed the knife (Tr. 389). Petitioner approached Barber who was sitting alone in the corner of the recreation room and started a conversation. The two men started pacing up and down the recreation room and talking. The petitioner pulled the knife out of his waistband and stabbed Barber in the back below his left shoulder blade (Tr. 334, 393). The wound was three and half to four inches deep and it ended within one-half inch of his heart (Tr. 252-253). Barber's left lung was penetrated, and he died in the penitentiary hospital of internal bleeding (Tr. 253-254).

Barber had reached the front of the room and stated, "Joe, I'm going to get you" and collapsed near Officer Noble (Tr. 171, 338, 396). Petitioner offered the testimony of five inmates who stated that he was either standing, or sitting, at a table playing poker when Barber collapsed (Tr. 501-502, 516-517, 536, 555, 578). At the close of the evidence, instructions, and arguments, the jury found petitioner guilty as charged.

This Court affirmed petitioner's conviction and sentence in State v. Amrine, 741 S.W.2d 665 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988). Petitioner subsequently filed a post-conviction relief motion in the Circuit Court of Cole County. After an evidentiary

hearing, the Circuit Court denied petitioner's post-conviction relief motion. Petitioner appealed the Circuit Court's denial of his post-conviction relief motion to this Court. This Court affirmed the Circuit Court's denial in Amrine v. State, 785 S.W.2d 531 (Mo. banc 1990), cert. denied, 498 U.S. 881 (1990).

On October 16, 1990, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri. On June 25, 1991, an amended petition for writ of habeas corpus was filed. On February 26, 1996, the Honorable Fernando J. Gaitan, Jr., denied petitioner's petition for writ of habeas corpus. In Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. 1997) (en banc), cert. denied, 523 U.S. 1123 (1998), the Eighth Circuit Court of Appeals remanded the cause back to Judge Gaitan to permit consideration of petitioner's claim of newly discovered evidence of actual innocence under Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 871, 130 L.Ed.2d 808 (1995) raised during the appeal.

On June 24, 1998, Judge Gaitan conducted an evidentiary hearing. On October 29, 1998, Judge Gaitan issued an order denying petitioner relief. Petitioner appealed Judge Gaitan's order denying his petition for writ of habeas corpus to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals affirmed Judge Gaitan's decision in Amrine v. Bowersox, 238 F.3d 1023 (8th Cir. 2001). The United States Supreme Court denied petitioner's petition for writ of certiorari in Amrine v. Luebbers, 534 U.S. 963 (2001).

ARGUMENT

I.

PETITIONER IS NOT ENTITLED TO RELIEF UNDER MISSOURI SUPREME COURT RULE 91 BECAUSE COLLATERAL ESTOPPEL PREVENTS PETITIONER FROM ASSERTING A CLAIM OF ACTUAL INNOCENCE SINCE THE SAME EVIDENCE PETITIONER PRESENTS TO THIS COURT WAS PRESENTED, AND REJECTED, IN HIS POST-CONVICTION PROCEEDINGS IN STATE AND FEDERAL COURTS. MOREOVER, A CLAIM OF ACTUAL INNOCENCE IS NOT, IN AND OF ITSELF, A GROUND FOR GRANTING RELIEF UNDER RULE 91 AND PETITIONER'S ALTERNATIVE CLAIM THAT HIS NEW EVIDENCE OF ACTUAL INNOCENCE ALLOWS HIM TO HAVE HIS PROCEDURALLY DEFAULTED CLAIMS REVIEWED FAILS BECAUSE PETITIONER'S ONLY NEW EVIDENCE IS THE RECANTATION OF JERRY POE, SINCE RANDY FERGUSON AND TERRY RUSSELL RECANTED DURING PETITIONER'S POST-CONVICTION PROCEEDINGS, AND POE'S RECANTATION IS NOT CREDIBLE.

Petitioner's first point relied on alleges that he is entitled to the issuance of a writ of habeas corpus discharging him from his unconstitutional conviction and sentence because he can persuasively establish that he is actually innocent of the murder. Petitioner raises both a free-standing claim of actual innocence and, or in the alternative, a claim that he meets the

gateway to have his procedurally defaulted claims reviewed on the merits.[2] Petitioner's claim fails for several reasons.

First, petitioner's claim fails as a free-standing claim, or as a gateway to have his procedurally defaulted claims reviewed on the merits under the doctrine of collateral estoppel. Collateral estoppel precludes petitioner from asserting that his newly discovered evidence of actual innocence entitles him to relief. As this Court stated in In re Carey, No. SC84189 (Mo. banc, December 4, 2002), the doctrine of collateral estoppel precludes parties from re-litigating issues of ultimate fact that have previously been determined by a valid judgment. Like In re Carey, the petitioner had a full and fair opportunity sufficient to satisfy the

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[2] A free standing claim of actual innocence was addressed by the United States Supreme Court in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In Herrera, the Supreme Court held that a claim of actual innocence, in and of itself, is insufficient to present a ground for relief under 28 U.S.C. §2254. While petitioner contends that Herrera does not stand for the proposition that a claim of actual innocence is not in and of itself a ground for relief under 28 U.S.C. §2254, in Mansfield v. Dormire, 202 F.3d 1018 (8th Cir. 2000), the Eighth Circuit Court of Appeals stated that "[t]o the extent Mansfield contends he is actually innocent of this crime, we add that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 1023-1024, citing Herrera v. Collins, supra.

requirements of due process based on the decision issued by Judge Gaitan in the hearing held before the United States District Court for the Western District of Missouri, and the conclusion of the Eighth Circuit Court of Appeals affirming Judge Gaitan's credibility determinations relating to the newly discovered evidence of actual innocence presented by petitioner.

Petitioner cannot now assert that Judge Gaitan's credibility determination does not have the full force of a valid judgment simply because Judge Gaitan did not agree with petitioner's witnesses. Judge Gaitan determined that Jerry Poe had a reason for recanting his trial testimony. Judge Gaitan found that Poe's recantation came after he was charged with threatening state officials with harm. As Judge Gaitan correctly points out, Poe had a vendetta against the state, and especially the Department of Corrections. Because petitioner fully litigated this claim in the United States District Court for the Western District of Missouri, and the claim was rejected by the United States District Court for the Western District of Missouri in Judge Gaitan's decision, and the Eighth Circuit Court of Appeals affirmed Judge Gaitan's decision, collateral estoppel prevents petitioner from asserting that he is entitled to relief under Rule 91 bases on newly discovered evidence of actual innocence.

Second, petitioner's newly discovered evidence of actual innocence raised in his petition consists of the recanted testimony of Poe, Randy Ferguson and Terry Russell.[3] However, Ferguson and Russell recanted their trial testimony during petitioner's post-conviction proceedings (Post-conviction Legal File - - hereinafter "P.C.L.F." at 191-193). The motion court found the recantations not to be credible (P.C.L.F. 191-193). Petitioner did not appeal the motion court's findings that the recantation were not credible to this Court. As such, the recantations of Ferguson and Russell are not newly discovered evidence of actual innocence. These recantations were known, and presented, during petitioner's post-conviction proceedings back in 1989. As this Court stated in State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993), habeas corpus was not designed to duplicate a direct appeal or post-conviction proceeding. Petitioner attempts to present recanted testimony from Ferguson and Russell that was presented during his post-conviction proceedings. Thus, petitioner is attempting to duplicate his post-conviction proceedings as to the recanted evidence of Ferguson and Russell. Not only is the recantation not newly discovered, the factual determination that the recantation is not credible (P.C.L.F. 191-193) should have collateral estoppel effect on the factual issue in this litigation.

[3] Although Russell has recanted his trial testimony, Russell did not actually witness the murder.

As for petitioner's free standing claim of actual innocence, petitioner cites this Court to cases in which newly discovered evidence of actual innocence was presented either in the motion for new trial or on direct appeal, and not 17 years after the conviction. In Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000), this Court adopted the manifest injustice standard set forth by the United States Supreme Court in Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). In Clay, this Court stated that:

> [T]his Court holds that the manifest injustice or miscarriage of justice standard requires a habeas corpus petitioner "to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'"

Id. at 217. This Court further stated in Clay, that the miscarriage of justice standard is a "gateway" through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. Id. In Clay, this Court recognized that newly discovered evidence of actual innocence merely allowed a petitioner to have his procedurally defaulted claims reviewed on the merits, and was not a basis for granting relief in and of itself.

While petitioner cites this Court to State v. Williams, 652 S.W.2d 102 (Mo. banc 1983), that case involved a direct appeal. Petitioner also cites this Court to State v. Mooney, 670 S.W.2d 510 (Mo. App., E.D. 1984). That case also involved a direct appeal. In fact, in Mooney, the Missouri Court of Appeals stated that their research revealed that the only remedy for newly discovered evidence of actual innocence presented out of time was executive clemency. Id. at 513. In support of this proposition, the Missouri Court of Appeals cited to

this Court's decision in State v. Johnson, 286 S.W.2d 787 (Mo. 1956); State v. Sadowski, 256 S.W. 753 (Mo. 1923) and State v. Worley, 353 S.W.2d 589 (Mo. 1962). Id. at 513-514.[4]

None of the cases cited by petitioner supports his proposition that he may present a claim of newly discovered evidence of actual innocence as a ground for relief in a petition for writ of habeas corpus under Missouri Supreme Court Rule 91. Moreover, the cases cited by petitioner only stand for the proposition that a claim of newly discovered evidence of actual innocence presented in a motion for new trial, or in limited circumstances on direct appeal, may entitle the trial court to consider the new evidence to determine whether to grant a motion for new trial. The cases do not stand for the proposition that presenting newly discovered evidence of actual innocence supports the granting of a writ of habeas corpus without showing that there was some form of constitutional violation.

[4] Despite finding that newly discovered evidence of actual innocence could not be presented once the time for filing a motion for new trial had expired, the Missouri Court of Appeals held that in limited circumstances remanding the case to the trial court with instructions that the defendant be permitted to file a motion for new trial raising the newly discovered evidence would be the appropriate remedy. Id. at 515-16.

Petitioner, in the alternative, asserts that even if the newly discovered evidence of actual innocence is merely a gateway in which to have his procedurally defaulted claims reviewed on the merits, he still meets this requirement. However, petitioner does not even attempt to explain how his newly discovered evidence of actual innocence meets this requirement. First, as previously discussed, the doctrine of collateral estoppel prevents petitioner from asserting that his witnesses are credible. Second, the recantations of Ferguson and Russell are not newly discovered evidence. Furthermore, while petitioner claims that individuals have been released from death row "because of powerful evidence of innocence, which in some cases did not surface until decades after conviction,." (Brief at 38), petitioner cites this Court to Schlup. Petitioner ignores the fact that although Schlup was found to have newly discovered evidence of actual innocence that entitle him to a new trial, Schlup eventually pled guilty to the charges. See Killer Lies to Get Off Death Row, Then Pleads Guilty of Murder, Jefferson City Post Tribune, Wednesday, March 24, 1999.

Furthermore, while petitioner cites DNA cases to this Court to support his claim of actual innocence, petitioner's claim of actual innocence does not involve DNA. Rather, it involves recanted testimony. Recantations are freely given. See Man Recants Confession That Freed Death Row Inmate, St. Louis Post-Dispatch, Friday, December 13, 2002. Petitioner has not shown that the recantations are credible. The recantations of Ferguson and Russell was found not to be credible by the motion court during petitioner's post-conviction proceedings. Likewise, the recantation by Poe was found not to be credible by the United States District Court. As such, petitioner's first point relied, on claiming that he is entitled to the issuance

of a writ of habeas corpus discharging him from his unconstitutional conviction and sentence of death because he can persuasively establish that he is actually innocent of the murder, should be denied.

II.

PETITIONER IS NOT ENTITLED TO RELIEF UNDER MISSOURI SUPREME COURT RULE 91 BECAUSE HE HAS FAILED TO ESTABLISH THAT THE PROSECUTOR PRESENTED PERJURED TESTIMONY.

Petitioner's second point relied on contends that he is entitled to the issuance of a writ of habeas corpus discharging him from his unconstitutional conviction and sentence because petitioner's conviction was secured through the prosecution's use of the perjured testimony of Jerry Poe, Randy Ferguson, and Terry Russell. This claim can only be reviewed if this Court determines that petitioner has established the gateway requirements to have his procedurally defaulted claim reviewed on the merits. Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000).

Petitioner contends that Circuit Judge Tom Brown, then the prosecutor of Cole County, presented perjured testimony in order to secure the conviction. In support of this claim, petitioner relies on the recanted testimony of Poe, Ferguson and Russell. Based on these recantations, petitioner states that he has presented strong evidence that Judge Brown knew he was presenting perjured testimony. Petitioner also claims that Judge Brown "skillfully glossed over the major inconsistency" between the witnesses' testimony and that Judge Brown "skillfully neutralized the exculpatory evidence from Officer Noble." Petitioner further alleges that Judge Brown recklessly ignored the fact that Terry Russell was the actual murderer.

Petitioner makes a great leap from the allegation that the witnesses have recanted their trial testimony to his claim that Judge Brown secured a conviction through perjured testimony. First, petitioner assumes that the recantations are true. As stated in response to petitioner's first point relied on, the Rule 29.15 motion court found that the recantations of Ferguson and Russell were not credible and the United States District Court found that the recantation of Poe was not credible. Petitioner, like too many people, hear the word recantation and think that now these individuals are telling the truth. As this Court stated in Shoemake v. State, 462 S.W.2d 772, 775 (Mo. banc 1971), assessing the credibility of a witness is pecuiliarly within the province of the trial court. Like the Missouri Court of Appeals in Ball v. State, 574 S.W.2d 463 (Mo. App. 1978), which deferred to the trial court's credibility determination of a recanting witness noting that the trial court had a better opportunity to evaluate the witnesses' credibility, this Court should also defer to the motion court's credibility determination as to the recantations of Ferguson and Russell and the United States District Court's credibility determination as to the recantation of Poe.

Here, petitioner attempts to bypass this standard and simply asks this Court to believe the recantations despite the fact that two other courts have found them not to be credible. In Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the Supreme Court remanded the case back to the district court to make credibility findings. In fact, the Supreme Court in Schlup stated that the district court could consider the timing of the new evidence in making this determination. Id. 513 U.S. at 332, 115 S.Ct. at 869.

In petitioner's federal habeas corpus proceeding, petitioner presented the testimony of Poe, Ferguson and Russell that they were threatened to testify against petitioner by Judge Brown and his investigators. Judge Brown and his investigators testified in the federal habeas corpus proceeding that they never threatened these individuals (Petitioner's Exhibits 14, pp. 8, 92, 115). Both Ferguson and Russell testified during petitioner's post-conviction proceedings that they had been threatened. Russell testified at the post-conviction evidentiary hearing that he was forced to testify against petitioner. The motion court held that "[t]he Court finds that no threats were made" (P.C.L.F. 191). The motion court based this finding on Russell's testimony that he was placed in protective custody after returning to the Missouri State Penitentiary and that Russell testified that he disliked protective custody (P.C.L.F. 191-192). The motion court held that "[t]he Court does not believe Russell and finds him incredible. His testimony in this proceeding was designed solely to place him in good stead with Amrine so he could be released from protective custody" (P.C.L.F. 192).

Petitioner attempted to assert that Ferguson's testimony was false in his motion for new trial. However, Ferguson re-affirmed his trial testimony at the hearing on petitioner's motion for new trial. Petitioner also attempted to claim Ferguson's trial testimony was false in his direct appeal. This Court rejected petitioner's claim. See State v. Amrine, 741 S.W.2d 665, 674 (Mo. banc 1987). At petitioner's post-conviction evidentiary hearing, Ferguson testified that he was coerced by investigators into making statements against petitioner. The motion court rejected this claim holding that "[n]o threats or coercion was used to secure his [Ferguson's] testimony" (P.C.L.F. 192). Ferguson testified at the post-conviction evidentiary

hearing that he was forced to testify falsely against petitioner because he was told that he would be left in the Missouri State Penitentiary and given a "snitch jacket" if he did not testify against petitioner (P.C.L.F. 193). Both investigator Lee and Brooks testified at the post-conviction evidentiary hearing that no threats or physical abuse were made by either of them to secure Ferguson's testimony (P.C.L.F. 193). The motion court found that Ferguson is unworthy of belief as to the threats and coercion that was used against him. (P.C.L.F.193). Ferguson's recantation is not credible because at one point he tried to claim responsibility for the murder (Petitioner's Exhibit 3, p. 58). Likewise, Ferguson acknowledges having psychological problems (Petitioner's Exhibit 3, pp. 22, 48).

Poe's recantation is also not credible. Poe claimed he wrote a letter to this Court recanting his trial testimony (Petitioner's Exhibit 6, p. 28). However, there is no support for this claim. Poe also claimed he wrote to Judge Russell Clark in the United States District Court (Petitioner's Exhibit 6, p. 29). Again, there is no support for this claim. Furthermore, Poe signed an affidavit recanting his trial testimony on September, 1996 (Petitioner's Exhibit 6). The affidavit was executed after Poe was convicted of threatening to assault a prosecutor's twelve year old daughter and threatening to shoot and cripple Missouri prison officials. See United States v. Poe, 96 F.3d 333 (8th Cir. 1996). During Poe's deposition he refused to even admit that he was confined at the federal penitentiary in Leavenworth, Kansas, due to the threats stating "they say it's all my imagination; I ain't really here" (Petitioner's Exhibit 6, p. 31).

Furthermore, during the federal habeas corpus proceedings before Judge Gaitan, the audiotape interview of Kevin Booker was presented (Petitioner's Exhibit 14, p. 124). Booker said that he witnessed the murder and that he saw petitioner stab Barber (Respondent's Exhibit A). Because petitioner relies on the recantations as proof that Judge Brown presented perjured testimony, since the recantations are not credible petitioner's claim should fail. Petitioner's assertion that he has presented strong circumstantial evidence that Judge Brown knew he was presenting perjured testimony is not supported by the record. Likewise, while petitioner calls the investigator's conduct evidence tampering, petitioner fails to support this accusation. Petitioner cites to testimony that the officer's reports are edited for clarity and accuracy in support of this claim. However, petitioner ignores the fact that, even when they are edited, the officers still sign the reports as being truthful. There is absolutely no evidence that officers sign fabricated reports or that any changes effected the officers' statements. Moreover, petitioner says that the editing of the reports was "likely followed" in this case even though he presents absolutely no evidence that in this case the reports were edited for accuracy and clarity. Thus, petitioner fails to demonstrate that Judge Brown knowlingly presented perjured testimony from Ferguson, Poe and Russell and petitioner's second point relied on should be denied.

III.

PETITIONER IS NOT ENTITLED TO RELIEF UNDER MISSOURI SUPREME COURT RULE 91 BECAUSE THIS COURT HAS PREVIOUSLY RULED ON PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS DURING THE APPEAL FROM THE DENIAL OF PETITIONER'S POST-CONVICTION RELIEF MOTION, AND, TO THE EXTENT THAT THESE CLAIMS WERE NOT RAISED IN PETITIONER'S POST-CONVICTION PROCEEDINGS, THE CLAIMS ARE WITHOUT MERIT.

Petitioner's third point relied on raises five ineffective assistance of counsel claims. These claims may be reviewed only to the extent that they were not raised in petitioner's post-conviction proceedings, and that petitioner can either show cause for not raising the claims in his post-conviction proceedings or a manifest injustice - - actual innocence - - to have his procedurally defaulted claims reviewed on the merits. Brown v. State, 66 S.W.3d 721 (Mo. banc 2002).

Petitioner alleges: 1) Trial counsel had a conflict of interest because the Public Defender's Office represented both petitioner and Randall Ferguson; 2) Trial counsel was ineffective for failing to effectively cross-examine witnesses Randy Ferguson, Jerry Poe, and Terry Russell; 3) Trial counsel was ineffective for failing to interview defense witness Brian Strothers prior to trial and failing to call Ronnie Ross and Kevin Dean as witnesses; 4) Trial counsel was ineffective for failing to elicit evidence diminishing the probative value of "minuscule blood droplets" on petitioner's clothes; and 5) Trial counsel was ineffective for

failing to elicit testimony from corrections officer John Noble that Noble identified Terry Russell as the murderer.

As this Court has stated, habeas corpus is an extraordinary remedy that is not available when other remedies are available and adequate. See Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000). In fact, this Court has stated that:

> This state has established a procedural system that provides a timely review of criminal convictions. It allows for direct appeal and for post-conviction review of certain constitutional protections pursuant to Rules 29.15 and 24.035. Neither these proceedings nor habeas corpus, however, was designed for duplicative and unending challenges to the finality of a judgment.

State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993). Therefore, claims that have been previously raised are barred from review in a habeas corpus proceeding because they present "duplicative and unending" challenges to the finality of a criminal judgment.

Petitioner's first claim of ineffective assistance of counsel alleges a conflict of interest. Petitioner raised this claim in his appeal to this Court from the denial of his post-conviction motion. This Court denied petitioner's claim. Amrine v. State, 785 S.W.2d 531, 535 (Mo. banc), cert. denied 498 U.S. 881 (1990).

Petitioner's second claim of ineffective assistance of counsel alleges that counsel was ineffective for failing to effectively cross-examine Ferguson, Poe and Russell with evidence

to impeach their credibility.[5] Petitioner's claim that the statements Ferguson and Poe gave were mutually contradictory is without merit. At trial, Poe testified that he was in the recreation room on the afternoon of the murder (Tr. 317). Poe testified that petitioner was standing near the punching bag (Tr. 329-31). Poe testified that both petitioner and the victim, Gary Barber, were walking toward him when the murder occurred (Tr. 333-34). Poe then testified to the following:

> Q [By Prosecutor]: And by that, what was it you saw happen about 2:25 p.m. on Friday, October 18, 1985?
>
> A [Poe]: I turned my head to the right and looked over my shoulder like and I seen Mr. Amrine pull a piece of metal out of his shirt, out of the waistband of his pants.
>
> Q: What did he do with it?
>
> A: He stuck Gary Barber in the back with it.

(Tr. 334). Ferguson testified that he saw petitioner and victim walking together near the punching bag when "[petitioner] took his arm off of Gary Barber's shoulder and pulled the knife out of his waistband and came up with his arm with a circle motion and hit Gary Barber with

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[5] Petitioner's brief frequently cites to testimony from two jurors attacking their verdict (Brief at 76, 81-82, 84-86, 93-95) However, as this Court stated in petitioner's appeal from the denial of his post-conviction motion, "Missouri law has long held that a juror may not impeach the jury's verdict after it is rendered." Amrine v. State, 785 S.W.2d at 535-36.

the knife in the upper back" (Tr. 393). Ferguson and Poe did not give contradictory statements. Both Poe and Ferguson stated that petitioner stabbed Gary Barber in the back. Petitioner attacks the fact that Poe did not testify that petitioner and Barber were walking prior to the murder. However, Poe testified that he did not recall seeing what petitioner had done during the recreation period prior to the murder (Tr. 322). No contradiction could have occurred here because Poe stated that he had no knowledge about the only point that petitioner now contests, petitioner's conduct prior to the murder. Counsel is not ineffective for failing to impeach a witnesses statement about events the witness has no knowledge of.

Petitioner's second claim of ineffective assistance of counsel also claims that counsel was ineffective for failing to "drive home to the jury" that Russell was a suspect in the case by presenting evidence that Russell was questioned, read his Miranda rights, and treated like a suspect (Brief at 76). The problem with this argument is that trial counsel adduced this testimony at trial. Counsel adduced testimony that Russell was taken to the control center in the housing unit prior to being interviewed and was not allowed to return to his cell (Tr. 307), that Russell was strip-searched and his fingers were examined for blood (Tr. 307), that Deputy John Hemeyer and Sheriff Wyman Basinger read Russell his rights (Tr. 307), and that prison officials questioned Russell about the murder (Tr. 308). Russell's answers to trial counsel's questions show that he was treated like a suspect, that he was read his rights, and that he was questioned. These are precisely the events that petitioner alleges trial counsel should have adduced. As trial counsel did what petitioner states he should have done, petitioner's claim must fail.

Petitioner's second claim of ineffective assistance of counsel makes a number of claims regarding Russell's truthfulness, or lack thereof. Petitioner claims that trial counsel was ineffective for failing to object when Russell volunteered that he had taken a polygraph examination. First, an admission that a polygraph examination has occurred is not always prejudicial. See State v. Woods, 639 S.W.2d 818, 820 (Mo. banc 1982). Second, petitioner's counsel was not ineffective for failing to object to this statement because trial counsel tried to minimize its effect. As the motion court found in deciding petitioner's Rule 29.15 motion, "asking that the response to this question be stricken would have called attention to the answer in the context of the trial" (P.C.L.F. 13-14). Certainly, calling attention to the fact that Russell took a polygraph examination, without introducing evidence that Russell failed, would highlight the fact that Russell passed. In fact, Russell never mentioned the results of the polygraph.

Moreover, there was no prejudice because petitioner has failed to show that the outcome of the trial would have been different. State v. Weston, 912 S.W.2d 96, 101 (Mo. App. 1995) (volunteered statement by witness that a polygraph examination was taken is not grounds for mistrial). The statement at issue was brief and volunteered and did not state the results of the polygraph examination. Even without the polygraph statement, or an inference that Russell passed, the jury could believe that Russell was telling the truth based on the fact that Russell was not promised parole for his testimony, that he was not promised protection for his testimony, and that no other promises had been made in exchange for petitioner's testimony (Tr. at 290). A reasonable probability thus does not exist to believe that the result

of the trial would have been different if counsel had objected to this evidence. This claim thus fails.

Petitioner's second claim of ineffective assistance of counsel next asserts that counsel was ineffective for failing to interview Harry or Johnny Hurd because no inmate by this name was housed in Unit 5-A at the time of the murder. This claim relates to petitioner's assertion that counsel was ineffective for failing to effectively cross-examine Russell. Petitioner asserts that had counsel interviewed Harry or Johnny Hurd counsel would have discovered that Russell was lying about talking with someone named Hurd at the time of the murder and thus his alibi would have been destroyed. This Court has already ruled on this point during petitioner's appeal from the denial of the petitioner's post-conviction relief motion. Amrine v. State, 785 S.W.2d at 534.

Petitioner's second claim of ineffective assistance of counsel next claims that counsel was ineffective for failing to cross-examine Russell with a statement in Russell's deposition. Petitioner claims that Russell's statement implicated him in a fight with Barber on the day of the murder. However, it is equally likely that Russell was referring to the fight that he and Barber had ten days before the murder. Russell had been restrained in his cell for ten days because of a fight he had with Barber. Russell had just been released. Therefore, the day of the murder was Russell's first opportunity to talk to other inmates about the fight ten days earlier. Petitioner's assertion that Russell implicated himself in a fight with Barber on the day of the murder misconstrues Russell's statement which can easily be taken that he was "talking"

about his fight with Barber ten days earlier on the day of the murder and not that he "had" a fight with Barber on the day of the murder.

Furthermore, evidence in the record shows that a corrections officer saw Russell leave the recreation room to get an aspirin. Sergeant David Dobson testified that three to four minutes prior to the murder he saw Russell in the corridor outside the multipurpose room and conversed with him (Tr. 197). Sergeant Dobson gave Russell permission to go up the cell block and get aspirin (Tr. 198) Russell did not return to the recreation room area before the murder occurred (Tr. at 199). Sergeant Dobson testified that Russell was not in the recreation room at the time of the murder (Tr. 210). Additionally, Corrections Officer Danny Bowers testified that just after the murder he saw Russell talking to other inmates in the common area of the cell block (Tr. 221). In light of this testimony, counsel may have reasonably believed that any further investigation as to where Russell was and to whom he was talking at the time of the crime was without merit.

Petitioner's third claim of ineffective assistance of counsel alleges that counsel was ineffective for failing to interview defense witness Brain Strothers prior to trial and for failing to call Ronnie Ross and Kevin Dean as witnesses. Petitioner raised the claim that counsel was ineffective for failing to call Ross as a witness in his appeal to this Court from the denial of his post-conviction motion. This Court denied this claim. Amrine v. State, 785 S.W.2d at 536.

Petitioner's third claim of ineffective assistance of counsel next alleges that counsel was ineffective for failing to interview defense witness Brian Strothers prior to trial because Strothers was unfamiliar with the crime scene diagram. At trial, counsel requested a recess prior to Strother's testimony to talk with him (Tr. 551-52). Counsel stated he wanted to talk to Strothers to decide whether he should release Strothers from testifying (Tr. 552). Counsel decided to present the testimony of Strothers. Strothers testified that Russell stabbed Barber while petitioner was playing cards (Tr. 556-59). However, on cross-examination Strothers was unable to state exactly where petitioner was sitting or where Strothers was (Tr. 560-63). Strothers further stated that he did not see the murder itself (Tr. at 564-65).

While petitioner faults counsel for failing to properly coach the witness, counsel cannot be blamed for the prosecution's effective cross-examination. Unfamiliarity with the crime scene diagram was a minor problem. Strothers was a poor witness in general, and the cross-examination brought out inherent weaknesses in his testimony. Strothers was unable to identify basic facts about the layout of the recreation room, the positions of himself and petitioner, and the clothing worn by Barber and petitioner. Therefore, counsel was not

ineffective for failing to interview Strothers prior to trial simply because Strothers was unfamiliar with the crime scene diagram.

Petitioner's third claim of ineffective assistance of counsel next asserts that counsel was ineffective for failing to call Dean as a witness. Petitioner claims that Dean would have testified that he saw Joe Amrine playing cards at the time that Gary Barber was murdered. However, this evidence would have been cumulative. Counsel is not ineffective for failing to present cumulative evidence. Clayton v. State, 63 S.W.3d 201, 208 (Mo. banc), cert. denied, 122 S.Ct. 2341 (2002); Skillicorn v. State, 22 S.W.3d 678, 683 (Mo. banc), cert. denied, 531 U.S. 1039 (2000). Counsel had previously introduced evidence through eight other inmate witnesses that petitioner was playing cards at the time of the murder (P.C.L.F. 197). Moreover, Dean had previously told prison investigators that he did not see the stabbing (Respondent's Appendix at 2). Counsel was not ineffective for relying on Dean's prior statement to investigators that he did not see the stabbing. Counsel could not anticipate that Dean now says he lied. Counsel is not expected to have extra-sensory perception or to be clairvoyant. State v. Twenter, 818 S.W.2d 628, 639 (Mo. banc 1991).

Petitioner's fourth claim of ineffective assistance of counsel claims that counsel was ineffective for failing to elicit evidence diminishing the probative value of "minuscule blood droplets" on petitioner's clothes. As best as respondent can understand this claim, petitioner argues that trial counsel did not rebut, through evidence, the minuscule blood droplets were on petitioner's clothing. Evidence at trial shows that three stains existed on petitioners clothing: 1) one below the knee on the right pant leg one-half inch long and one-sixteenth inch

wide; 2) one inside the trouser pocket one-quarter inch in diameter; and 3) one on the front of the T-shirt one-sixteenth inch in diameter (Tr. 488). Testing showed that the blood was human, but could not determine whose blood nor when the blood stain occurred (Tr. 489).

Petitioner, in essence, argues that counsel was ineffective for not presenting evidence and arguing that the blood testing was inconclusive. Trial counsel adduced at trial all of the information that the blood was not testable and that the results were inconclusive (Tr. 488-89). Trial counsel thus placed before the jury evidence that the blood was not identifiable and that the time of the blood stain was not determinable. This is precisely what petitioner now claims counsel should have done. Petitioner also seems to allege that the blood stains could, in fact, have been tested and identified. This claim was considered and denied by this Court on appeal from the denial of petitioner's Rule 29.15 motion. Amrine v. State, 785 S.W.2d at 535.

Petitioner's fifth claim of ineffective assistance of counsel claims that counsel was ineffective for failing to elicit testimony from corrections officer John Noble that Noble identified Russell as the inmate Barber was chasing. The trial transcript, and for that matter Noble's testimony in the federal habeas hearing, shows that Noble identified Russell as the inmate that Barber was chasing after Barber was stabbed (Tr. 182; Petitioner's Exhibit 14, p. 61). The trial transcript shows that following exchange between Noble and the prosecutor and Noble and trial counsel:

> Q [By Prosecutor]: I want the jury to know: are you sure or not sure as to the identity of the other inmate you think you saw Gary Barber chasing?
>
> A [Noble]: No, I would have to say I'm not sure.

* * *

> Q [By Trial Counsel]: Now, you indicated, when Mr. Brown first began questioning you, that this inmate that you saw also running at the same time as Mr. Barber was Terry Russell; is that correct?
>
> A [Noble]: Yes.

(Tr. 183, 189). Petitioner complains about "the misleading suggestion that he believed his own identification of Russell to be mistaken" (Brief at 87). However, Noble testified that he was not sure whether the inmate he saw was Russell (Tr. at 189). Trial counsel tried to rehabilitate Noble by having Noble state that the inmate Noble saw was Russell. Trial counsel on cross-examination thus gave Noble the chance to state that he had in fact saw Barber chasing Russell. Counsel thus did what petitioner now states that counsel should have done.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent prays that this Court deny petitioner's petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 7,101 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of January, 2003, to:

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IN THE
SUPREME COURT OF MISSOURI

STATE EX REL JOSEPH AMRINE,

Petitioner,

v.

AL LUEBBERS,

Respondent.

On Writ of Habeas Corpus to the Missouri Supreme Court

RESPONDENT'S APPENDIX

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TABLE OF CONTENTS