IN THE
MISSOURI SUPREME COURT

DAVID HOSIER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC97231
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19TH JUDICIAL CIRCUIT
THE HONORABLE PATRICIA S. JOYCE, JUDGE

APPELLANT'S REPLY BRIEF

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[1] Appellant responds to Points I and IV, and relies on his opening brief as to the remaining points.

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ARGUMENTS

I.

COUNSEL FAILED TO STIPULATE TO UNDERLYING FELONY IN CT. IV

The motion court clearly erred in denying David's claim that counsel were ineffective for failing to stipulate to his prior battery conviction – the felony underlying Ct. IV, unlawful possession of a firearm by a felon – because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends VI, VIII, XIV, in that reasonable counsel would have stipulated to this felony to prevent the jury from hearing prejudicial evidence of a violent conviction during guilt phase, and David was prejudiced because his prior conviction, Ex. 280A, was requested by the jury during guilt phase deliberations, informing them he had been imprisoned before for battering a different woman in the head, and there is a reasonable probability that without being exposed to highly prejudicial propensity evidence, the jury would have harbored reasonable doubt in this circumstantial case.

The findings are factually incorrect - Ex. 280A does not reflect an SIS conviction

Respondent brief repeats the false finding of fact by the motion court (which were entirely the State's proposed findings) that David's prior conviction was an SIS, thus allowing the defense to argue an SIS could not support a conviction for Count IV, Felon in Possession. (Resp. Br. 44-45). This is a complete canard. David's prior conviction was not an SIS, and Respondent makes no effort to explain how this non-fact can possibly support the motion court's conclusion of counsel's "reasonable trial strategy." (D40:7). This is especially concerning given the genesis of this false fact came directly from the State's proposed findings. Since the factual premise is untrue, reliance by the motion court upon such fiction is clearly erroneous. "[T]o be valid, the proposed findings of fact and conclusions of law must be supported by the evidence. Though drafted by another, this process makes the findings of fact and conclusions of

law those of the court." *Skillicorn v. State*, 22 S.W.3d 678, 690-91 (Mo. banc 2000). Since the motion court's finding is objectively incorrect, it is entitled to no deference.

An eight year term of imprisonment was imposed against David for this prior conviction. (Ex. 280A). It was not an SIS and counsel never attempted to make such an argument to the jury or to the trial court. Trial counsel acknowledged that David "pled guilty and was convicted in Indiana on February 10th, 1993." (TR.1384). The only argument counsel ever made to the trial court was that the Indictment listed an incorrect date of the prior conviction. (TR.1383-1385). Counsel noted that David's plea of guilty occurred on February 10, 1993, but he was not sentenced until March 17, 1993. (Ex. 280A; Mov. Ex. 20). The Indictment lists the date of his prior conviction as March 17, 1993 (the date of sentencing) (LF.24-26). Therefore, counsel urged the trial court that this was a fatal flaw in the Indictment.[2] Nowhere, however, did counsel ever argue to the trial court or the jury that David's prior conviction was an SIS.

Since the motion court's first "trial strategy" justification is wholly unsupported by any evidence and is objectively untrue, this Court is left to evaluate the motion court's only remaining conclusion, which is that it was "reasonable" for trial counsel to expose the jury to otherwise inadmissible propensity evidence of David's assault and battery of another woman, so that they "would not be surprised by it in the second phase." (D40:7).

If counsel's "strategy" was to allow extremely inflammatory propensity facts in guilt phase, why allege this as error in the motion for new trial?

Counsel Zembles' post-hoc strategy explanation that she did not want jurors to be "surprised" by aggravating evidence in a death penalty case is patently absurd. But

[2] Not only did this objection come too late, but for purposes of this Point, counsel did not claim that David did not *have* this prior conviction, that he was not *sentenced* on this prior conviction, or that the incorrect date prejudiced him in any way regarding his trial preparation.

this alleged strategy is also belied by her challenge to the admission of this very evidence as erroneous. This is an excerpt from David's motion for new trial:

> The Court clearly erred and/or abused its discretion to Mr. Hosier's prejudice by overruling…[his] reques[t] the Court preclude the State from eliciting in the first phase of his trial, through testimony, exhibits, or argument the specifics of Mr. Hosier's 1993 felony conviction from Indiana. Those specifics were not relevant in the first phase of his trial…[and] had no logical relevance to the counts for which Mr. Hosier was on trial and, therefore, the prejudicial effect greatly outweighed the probative value.
> …
>
> The introduction of the identity of the victim and the circumstances of the offense was greatly and unnecessarily prejudicial in that it told the jury that Mr. Hosier was previously convicted of battery on a woman, an offense similar to what he was on trial for in this cause. Such specific evidence had no logical relevance to the counts for which Mr. Hosier was on trial and, therefore, the prejudicial effect greatly outweighed the probative value.
>
> Indeed, the only item of evidence the jury requested during their deliberations on guilt was State's Exhibit 280A (Attachment G) the very documents from Indiana which delineated the specifics of that 1993 Indiana conviction. The admission and publication of State's Exhibit 280A violated Mr. Hosier's federal and state constitutional rights… [.]

(LF.416-418). If Zembles truly had a strategy – at the time of trial – to not stipulate to the prior conviction, but instead allow the entirety of Ex. 280A to be viewed by the jury so that they would not be "surprised" by it in penalty phase, then she would not have challenged the admission of this evidence in the guilt phase in the motion for new trial.

Clearly, this was not her strategy at the time of trial. This is further evidenced by the numerous, lengthy, specific objections she made just before trial, before opening statements, and during the guilt phase of trial, to try and prevent the inflammatory facts underlying David's prior conviction from coming before the jury (TR.172, 726, 774-776, 813). After the first three witnesses testified, the State moved

to admit Ex. 280. (TR.774). Zembles specifically objected that the State was only "entitled to introduce from Exhibit 280…the sentence and judgment, essentially what Mr. Hosier pled guilty to, what his sentence was," but that Exhibit 280 "contains an amended information for criminal confinement, an amended information for battery" and "[t]hose should not be in this exhibit." (TR.775). She emphasized, "I just don't want any references to anything in this document other than the sentence and judgment which comprises one page of this document." (TR.776).[3]

Further, during the testimony of Jodene Scott, counsel asked if the prosecutor would elicit "none of the circumstances of the conviction?" and the Court stated, "That's right." (TR.813). The prosecutor asked for time to talk to the witness to make sure she did not say anything she shouldn't. (TR.813).

The totality of the evidence belies any notion that counsel's strategy was to reject the prosecutor's offer to stipulate, and instead, allow the introduction of incredibly prejudicial evidence against her own client during the guilt phase of his trial. The motion court clearly erred in finding that this was counsel's actual strategy.

If this was counsel's strategy it was not reasonable

Respondent makes no attempt to argue how this strategy of allowing the introduction of highly damaging evidence against your own client could possibly be reasonable. Respondent simply states the truism that "[i]t is not ineffective assistance of counsel to pursue one *reasonable* trial strategy to the exclusion of another *reasonable* trial strategy." (Resp. br. at 46-47). But the point is that counsel's professed strategy is the textbook definition of "unreasonable" trial strategy. If this Court finds that this was counsel's actual trial strategy, given all of the evidence to the contrary, then it should also find that such strategy was not reasonable under any stretch of the imagination, especially in a capital case.

[3] Respondent concedes the State offered to stipulate to the underlying felony pursuant to MAI-CR3d 331.28, Notes on Use 4. (Resp. Br. 44).

It cannot be overstated that the effect of counsel's failure to enter into a stipulation with the prosecutor allowed the jury to learn, in the guilt phase of David's capital trial, that he previously had been convicted and sentenced to prison for assaulting another woman by hitting her in the head in an "angry manner" and caused "serious bodily injury," by giving her a concussion. (Ex. 280A; Mov.Ex.11). The prosecutor urged the jury to request this exhibit during their deliberations (Tr.1408), and they did. (Tr.1439). It was the only exhibit they asked to see. There is a reasonable probability that the outcome of the guilt phase would have been different had they not been exposed to this inflammatory evidence.

That this evidence is too prejudicial for the guilt phase is the entire premise of *U.S. v. Old Chief*, 519 U.S. 172, 179 (1997). Proof of the nature of the underlying felony creates the risk of unfair prejudice. *Id.* In *Old Chief*, a prior assault caused prejudice in the defendant's current assault case. The United States Supreme Court reversed Old Chief's convictions because, although the evidence of the prior crime was relevant, the form that evidence took created unfair prejudice to the accused. *Id.* at 191-192; *see also State v. Brown*, 457 S.W3d 772, 787 (Mo. App. E.D. 2014) (citing *Old Chief* and concluding that "unfair prejudice," as to a criminal defendant, speaks to the capacity of some admittedly relevant evidence to entice the factfinder to declare guilt on a ground apart from proof specific to the offense charged.) The Supreme Court recognized the prior assault evidence would necessarily prejudice jurors against the accused. *Old Chief*, 519 U.S. at 185.

Here, David's prior assaultive conviction of Nancy Marshall caused prejudice at his trial for killing Angela Gilpin, and it was unreasonable for counsel not to stipulate to keeping such irrelevant and prejudicial details from the jury in guilt phase. Although counsel's actions should be judged by her overall performance, the right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Deck v. State*, 68 S.W.3d 418, 429 (Mo. banc. 2002) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Furthermore, allowing the introduction of details of a prior assaultive crime by failing to enter into an *Old Chief* stipulation is akin to failing to object if the State was trying to admit such evidence. Trial counsel's failure to object to the admission of inadmissible evidence can be tantamount to the failure to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances. *See e.g., Zych v. State*, 81 S.W.3d 96, 100 (Mo. App. E.D. 2002). If counsel had objected to such evidence, the objection would have been sustained and such failure resulted in a substantial deprivation of David's right to a fair trial. *Glass v. State*, 227 S.W.3d 463, 473 (Mo. banc 2007). Very recently, the North Dakota Supreme Court reversed a defendant's conviction where his attorney failed to object when the State introduced evidence of uncharged misconduct. *See Brewer v. State*, 924 N.W.2d 87, 93 (N.D. 2019). The attorney's failure to object was not simply a trial tactic; rather, he thought he had made an adequate record, when he clearly had not. *Id.* His statement admitted a basic legal error that satisfies *Strickland's* first prong.

The same is true of Ms. Zembles' alleged strategy. David pleaded not guilty, and the State's evidence against him was nearly entirely circumstantial. Save for the State's tortured theory that a malfunctioning World War II STEN submachine gun found in David's car was the murder weapon,[4] there was no direct evidence tying David to this crime. No confession, no eyewitnesses, no fingerprints, and none of David's DNA or other personal effects were found at the crime scene. When a client expressly asserts that the objective of "*his* defense" is to maintain innocence of the

[4] Counsel Catlett was successful in getting firearms expert Garrison to admit that he could not say to a degree of reasonable scientific certainty that any of the cartridge cases or bullets found at the crime scene had been fired from the STEN machine gun. (Tr.1204-19, 1293-94). During testing, the STEN did not fire reliably or consistently. (Tr.1265). Garrison had to repeatedly pull the gun's magazine and shake a bullet out when it failed to detonate. (Tr.1265-1266). It took him several attempts to even get the gun to fire. (Tr.1266). Det. Edwards also had trouble test-firing the STEN. (Tr.1379).

charged criminal acts, his lawyer must abide by that objective. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508–09 (2018); and ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation"). Instead, Zembles sabotaged David's guilt phase case by assenting to the admission of highly inflammatory and otherwise inadmissible evidence of a prior assault, so that the jury would not be "surprised" by it in penalty phase. No reasonable attorney would have done this. *See Buck v. Davis*, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017) (castigating defense counsel for presenting an expert who testified in part regarding statistical likelihood of black defendant committing future crimes, even though expert was opining that defendant would not be dangerous).

It is hard to imagine more damaging evidence to place before the jury in the guilt phase of David's capital trial for murdering an ex-lover, than he had violently assaulted another woman. This Court has repeatedly held, as a general rule, "evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes." *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000). And it is especially true when a significant factor in determining prejudice is the similarity of the charged offenses to the improperly admitted evidence. *Id.* at 150 (citing Imwinkelried sec. 9.85). The jury is more likely to attach significant probative value to the improperly admitted evidence if it relates directly to the charged offenses. *Id.*

Because Zembles' outrageous failure to stipulate to the admission of Ex. 280A was not reasonable, this Court should find that David has met the first prong of *Strickland*. *See Butler v. State*, 108 S.W.3d 18, 25–27 (Mo. App. W.D. 2003) (counsel's choice not to object to admission of testimony was not reasonable trial strategy when case law clearly revealed challenged testimony would have been found inadmissible); *Kenner v. State*, 709 S.W.2d 536, 539 (Mo. App. E.D. 1986) (by failing to object to the admission of testimony concerning evidence of another burglary for which movant was not charged, defense counsel did not exercise the customary skill and diligence that a reasonably competent attorney would perform under similar

circumstances); *Timms v. State*, 54 So.3d 310, 316 (Miss. Ct. App. 2011) (finding trial counsel ineffective for failing to seek a stipulation that defendant had a prior for drug possession); and *State v. Rivera*, 871 N.W.2d 692 (Wis. App. 2015) (finding trial attorney ineffective in failing to obtain an *Old Chief* stipulation to prevent the jury from hearing about the charges underlying convictions).

David was Prejudiced by the Admission of the Prior Assault

The State's case against David was entirely circumstantial, based upon prior angry statements made by David at the tumultuous end of a year-long relationship with Angela. But there was no physical evidence connecting David to the actual crime or to even being in that hallway when Angela was shot. Highly disputed testimony by the firearms examiner connecting the cartridges to the STEN gun found in David's car was the crux of the State's direct evidence of guilt. The legitimacy of this forensic evidence was the battleground at trial, and counsel Catlett spent the entirety of his closing argument outlining why the jury should not credit the extremely tenuous evidence. (TR.1413-32). The State's case, though circumstantial, was not overwhelming. This type of prior assaultive crimes evidence could certainly contribute to the jury's verdict, *see Barriner*, 34 S.W.3d at 151–52. There is a reasonable probability that, without the details of the prior assaultive conviction, that at least one juror would have harbored a reasonable doubt about whether David actually committed this crime. *See Buck v.* Davis, 137 S.Ct. at 776.

Within minutes of requesting Ex. 280A, the jury returned a guilty verdict. This Court cannot say that evidence of David's attack on another woman did not sway the jury's decision on his guilt. Confidence in the verdict has been undermined. But for trial counsels' ineffectiveness in failing to stipulate to David's prior felony, the jury would not have been exposed to this prejudicial evidence in the guilt phase of his trial, and there exists a reasonable probability the result would have been different. A new trial is required.

IV.

FAILURE TO CALL PSYCHIATRIST TO EXPLAIN MITIGATING EVIDENCE OF DAVID'S STROKE AND ITS EFFECT ON HIS DEPRESSION

The motion court clearly erred in denying the claim counsel was ineffective for failing to call a psychiatrist, such as Dr. Harry, in penalty phase because David was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, in that reasonably competent counsel would have called such doctor to provide significant mitigating evidence that David has areas of brain damage and lesions from a stroke, that this type of injury exacerbates pre-existing depression, and that David's behavior over the years was symptomatic of increasing depression with psychotic features which was made worse by his having a stroke, all of which would have supported the §565.032.3 statutory mitigators of extreme mental or emotional disturbance and substantial impairment. David was prejudiced because there is a reasonable probability if Dr. Harry testified, David would have been life-sentenced.

Respondent agrees that Dr. Harry would have testified and explained to the jury that David suffered a stroke in 2007, and that the resulting damage to his brain from the lesions likely exacerbated his preexisting depression. (Resp. Br. 60, fn11). Respondent also does not dispute that the following testimony from Dr. Harry could have been presented as mitigation at David's trial, but was not: David's serious episodes of dysphoria affected his ability to perceive situations and respond appropriately; his diagnosis of major depression, recurrent, with psychotic features affected his limited ability to deal with frustrating situations, impulsivity, violent behavior and loss of control; and David's 2007 stroke caused brain damage which likely made his depression worse and more recurrent, yet his symptoms ultimately could be controlled with medication. (PCRTR.23-29; Mov. Ex.37, Mov. Ex.38-A). Dr. Harry's testimony explained the root medical and psychological causes of the

behavior underlying the anecdotal observations of lay witnesses. The jury heard none of this critical mitigating medical evidence because, while purporting to put on a mental health mitigation case, Zembles wholly failed to call a necessary expert witness to support it. Respondent makes no argument that this was effective representation.

Instead, Respondent argues that the motion court's finding that "there is nothing in the record to suggest a mental defense expert would have helped movant in his trial," is a "credibility determination" to which this Court must defer. (Resp. Br.59). This is incorrect. A finding that certain testimony would not have affected the result is not a credibility determination about the testimony or the witness providing it; rather, it is a finding that no prejudice resulted from counsel's failure to present that testimony. There is a distinct difference. Here, the motion court made no credibility findings about Dr. Harry's testimony or Zembles' testimony to which this Court must defer.[5]

Zembles testified that she had no strategic reason for failing to call a medical doctor to educate the jury about David's medical history. (PCRTR.108). The motion court made no finding that she performed competently. This is not surprising because, although Zembles submitted the statutory mitigators for: 1) under the influence of extreme mental or emotional disturbance; and 2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, she presented no medical testimony on these matters. (PCRTR.103, 107; LF403). Although an MRI had been performed on David at Zembles request, she never obtained the results of this testing or the report. (PCRTR.106). Therefore, she presented no films or reports about David's MRI

[5] In *Hoeber v. State*, 488 S.W.3d 648, 659 (Mo. banc 2016), this Court reversed where trial counsel failed to object to improper verdict directors, and where the motion court made no credibility findings regarding counsel's testimony that he had no trial strategy in failing to do so. Thus, counsel's unrefuted testimony, without a credibility determination, was sufficient to rebut a presumption of strategy.

showing his brain damage. (Mov.Ex.38; PCRTR.107). She similarly failed to include the results of David's CT scan in the records. (Mov.Ex.37) (PCRTR.105). Instead, at the very end of the penalty phase, Zembles dumped a bulk of hospital records[6] into evidence without discussing them, reading them or passing them to the jury. (TR.1638-1639). Once again, Zembles performed deficiently.

Respondent argues that this case is like *Barton v. State*, 432 S.W.3d 741 (Mo. banc 2014), where this Court found that trial counsel's expressed strategy of maintaining residual doubt through penalty phase was a reasonable strategy, even though a mental health defense showing Barton's brain injury and limited intellectual functioning would also have been reasonable. This Court found that counsel could not be faulted for choosing one reasonable strategy over the other. Therefore, *Barton* involved a choice between reasonable strategies.

David's case is wholly different than *Barton* because Zembles purportedly chose a mental health defense, but failed to present it competently when she put on no expert to explain David's medical and psychological deficits. She is not being faulted for choosing between two reasonable strategies; rather, she is being challenged for failing to present evidence necessary to support the strategy she selected.

David's case is more similar to *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004), *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007), and *Taylor v. State*, 262 S.W.3d 231, 251 (Mo. banc 2008). In each of these cases, counsel failed to present mitigating medical and mental health testimony in penalty phase. In *Hutchison*, counsel was ineffective for failing to present a thorough comprehensive expert presentation. Hutchison's counsel did not attempt to find the psychiatrist who treated the defendant, even though this information was made known to counsel before trial. *Id.* at 305.

In *Glass*, counsel was found ineffective for failing to call multiple expert witnesses to provide mitigating evidence. Counsel failed to call a neuropsychologist,

[6] Def.Ex.ZZ (Fulton State Hospital records) and Def.Ex.YY (Audrain County Medical Center records).

who had evaluated Glass before trial and found he had brain impairment that caused him to have difficulty with learning, memory, and impulse control. 227 S.W.3d at 470. This Court specifically held that the failure to call the neuropsychologist was prejudicial because the psychological evidence had powerful inherently mitigating value and was especially prejudicial because the jury *heard no penalty phase* experts. *Id.* (emphasis added). The same is true in David's case.

In *Taylor*, trial counsel failed to introduce into evidence any of the records on which their expert relied in reaching his conclusions regarding Mr. Taylor's abusive background, history of mental illness, and eventual diagnosis. This Court ruled that "[b]ecause of the unique nature of capital sentencing - both the stakes and the character of the evidence to be presented - capital defense counsel have a heightened duty to present mitigation evidence to the jury." *Id.* 262 S.W.3d at 249, citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Here, Zembles' merely dumped records into evidence, but the jury had no expert to explain them, no witness to even read or summarize them, and no attorney who argued from them or even passed them around for the jury to see. It is as if the records were not there. Just as in *Hutchison*, *Glass* and *Taylor*, David's jury heard no available expert mitigating evidence in penalty phase. Reasonable counsel would have called an expert like Dr. Harry in the penalty phase to support the defense she chose to present.

In deciding prejudice from failing to present mitigating evidence courts are required to evaluate the totality of the evidence. *Hutchison v. State*, 150 S.W.3d at 306 (relying on *Wiggins v. Smith*, 539 U.S. 510, 536 (2003)). "The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Hutchison v. State*, 150 S.W.3d at 306. Here, the jury would have heard compelling mitigation that David suffered from bouts of psychotic depression and bipolar disorder, but also had a stroke and resulting brain damage which exacerbated his depression symptoms. This testimony would have supported the §565.032.3 statutory mitigators of extreme

emotional disturbance and substantial impairment. *Cf. Glass*, *supra* (failure to call toxicology pharmacologist who supported same mitigators).

Respondent is correct that the jury was aware, from evidence the State presented, of David's history of violent behavior (Resp. Br. 59). What they were not aware of was the medical and psychological evidence underlying that behavior, why it was becoming worse over time, and why David's stroke in 2007 significantly exacerbated the symptoms. Importantly, they did not hear that David's mental health issues can be treated with medication. (PCRTR.37). Respondent believes that this type of evidence makes no difference and that "an alleged medical condition was not reasonably calculated to help his case;" however, emotional disturbance §565.032.3(2) and substantial impairment §565.032.3(6) are actual statutory mitigators, whether Respondent likes it or not. This evidence certainly "might serve 'as a basis for a sentence less than death,' " *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)). They were relevant and important to David's case and to the jury's evaluation of the appropriate sentence. Zembles submitted these mitigators, but did nothing to prove them to the jury. Had she done so, there is a reasonable probability that David would have been life sentenced.

Finally, the motion court's findings were incorrect that it was David's "wish to not present a mental defect expert to the jury." (PCRLF40:10, Resp. Br.60). Dr. Harry did not testify that David explicitly told his trial attorneys that he did not want a mental defense presented (PCRTR.38), and Zembles testified that David never indicated that he did not want her to pursue such a defense. (PCRTR.116-17). Zembles *did*, in fact, attempt to present a mental health defense, but was wholly ineffective in doing so. Her representation was substandard and it prejudiced David. A new penalty phase is required.

CONCLUSION

For the reasons stated in Points I, II, III & VI, of his original and reply briefs, David requests a new trial on guilt, or in the alternative, a new penalty trial. For the reasons stated in Points IV, VII, VIII, IX & X, he asks for a new penalty trial. For the reasons stated in Point V, he asks for a new evidentiary hearing before a conflict-free judge.

Respectfully submitted,

/s/ Amy M. Bartholow

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CERTIFICATE OF COMPLIANCE AND SERVICE

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 **4,881** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 17th day of April, 2019, on Assistant Attorney General Gregory Barnes at Greg.Barnes@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ Amy M. Bartholow

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Amy M. Bartholow