IN THE
MISSOURI SUPREME COURT

STEWART R. HOPKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC95916
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF TANEY COUNTY
38th JUDICIAL CIRCUIT
THE HONORABLE LAURA J. JOHNSON, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Amy M. Bartholow, MoBar #47707
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
Amy.Bartholow@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***RULES*:**

JURISDICTIONAL STATEMENT

Appellant, Stewart Hopkins, appeals the denial of his 29.15 post-conviction motion. Mr. Hopkins sought to vacate his Taney County convictions for first degree murder, §565.020, and armed criminal action, §571.015 [1] for which he received concurrent terms of life imprisonment without the possibility of parole and twenty-five years, respectively. After issuing its opinion, the Court of Appeals, Southern District, ordered this case transferred to this Court pursuant to Rule 83.02.

[1] All statutory references are to RSMo 2000, unless otherwise noted.

TIMELINESS STATEMENT

- **May 21, 2014** – Stewart's direct appeal mandate issues (PLF 20).[2]
- **July 16, 2014** –Stewart files a *pro se* motion for post-conviction relief under Rule 29.15 (Form 40) (PLF 1, 5-17).
- **August 18, 2014** – The motion court enters an "Order of Notification," informing[3] the public defender that Stewart has filed a Form 40 (PLF 18).
- **September 26, 2014** – Attorney Arthur Allen enters his appearance (PLF 1).
- **October 1, 2014** – The motion court grants an additional thirty days to file the amended motion (PLF 19).
- **December 26, 2014** – Attorney Allen files Amended Motion (PLF 1, 20-29).
- **May 13, 2015** – Stewart waives an evidentiary hearing and the case is submitted on depositions (PLF 30).
- **October 5, 2015** – The motion court issues Findings of Fact and Conclusions of Law denying relief; no abandonment findings are made (PLF 31-37).

STATEMENT OF FACTS

[2] The record from the direct appeal was transferred to this case. The record references herein are to the direct appeal transcript, legal file and exhibits (TR, LF, Ex.), the post-conviction legal file (PLF), and exhibits (PCR Ex.).

[3] The issue of whether a "notification" amounts to an "appointment" under Rule 29.15, is currently before this Court in *Creighton v. State*, SC95527 (transfer granted April 5, 2016).

Stewart Hopkins (Appellant) was convicted of first degree murder in the death of his ex-wife, Stacey Birmingham, who died from stab wounds in a Branson motel room (TR 686, 1006). Stacey and Stewart went to the motel in separate cars and Stacey paid for the room in cash (TR 325-331, 806; Ex. 4). Stacey brought along several legal documents, including a divorce decree, an ex parte order, and a handwritten document entitled "last will and testament" (TR 436-437, 448, 884-885, 891). She also brought a fishing knife (Exs. 28 & 89). Stewart also brought a knife when he came to meet Stacey because he had a feeling that something was not right (TR 1033; Ex. 89).

In the motel room, Stacey told Stewart that the reason she brought him there was because one of them was going to meet Jesus tonight (TR 1004; Ex. 89). She wanted to make a suicide pact (TR 1007). They were both on prescription psychiatric medication (TR 371, 444, 752, 768-769). Stewart is bipolar (Ex. 89). Stacey was an alcoholic and had made a recent suicide attempt (TR 621, 684, 890). They took overdose amounts of their psychiatric medication and drank large amounts of alcohol (Ex. 89; TR 486-488, 493, 510-511, 1007).

At one point, Stacey took out her knife; she told Stewart that she hated his guts and that she would rather see him dead than have him see their daughter again (TR 1030; Ex. 89). While Stewart was sitting in a chair, Stacey took the knife and stabbed Stewart in the neck (Ex.67 & 89; TR 720, 736, 1004-1005). Stacey called

a friend, Scott Acuff, and told him that she had cut Stewart's throat and that Stewart was really mad (Ex. 67).[4]

After being stabbed by Stacey, Stewart jumped up out of the chair, took out his knife and slashed her; at some point, he took Stacey's knife and threw it out of the motel room (Exs. 28, 67 & 89; TR 387, 539). It landed in the parking lot under a bus tire (Ex. 28; TR 387, 539). When this knife was later recovered, it tested positive for blood; the DNA sample from the blade was consistent with Stewart's DNA profile, and Stacey was eliminated as a source (TR 581).

At some point, Stacey placed another call to Acuff in which she said, "you're cutting me, you're cutting me" and "you're sticking it my thigh!" (Ex. 67). The handle of Stewart's knife had a mixture of DNA that was consistent with both his and Stacey's DNA (TR 591).

At some point, Stewart left the motel room, although the exact time was disputed at trial: Stewart told the police that he thought he was near Springfield at 9:30 p.m. (Ex. 89); a text message sent from Stewart's phone to Stacey's phone at 10:00 p.m. stated, "I just killed your mom" (TR 810; Ex. 55); one of the motel managers claimed to have given a key to room 128 to a man at 10:30 p.m. (TR 903); but a cleaning lady claimed to have seen Stacey alive on the balcony with a man around midnight (TR 1217).

[4] Phone records show that Stacey called Acuff approximately seventeen times that day (TR 1068-1069).

At approximately 1:30-2:00 a.m., Tony Thompson, answered the phone at his girlfriend's house (TR 310-313). Tony's girlfriend, Lori, is also an ex-wife of Stewart (TR 313). The voice on the phone announced himself as Stewart and he asked to talk to Lori because he had just killed his wife (TR 313-314, 317-318).

Stacey's body was found by the cleaning staff on the morning of October 28, 2010 (TR 322). She was lying face up on the floor in a pool of blood with a cut across her neck (TR 322, 355; Exs. 6-9). Stacey's body was lying between the bed and the TV stand (TR 322, 403; Ex. 6). It did not appear that her body had been moved, and the only blood was around her body (TR 366, 370, 408).

The lethal neck wound cut her carotid artery and it was determined to be the cause of her death (TR 464, 468, 478, 480, 488). She had several other non-lethal sharp injury wounds (TR 463-465). There were also three wounds to her neck that were only 1/8" deep and did not go through the skin (TR 506). These wounds would be created with a slashing motion and not a stabbing motion (TR 506). There was no sign of a struggle (TR 981-982).

Stewart's knife with dried blood was lying on a table closest to the entry door of the room (TR 370, 377-378, 422, 427, 799; Exs. 15-16, 27). While either Stewart's knife or the knife found in the parking lot could have caused the lethal wound (TR 514), the pathologist could not rule out that the other wounds were self-inflicted (TR 510).

There were pills found all over the motel room floor and bed, as well as a large bottle of vodka (TR 322, 334, 369, 444; Exs. 13-14). Stacey's toxicology

report showed that her blood alcohol level was .277, and that she had consumed a toxic level of Xanax (TR 486-487). This combination of drugs would have dulled her sense of pain, and the wounds would have been less painful, even if self-inflicted (TR 510). Overdosing on alcohol and Xanax can increase the likelihood of a person carrying out a suicide plan (TR 511).

Stewart was arrested the next day at a motel room in Tulsa, Oklahoma, and charged with first degree murder (TR 718-720; LF 15-17). Stewart's bloody clothes were seized, but none of Stacey's blood was found on his clothing (TR 996). He surrendered without incident, and was treated for the knife wound to his neck (TR 822, 950).

Branson Detective Scotty Penner arrived in Tulsa to interrogate Stewart; he noticed that Stewart was jumpy, and he asked him what he was on (Exhibit 89; TR 997). Stewart told him that he was on Depakote and a couple of other drugs for his bipolar disorder (TR 997). Detective Penner knew that he would have to handle the interview carefully, but he had not had any training about questioning bipolar individuals (TR 997-998). During the interrogation, Stewart confessed to killing Stacey and he discussed the details of the evening (Ex. 89).

Stewart did not testify at trial. The State admitted recordings of three telephone calls that Stewart had placed from the Taney County jail (Ex. 98, PCR Ex. 2). In one phone call, Stewart told a family member that he hoped that he would get sent back to Cameron, and that it was a Level 3, 4 or 5 (prison) (Ex.98, PCR Ex. 2). In another call, Stewart told a family member that he could not wait

to get back into "DOC" because it was better that the jail he was in (Ex. 98, PCR Ex. 2). Stewart's trial attorney did not object to the admission of these recordings containing evidence of prior convictions. The jury also requested and received these recordings to review during its deliberations (TR 1344-1345).

The jury found Stewart guilty of murder in the first degree and armed criminal action (LF 81-82; TR 1351-1352). He was sentenced to life imprisonment without parole and a concurrent term of twenty-five years, respectively (LF 88-89; TR 116-117, 1360).

This Court affirmed Stewart's convictions on direct appeal in an unpublished memorandum opinion in Case No. SD32486. Following the issuance of this Court's direct appeal mandate, Stewart timely filed his *pro se* motion to vacate, set aside or correct the judgment or sentence (Form 40) (PLF 5-17).

The motion court issued an Order of Notification,[5] directing the Circuit Clerk to notify the Public Defender that Stewart had filed a Form 40 (PLF 18). Counsel entered his appearance, and an amended motion was filed (PLF 20-29).

In the amended motion, counsel alleged, in part, that Stewart's trial attorney was ineffective in failing to object to the admission of the recorded jail phone calls because they contained evidence of Stewart's prior convictions (PLF 25-35).

[5] Again, the issue of whether a "notification" amounts to an "appointment" under Rule 29.15, is currently before this Court in *Creighton v. State*, SC95527 (transfer granted April 5, 2016).

The trial attorney testified by deposition[6] that, from a strategy standpoint, he did not want Stewart's prior criminal history to come into evidence (PCR Ex. 1, p. 23-24). However, he could only speculate why he did not object at trial to the admission of the jail phone calls, stating that the trial court already had ruled before trial that the phone calls would come in (PCR Ex. 1, p. 22-23).

The motion court made no specific findings as to whether the jail phone calls were admissible, or whether the trial attorney was ineffective for failing to object to their admission; rather, it found that, assuming the recordings were inadmissible and that the trial attorney as ineffective for failing to object to their admission, Stewart still had not shown any prejudice (PLF 35). The motion court found that the lengthy police interview wherein Stewart admitted to stabbing Stacey, made his guilt overwhelming, and that no prejudice resulted from the recordings (PLF 35).

Stewart filed a timely notice of appeal (PLF 39-40). After issuing its opinion – holding that the motion court's Order of Notification constituted an appointment of counsel, rendering the amended motion untimely – the Southern District remanded the case for an abandonment hearing, but also ordered this case transferred to this Court pursuant to Rule 83.02.

---

[6] Stewart waived an evidentiary hearing and the case was submitted to the motion court on the pleadings and the deposition of his trial attorney Rick Watson (PLF 30; Ex. 1).

POINTS RELIED ON

I.[7]

The motion court erred in failing to conduct an abandonment inquiry, in violation of Stewart's rights to due process and the effective assistance of counsel guaranteed by the 6th and 14th Amendments to the U.S. Const., and Art. I, §§ 10 and 18(a) of the Mo. Const., in that the amended motion arguably was untimely filed, creating a presumption of abandonment, and the motion court was required to hold an abandonment hearing to determine whether abandonment occurred and which motion the court should adjudicate; this Court must remand this case for such a hearing because not all claims in Stewart's *pro se* motion were adjudicated by the motion court.

Moore v. State, 458 S.W.3d 822 (Mo. banc 2015);

State v. Creighton, 2015 WL 9240967 (Mo. App. E.D. 2015) (transferred April 5, 2016);

U. S. Const., Amends. 6 & 14;

Mo. Const., Art. I, §§ 10 & 18(a); and Rule 29.15.

---

[7] Stewart did not challenge in the Court of Appeals that a "notification," is not an "appointment" of counsel under Rule 29.15. In the event that this Court determines that a "notification" is an "appointment" of counsel, *See Creighton v. State*, SC95527 (transfer granted April 5, 2016), Stewart asks for a remand for an abandonment hearing.

II.

The motion court clearly erred in denying Stewart's Rule 29.15 motion because his trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, resulting in prejudice to Stewart, in violation of his rights to effective assistance of counsel, due process of law, and a fair trial as guaranteed by the 6th and 14th Amendments to the U.S. Const. and Art. I, §§10 and 18(a) of the Mo. Const., in that trial counsel claimed no strategy reason in failing to object to evidence of Stewart's uncharged crimes introduced through three jail phone calls, and this Court should be left with a definite and firm impression that a mistake has been made because the inadmissible calls informed the jury of Stewart's criminal and prison history, which made it more likely that the jury would convict upon his propensity to commit the crime, rather than the evidence.

Kenner v. State, 709 S.W.2d 536 (Mo. App. E.D. 1986);

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

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Section 10 & 18(a); and

Rule 29.15.

ARGUMENT

I.

The motion court erred in failing to conduct an abandonment inquiry, in violation of Stewart's rights to due process and the effective assistance of counsel guaranteed by the 6th and 14th Amendments to the U.S. Const., and Art. I, §§ 10 and 18(a) of the Mo. Const., in that the amended motion arguably was untimely filed, creating a presumption of abandonment, and the motion court was required to hold an abandonment hearing to determine whether abandonment occurred and which motion the court should adjudicate; this Court must remand this case for such a hearing because not all claims in Stewart's *pro se* motion were adjudicated by the motion court.

Facts

Following the issuance of the mandate in his direct appeal on May 21, 2014, Stewart timely filed his *pro se* motion for post-conviction relief on July 16, 2014 (PLF 1, 5-17, 20).

On August 18, 2014, the motion court entered an "Order of Notification," informing the public defender's office that Stewart had filed his Form 40 (PLF 18). Attorney Arthur Allen entered his appearance as Stewart's counsel on September 26, 2014 (PLF 1).

On October 1, 2014, the trial court issued an order granting an additional thirty days to file the amended motion (PLF 19). The amended motion was filed on December 26, 2014 (PLF 1, 20-29).[8]

On October 5, 2015, the motion court issued Findings of Fact and Conclusions of Law denying relief (PLF 31-37). The motion court made no findings as to the timeliness of the amended motion and it did not conduct an independent inquiry into abandonment by appointed counsel.

Standard of Review

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. ***Rotellini v. State***, 77 S.W.3d 632, 634 (Mo. App. E.D. 2002); ***Rule***

---

[8] If the due date of the amended motion is calculated from Attorney Allen's entry of appearance, then the amended motion was timely filed; although ninety days from September 26, 2014 was December 25, 2014, that date was a holiday, so the motion would have been due on the following business day, which was December 26, 2014 – the date it was filed. ***Rule 44.01(a)***.

However, if the due date of the amended motion is calculated from the date of the Order of Notification – i.e., if this order is deemed to be an appointment of counsel – then the amended motion was due on November 17, 2014 (the 90th day being Sunday, November 16, 2014, it would have been due the following day). ***Rule 44.01(a)***.

29.15(k). Findings of fact and conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. ***Id.***

Additionally, before this Court can potentially address the merits of a movant's amended motion for post-conviction relief, it must first determine whether the amended motion was timely filed. ***Federhofer v. State***, 462 S.W.3d 838, 841 (Mo. App. E.D. 2015) (citing ***Moore v. State***, 458 S.W.3d 822 (Mo. banc 2015).

Analysis

Rule 29.15(g) states:

> …If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days…

Here, the motion court never "appointed" the Public Defender's office; rather, it entered an "Order of Notification," informing the Public Defender's office that Stewart had filed his Form 40 (PLF 18). Therefore, the question is whether an

"Order of Notification" is equivalent to an "appointment" of counsel under Rule ***29.15(g)***.

This issue is currently pending before this Court in ***Creighton v. State***, SC95527 (transfer granted April 5, 2016). The Eastern District had reversed Creighton's post-conviction case for an abandonment hearing due to an untimely-filed amended motion. ***Creighton v. State***, 2015 WL 9240967 (Mo. App. E.D. December 15, 2015). In ***Creighton***, as in Stewart's case, the motion court merely "notified" the Public Defender's office that the movant had filed a Form 40. The Eastern District treated this "notification" as an "appointment" of counsel under the post-conviction rules. It then noted that nothing in the record indicated that the motion court made an independent inquiry into whether Creighton was abandoned by counsel; the motion court ruled on the amended motion with no reference to timeliness or abandonment. ***Id.*** at 3. Therefore, the Court held that it had "no alternative but to remand [the] matter to the motion court so that it [could] conduct the legally-required inquiry." ***Id.***

An untimely amended motion creates a presumption that counsel failed comply with ***Rule 29.15(e)***, which requires counsel to ascertain whether sufficient facts support claims asserted in the *pro se* motion, to ascertain whether the movant has included all claims known to him, and to file an amended motion if the *pro se* motion is insufficient. *See* ***Moore v. State***, 458 S.W.3d at 825. When an untimely amended motion is filed, the motion court has a duty to undertake an independent inquiry to determine whether abandonment occurred. ***Id.*** "When the independent

inquiry is required but not done, this Court will remand the case because the motion court is the appropriate forum to conduct such an inquiry." ***Id.*** at 826. The result of the inquiry determines which motion – the *pro se* motion or the amended motion – the court should adjudicate. ***Id.***

Here, Stewart's *pro se* motion included claims not discussed in the court's findings of fact, conclusions of law and order. The amended motion did not incorporate any of the *pro se* claims.

It is now clear that when an untimely amended motion is filed, and the motion court does not consider all the claims in a movant's *pro se* motion, the motion court has a duty to undertake an independent inquiry to determine if abandonment occurred and which claims – those in the *pro se* motion or those in the amended motion – are properly before the motion court. *See* ***Lewis v. State***, 476 S.W.3d 364 (Mo. App. S.D. 2015); ***Mann v. State***, 475 S.W.3d 208 (Mo. App. E.D. 2015); ***Lomax v. State***, 471 S.W.3d 358, 359 (Mo. App. E.D. 2015).

If the motion court's notification was an appointment of counsel, the motion court clearly erred in failing to conduct an abandonment inquiry to determine whether Stewart was abandoned and which motion should be adjudicated. This Court should stay Stewart's case pending resolution of the notification vs. appointment issue before it in ***Creighton v. State***, SC95527 (transfer granted April 5, 2016). If this Court determines that a notification is an appointment, then Stewart's amended motion was untimely filed, and this Court should remand to the motion court for an abandonment inquiry; however, if this

Court determines that notification is not an appointment, then Stewart's amended motion was timely filed and this Court should resolve the issue presented in Point II of Stewart's brief.

II.

The motion court clearly erred in denying Stewart's Rule 29.15 motion because his trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, resulting in prejudice to Stewart, in violation of his rights to effective assistance of counsel, due process of law, and a fair trial as guaranteed by the 6th and 14th Amendments to the U.S. Const. and Art. I, §§10 and 18(a) of the Mo. Const., in that trial counsel claimed no strategy reason in failing to object to evidence of Stewart's uncharged crimes introduced through three jail phone calls, and this Court should be left with a definite and firm impression that a mistake has been made because the inadmissible calls informed the jury of Stewart's criminal and prison history, which made it more likely that the jury would convict upon his propensity to commit the crime, rather than the evidence.

Standard of Review

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. ***Burroughs v. State***, 773 S.W.2d 167, 169 (Mo. App. E.D. 1989). Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake

has been made. *Id.;* ***Richardson v. State***, 719 S.W.2d 912, 915 (Mo. App. E.D. 1986).

Ineffective Assistance of Counsel

A movant bears the burden of proving, by a preponderance of the evidence, that he received ineffective assistance of counsel. ***Placke v. State***, 341 S.W.3d 812, 814-15 (Mo. App. S.D. 2011); *Rule 29.15(i)*. To establish ineffective assistance of counsel, a movant must show that: (1) "counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney;" and (2) counsel's poor performance prejudiced the defense. ***State v. Hall***, 982 S.W.2d 675, 680 (Mo. banc 1998); *see* ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To satisfy the first prong, a movant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688, 104 S.Ct. 2052. The second prong of the ***Strickland*** test is met when a movant shows that his attorney's errors affected the judgment. ***Strickland***, 466 U.S. at 694, 104 S.Ct. 2052. A movant can prove that the judgment was affected when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694, 104 S.Ct. 2052. Movant must prove each portion of this two-pronged performance and prejudice test in order to prevail on his ineffective assistance of counsel claim. ***Sanders v. State***, 738 S.W.2d 856, 857 (Mo. banc 1987).

Analysis

Claim (b) in the amended motion alleged that Stewart's trial attorney was ineffective for failing to object to the evidence of Stewart's prior convictions and bad acts, introduced through three phone calls made by Stewart from the Taney County Jail (Ex. 98; PCR Ex. 2) (PLF 25-26). In one phone call, Stewart told a family member that he hoped that he would get sent back to Cameron, and that it was a Level 3, 4 or 5 (prison) (Ex. 98; PCR Ex. 2). In another call, Stewart told a family member that he could not wait to get back into "DOC" because it was better that the jail he was in (Ex. 98; PCR Ex. 2). The jury also requested and received these recordings to review during its deliberations, without objection (TR 1344-1345).

The trial attorney testified by deposition that, from a strategy standpoint, he did not want Stewart's prior criminal history to come into evidence (PCR Ex. 1, p. 23-24). However, he could only speculate why he did not object at trial to the admission of the jail phone calls, stating that the trial court already had ruled before trial that the phone calls would come in (PCR Ex. 1, p. 22-23).

The motion court assumed for purposes of its ruling that evidence of the jail recordings was inadmissible and that the trial attorney was ineffective for failing to object to their admission (PLF 35). Rather, the motion court found that Stewart failed to meet his burden of proof that any prejudice resulted from the admission of such evidence (PLF 35). Specifically, the motion court found that the evidence of Stewart's lengthy police statement, giving an account of the murder, made the

evidence of his guilt overwhelming (PLF 35). The motion court's judgment was clearly erroneous.

Criminal defendants have a right to be tried only for the offense for which they are charged. ***State v. Hornbuckle***, 769 S.W.2d 89 (Mo. banc 1989). If evidence is introduced showing that the defendant has committed, been accused of, been convicted of, or been definitely associated with another crime or crimes, a defendant's rights may have been violated and a new trial may be required. ***Id.*** Evidence of other uncharged crimes, misconduct, or bad acts that does not properly relate to the facts and cause on trial violates the general rule that a defendant can stand trial only for the offense charged. ***State v. Bernard***, 849 S.W.2d 10, 13 (Mo. banc 1993). The fact that Stewart had been to prison in the past was evidence that he had been convicted of other crimes and was not relevant to the crimes charged.

The second prong of *Strickland* then requires a determination of whether "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694, 104 S.Ct. 2052.

In ***Kenner v. State***, 709 S.W.2d 536, 539 (Mo. App. E.D. 1986), the appellate court ruled that trial counsel was ineffective for failing to object to the State's reference to other crimes that the defendant had committed. Trial counsel had failed to object when the State introduced evidence of other burglaries for

which movant was not on trial and evidence of the movant's illegal drug use, a crime for which the movant was not charged. *Id.* at 537-538. The appellate court held that the movant was prejudiced by this failure to object because it gave the jury the opportunity to assess evidence of a crime for which movant was not on trial and take this evidence into consideration when making a final decision on a verdict concerning the crimes for which he was on trial. *Id.* at 539.

Similarly, here, trial counsel failed to object to prejudicial uncharged crimes evidence that Stewart had been to prison before. The jury asked for the jail calls containing the prejudicial evidence during deliberations. Although Stewart's police statement may have been strong evidence that Stewart was the person that inflicted the fatal wounds to Stacey, the jury was tasked to determine the circumstances under which such wounds were inflicted, and for which degree of crime he was responsible, if any. Many of her wounds were determined to be possibly self-inflicted. Stewart also presented, in part, a self-defense case, as he had been stabbed in the neck by Stacey moments earlier. Also, under the circumstances, the jury clearly could have found that Stewart was not acting with deliberation, but some lesser mental state.

Therefore, a reasonable probability exists that had the jury not been repeatedly exposed to this highly inflammatory evidence that Stewart had a criminal felony history, having gone to prison before, they may have viewed the defense case in a much different and more favorable light. This is sufficient to

undermine confidence in the outcome of his trial and this Court must reverse the motion court's judgment and remand for a new trial.

CONCLUSION

If the amended motion filed by Appellant's post-conviction attorney was untimely, creating a presumption of abandonment, this Court must remand for an abandonment inquiry (Point I). If the amended motion was timely, this Court must reverse the motion court's judgment because Stewart's trial attorney rendered ineffective assistance of counsel when he failed to object to evidence of uncharged crimes, resulting in prejudice to Stewart's right to a fair trial.

Respectfully submitted,

/s/ Amy M. Bartholow

Amy M. Bartholow, MOBar #47077
Attorney for Appellant
Woodrail Centre
1000 W. Nifong, Building 7, Suite 100
Columbia, MO 65203
Phone (573) 777-9977
Fax 573-777-9974
Amy.Bartholow@mspd.mo.gov

Certificate of Compliance

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains **5,203** words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 21st day of September, 2016, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Dora Fichter, Assistant Attorney General, at Dora.Fichter@ago.mo.gov.

/s/ Amy M. Bartholow

Amy M. Bartholow