NO. 83615

IN THE SUPREME COURT OF MISSOURI

WALTER BARTON,

Appellant,

v.

STATE OF MISSOURI

Respondent.

Appeal from the Circuit Court of Benton County

Honorable Theodore Scott

BRIEF FOR APPELLANT

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NO. 83615

IN THE SUPREME COURT OF MISSOURI

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JURISDICTIONAL STATEMENT

After his conviction and sentence of death, and the affirmance of his conviction and sentence on direct appeal in this Court's Cause No. 80931, Appellant filed a timely motion and amended motion under Sup.Ct.R. 29.15. Judgment denying relief was entered on December 21, 2000. LF.220. A timely motion for new trial was filed January 22, 2001. LF.257. The motion was overruled by operation of law on April

23, 2001, and notice of appeal was timely filed on April 26, 2001. LF.278.

This court has exclusive jurisdiction of the appeal, pursuant to Mo. Const. Art. V§3 in that appellant was sentenced to death.

STATEMENT OF FACTS

Walter Barton was convicted of the murder of Gladys Kuehler in Ozark, Missouri, and sentenced to death. This was his third complete trial. When the case was first called for trial, a mistrial was declared because the state had failed to endorse its witnesses. Next, the jury was unable to reach a verdict at the close of the guilt-innocence phase, and a mistrial was declared. Mr. Barton was convicted on retrial and sentenced to death. The conviction was reversed by this Court on appeal. *State v. Barton*, 936 S.W.2d 781, 782 (Mo.banc 1996). Mr. Barton was again tried, and again convicted of first degree murder. The jury returned a verdict of death, and Mr. Barton appealed. This court affirmed the conviction and sentence, with Justices Wolff and White dissenting and Justice Holstein not participating. *State v. Barton*, 998 S.W.2d 19 (Mo.banc 1999). This post-conviction

proceeding followed. The facts of the offense, as found by the court, are stated in the opinion and will not be repeated here.

Mr. Barton's amended motion under Rule 29.15 raised 68 grounds. LF.3. Prior to the evidentiary hearing, counsel for Mr. Barton moved to disqualify the presiding judge, which was denied. LF.82, PCRT[1].1. Also denied before the hearing was Mr. Barton's motion that he be present during the hearing. LF.89, PCRT.12-13.

Evidence and/or argument was presented on 52 of the grounds in the motion. The evidence included two days of testimony, eleven depositions, several affidavits, and other documentary evidence. The exhibits will be filed with the court before submission. Specific evidence will be described under the points to which it pertains.

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[1] The record will be cited as follows: "PCRT" refers to the transcript of the post-conviction evidentiary hearing. "TT" refers to the transcript of the most recent trial. "1994 TT" refers to the transcript of the 1994 trial. "1993 TT" refers to the transcript of the 1993 hung jury trial. "1993 MT" refers to the transcript of the 1993 mistrial.

POINTS RELIED ON

POINT I

THE MOTION COURT ERRED IN OVERRULING THE MOVANT'S MOTION TO DISQUALIFY THE MOTION COURT WITHOUT A HEARING BEFORE ANOTHER JUDGE BECAUSE THE JUDGE'S ACTION IN COMMENDING THE TESTIMONY OF A TRIAL WITNESS MADE HIM A WITNESS IN THE POST-CONVICTION ACTION AND CALLED HIS IMPARTIALITY INTO QUESTION. THIS ACTION VIOLATED MR. BARTON'S RIGHT TO AN IMPARTIAL JUDGE, A COMPONENT OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS.

State v. Lovelady, 691 S.W.2d 364, 367(Mo.App. 1985)

State v. Smulls, 935 S.W.2d 9, 27 (Mo.banc 1996)

Sup.Ct.R. 2.03, Canon 3.E.1.(a)

State v. Garner, 760 S.W.2d 893, 906 (Mo.App. 1988)

POINT II

THE MOTION COURT ERRED IN DENYING RELIEF ON MOVANT'S CLAIM THAT THE PROSECUTOR FAILED TO DISCLOSE THE CRIMINAL RECORD OF PROSECUTION WITNESS KATHY ALLEN BECAUSE THE EVIDENCE SHOWED THAT DISCLOSURE WAS REQUESTED AND NOT MADE. THE PROSECUTOR'S FAILURE TO DISCLOSE IMPEACHING EVIDENCE VIOLATED THE MOVANT'S RIGHT TO DUE PROCESS OF LAW AND CONFRONTATION OF WITNESSES UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS.

Brady v. Maryland, 373 U.S. 83 (1963)

United States v. Bagley, 473 U.S. 667(1985)

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

State v. Dayton, 535 S.W.2d 469, 477 (Mo.App.1976)

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Brady v. Maryland, 373 U.S. 83 (1963)

United States v. Smith, 77 F.3d 511 (D.C. Cir. 1996)

Wilson v. State, 363 Md. 333, 352 (Md. 2001)

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State v. McClain, 498 S.W.2d 798 (Mo.banc 1973)

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State v. Galicia, 973 S.W.2d 926, 934 (Mo.App.1998)

Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000)

Turpin v. Bennett, 525 S.E.2d 354 (Ga. 2000)

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THE MOTION COURT ERRED BY FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO RENEW THE MOTION FOR DOUBLE JEOPARDY FILED BY PRIOR COUNSEL AT TRIAL AND IN THE MOTION FOR NEW TRIAL. HAD THIS MOTION BEEN PROPERLY PRESERVED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Gilmore v. State, 710 S.W.2d 355 (Mo.App. 1986)

Green v. State, 721 S.W.2d 197 (Mo.App. 1986)

Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990)

Adams v. State, 677 S.W.2d 408, 412 (Mo.App. 1984)

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Harris v. Blodgett, 853 F.Supp. 1239, 1286 (W.D. Wash. 1994), *affirmed* 64 F.3d 1432 (9th Cir. 1995)

POINT VIII

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO REQUEST A PRETRIAL EVALUATION OF THE RELIABILITY OF THE STATE'S JAILHOUSE INFORMANT WITNESSES. HAD THIS MOTION BEEN FILED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

McNeal v. State, 551 So.2d 151, 158 (Miss. 1989)

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State v. Price, 940 S.W.2d 534 (Mo.App. 1997)

Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992)

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State v. Baldridge, 857 S.W.2d 243, 259 (Mo.App. 1993)

Thomas v. State, 516 S.W.2d 761, 767 (Mo.App. 1974)

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Steinkuehler v. Meschner, 176 F.3d 441 (8th Cir. 1999)

Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995)

Clay v. State, 876 S.W.2d 760 (Mo.App. 1994)

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State v. Baldridge, 857 S.W.2d 243, 259 (Mo.App. 1993)

Thomas v. State, 516 S.W.2d 761, 767 (Mo.App. 1974)

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Griffin v. Warden, 970 F.2d 1355, 1358-1359 (4thCir. 1992)

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Mo.Rev.Stat. §491.074

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THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO CALL BOB RILEY TO IMPEACH THE TESTIMONY OF KATHERINE ALLEN. HAD THIS EVIDENCE BEEN

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State v. Baldridge, 857 S.W.2d 243, 259 (Mo.App. 1993)

Thomas v. State, 516 S.W.2d 761, 767 (Mo.App. 1974)

Williams v. Kaiser, 323 U.S. 471 (1945)

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Gravley v. Mills, 87 F.3d 779 (6th Cir. 1996)

Crotts v. Smith, 73 F.3d 861 (9th Cir. 1996)

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Luchenburg v. Smith, 79 F.3d 388 (4th Cir. 1996)

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Skipper v. South Carolina, 476 U.S. 1 (1986)

Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001)

Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 764 (2001)

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Skipper v. South Carolina, 476 U.S. 1 (1986)

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THE TRIAL COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO PRESENT THE TESTIMONY OF RALPH BARTON AND MARY REESE IN THE PENALTY PHASE. HAD THESE WITNESSES TESTIFIED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME FOR THE PENALTY PHASE.

Carter v. Bell, 218 F.3d 581, 596 (6th Cir. 2000)

POINT XX

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PROBABILITY OF A DIFFERENT OUTCOME OF THE PENALTY PHASE.

Blankenship v. State, 23 S.W.3d 848, 851 (Mo.App. 2000)

POINT XXI

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO PRESENT TESTIMONY FROM LUCY ENGELBRECHT CONCERNING HER CLOSE, LONG-TERM RELATIONSHIP WITH MR. BARTON AND WHAT HE MEANT TO HER FAMILY. HAD THIS EVIDENCE BEEN PRESENTED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Collier v. Turpin, 177 F.3d 1184, 1201-1202 (11th Cir. 1999)

Woodson v. North Carolina, 428 U.S. 280, 303 (1976)

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THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S FAILURE TO ALLOW ARGUMENT AT FINAL SENTENCING. HAD COUNSEL BEEN PERMITTED TO ARGUE, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

State v. Feltrop, 803 S.W.2d 1 (Mo.banc 1991)

Herring v. New York, 422 U.S. 853, 858 (1975)

United States v. King, 650 F.2d 534 (4th Cir. 1981)

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Roe v. Delo, 160 F.3d 416 (8th Cir. 1998)

Jackson v. Leonardo, 162 F.3d 81 (2nd Cir. 1998)

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Williams (Terry) v. Taylor, 120 S.Ct. 1495 (2000)

Lindstadt v. Keane, 239 F.3d 191 (2nd Cir. 2001)

Washington v. Smith, 219 F.3d 620 (7th Cir. 2000)

POINT XXVI

THE MOTION COURT ERRED IN FINDING THAT SUP.CT.R. 29.15 PROVIDES A CONSTITUTIONALLY ADEQUATE REMEDY IN THAT POST-CONVICTION COUNSEL HAD INSUFFICIENT TIME AND RESOURCES TO PLEAD AND RAISE ALL OF THE ISSUES IN THE CASE AS REQUIRED BY THE RULE AND THIS COURT'S DECISIONS. THEREFORE, MR. BARTON WAS DENIED DUE PROCESS OF LAW IN THE POST-CONVICTION PROCEEDING.

Scott v. State, 717 So.2d 908, 912 (Fla. 1998)

Young v. Ragen, 337 U.S. 235 (1949)

Pyle v. Kansas, 317 U.S. 213 (1942)

Williams v. Kaiser, 323 U.S. 471 (1945)

POINT XXVII

MR. BARTON'S SENTENCE OF DEATH VIOLATES DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE BECAUSE OF THE ARBITRARY AND CAPRICIOUS NATURE OF THE CLEMENCY PROCESS, AND THE MOTION COURT ERRED IN FINDING OTHERWISE.

Herrera v. Collins, 113 S.Ct. 853 (1993)

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring)

Duvall v. Keating, 162 F.3d 1058, 1061 (10th Cir. 1998)

ARGUMENT AND AUTHORITIES

Standard of review. The rulings of the motion court as to the claims in the Amended Motion are reviewed by this court to determine

whether they are clearly erroneous. Sup.Ct.R. 29.15(k); *State v. Tokar*, 918 S.W.2d 753, 761 (Mo.banc 1996).

When reviewing claims of ineffective assistance of counsel, this Court follows the test first articulated in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); and recently clarified in *Williams (Terry) v. Taylor*, 120 S.Ct. 1495 (2000). That standard requires that the court first determine whether Mr. Barton received reasonably effective assistance of counsel. In making this determination, the court is to avoid judging the attorney's performance in hindsight, and must consider any strategic reason advanced by the attorney to determine whether it is reasonable; reasonable tactical decisions should be given great deference.

However, the word "strategy" is not an incantation which frees a decision of counsel from further scrutiny. Rather, the decisions of counsel must be considered to determine whether the strategy was reasonable:

> The mere assertion that conduct of trial counsel was "trial strategy" is not sufficient to preclude a movant from obtaining post-conviction relief based on a claim of ineffective assistance of trial counsel. *State v. Hamilton*,

871 S.W.2d 31, 34 (Mo.App. W.D. 1993). For "trial strategy" to be the basis for denying post-conviction relief, the strategy must be reasonable. Id.

State v. Galicia, 973 S.W.2d 926, 934 (Mo.App.1998).

Moreover, the court should not create strategic reasons which are not advanced by counsel: *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999) ("Court is. . . not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."); *Griffin v. Warden*, 970 F.2d 1355, 1358-1359 (4th Cir. 1992) (Court may not "conjure up tactical decisions an attorney could have made, but plainly did not. . . Tolerance of tactical miscalculations is one thing, fabrication of tactical excuses is quite another.")

If the court determines that Mr. Barton did not receive reasonably effective assistance of counsel, the court must determine whether the insufficiency had a reasonable probability of affecting the outcome of the case. A "reasonable probability" does not mean a certainty that the verdict would have been different, but means that the confidence of the court in the outcome is undermined. For

example, in *Williams (Terry) v. Taylor,* 120 S.Ct. 1495, 1516 (2000), the court found that the failure to present mitigating evidence was prejudicial even though the omitted evidence did not defeat the prosecution's death-eligibility evidence. The court held that this was true because mitigating evidence "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."

The Missouri Court of Appeals recently applied this standard and granted relief in *Blankenship v. State,* 23 S.W.3d 848, 851 (Mo.App. 2000). There, the court held,

> The *Strickland* and *Sanders* cases set a strict standard. It is difficult to prove that the result of a trial would probably be different, but for counsel's inadequacies. Yet it is not the purpose of *Strickland* to set an impossible standard. See *Williams [Terry] v. Taylor,*. . . 120 S. Ct. 1495, 1503 (2000) (referring to "errors that undermine confidence in the fundamental fairness of the . . . adjudication . . .."). We conclude that counsel's performance here fell so far short of acceptable professional standards that defendant was deprived of his constitutional right to competent

> representation. . . Our state has always been a leader in affording defendants the right to counsel, and we cannot take pride in the kind of representation the defendant received here.

Similarly, in *Perkins-Bey v. State*, 735 S.W.2d 170, 172 (Mo.App. 1987), the court found prejudice from failure to present the testimony of an alibi witness. The court noted, "The presence of the alibi witness may not have changed the result, but the probability cannot be ignored and meets the minimum standard of undermining confidence in the outcome."

This discussion pertains to all of the ineffective assistance of counsel issues presented in this brief. Authorities and arguments pertinent to specific claims of ineffective assistance of counsel will be discussed in connection with the points to which they pertain.

POINT I

THE MOTION COURT ERRED IN OVERRULING THE MOVANT'S MOTION TO DISQUALIFY THE MOTION COURT WITHOUT A HEARING BEFORE ANOTHER JUDGE BECAUSE THE JUDGE'S ACTION IN COMMENDING THE TESTIMONY OF A TRIAL WITNESS MADE HIM A WITNESS IN THE POST-CONVICTION ACTION AND CALLED HIS IMPARTIALITY INTO QUESTION. THIS ACTION VIOLATED MR. BARTON'S RIGHT TO AN IMPARTIAL JUDGE, A COMPONENT OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS.

Counsel for Mr. Barton moved to disqualify the motion court—which was also the trial court—from hearing the post-conviction motion. PCRT.1, SUPP.L.F.1. The motion was based upon the fact that the judge, after trial but before sentencing, had written a letter to an Indiana judge who had jurisdiction over a case involving Katherine Allen, one of the state's jailhouse informant witnesses. In the letter, the trial judge characterized Ms. Allen's testimony as

"crucial" to the state's case and suggested that she receive consideration in her pending Indiana case for her testimony in Mr. Barton's case. The prosecutor testified that after the verdict, the trial court asked him to supply the address of the Indiana judge, and he did so. PCRT.270. However, he denied requesting that the court write the letter. PCRT.269,272.

The letter was not found in the court file in Mr. Barton's case. Rather, it was discovered by post-conviction counsel in the court file in Ms. Allen's *Indiana* case. SUPP.LF.2.

The allegations in the amended motion included claims of prosecutorial misconduct with respect to the testimony of Ms. Allen. Specifically, Claim A alleged that the prosecutor failed to disclose fully Ms. Allen's criminal record, and Claim B alleged that the prosecutor knowingly presented perjured testimony of Ms. Allen. LF.5-6. the defense contended that the trial court's testimony would be pertinent to these grounds. The motion to disqualify was denied before the evidentiary hearing began . PCRT.1.

Because the disqualification issue is so intertwined with the prosecutorial misconduct claims, the evidence pertaining to those claims will be set out here.

During the evidentiary hearing, trial counsel testified that he did not receive a printout of the convictions and pending charges of Ms. Allen, although he did receive such printouts for other witnesses. He was unaware of many of Ms. Allen's prior convictions and pending charges. PCRT.178-191. He believed that the records presented to him by movant's current counsel were inconsistent with Ms. Allen's testimony about her criminal record at prior trials. PCRT.197. Had he been aware of this information, he would have used it to cross-examine Ms. Allen. PCRT.196.

Counsel was also shown a forensic mental report on Ms. Allen. He testified that if he had received this prior to trial, he would have moved to disqualify Ms. Allen as incompetent. PCRT.246. Co-counsel had no recollection of reviewing criminal history material regarding Ms. Allen. PCRT.71. The trial prosecutor testified that he believed he had disclosed complete information about Ms. Allen's prior record to trial counsel, but he had no written confirmation of this and no clear knowledge of what he had disclosed or when. PCRT.252-255.

At the close of the hearing, counsel for Mr. Barton attempted to call the motion judge as a witness. PCRT.392. The judge declined to testify, and renewed his ruling overruling the motion. Counsel

informed the court that if he were permitted to do so, he would have asked the court what he knew about the letter, when he learned of the facts in the letter, why he wrote it, and what biases he had in the case. PCRT.392.

After the evidentiary hearing, counsel for the state disclosed to Mr. Barton's post-conviction counsel a letter written by Asst. Cass County prosecutor Candace Cole to Robert Ahsens, the trial prosecutor. The letter was dated April 15, 1997, about a year before Mr. Barton's trial. The letter states, "Pursuant to our conversation today, Cass County is dismissing its forgery case against Katherine Feltner in return for her testifying in the Calloway County[2] murder case." The trial prosecutor, in a deposition taken by agreement after the evidentiary hearing, acknowledged receiving the letter, but said that he had not asked Ms. Cole to dismiss the case in return for Ms. Allen's testimony. Ahsens Depo. p.28. Ms. Cole, in a subsequent affidavit offered in support of Mr. Barton's post-trial motion, stated in part,

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[2] The reference to "Calloway County" is an error of the Cass County prosecutor. The trial prosecutor in *this* case acknowledged that he had discussed Ms. Allen with Ms. Cole. Ahsens depo, p.41.

> [I]n early 1997, I was contacted by Robert Ashens [sic], an assistant attorney general. He told me that a defendant who was charged with a felony offense in Cass County, Missouri under the name "Katherine A. Feltner" in cause No. CR396657F was a witness for the state in a murder case. . .
>
> I have since been told that "Katherine Feltner" is more commonly known as "Katherine Allen" and that the person against whom she testified was Walter Barton.
>
> Mr. Ashens [sic] asked me to review my case against Ms. "Feltner" to see if it could be resolved. I did so and informed him that I felt the case was weak and should not have been filed. I dismissed the case. . .
>
> After-Trial Motion, Exhibit A.

Finally, after the discovery of the letter from Ms. Cole, counsel for Mr. Barton were able to locate and depose Robert Craven, Ms. Allen's Indiana counsel. In a deposition offered in support of Mr. Barton's After-Trial Motion, Mr. Craven stated that he was aware that Ms. Allen had pending Missouri charges, and that "It was my understanding that if she came over and testified, that they were

going to dismiss the case in Cass County. . .” After-Trial Motion, Exhibit B, Craven depo., 5. Mr. Craven indicated that this assurance came from an investigator for the Missouri Prosecutor’s Office. Craven depo., 4,8. The dismissal of charges, of which Mr. Craven received a copy, came after this visit from the investigator. Craven depo., 6.

Also after the evidentiary hearing, the state, for the first time, disclosed to counsel for Mr. Barton a printout of Ms. Allen’s record dated March 17, 1997. (Ahsens depo., RX.A.7) The record was sent to the attention of the prosecutor’s investigator. Ahsens depo. 7. This printout was not discovered by counsel for the state in the post-conviction hearing until after the evidentiary hearing. Mr. Ahsens testified in his post-hearing deposition that he was sure that he had provided the information on the printout to trial counsel. Ahsens depo. 7-8. In fact, he said that he had probably run an earlier version and provided that. However, counsel for the state stipulated that RX.A was the only printout for Ms. Allen found in the prosecutor’s trial file. Ahsens depo. 21.

Standard of review. When the denial of a motion to disqualify is raised on appeal, “Our review must be based upon the objective facts of the record as we read it, from the standpoint of a reasonable

and disinterested bystander, unacquainted with the personality, the integrity and the dedication of the judge." *State v. Lovelady*, 691 S.W.2d 364, 367(Mo.App. 1985).

Argument. The motion court was required to recuse himself for two reasons. First, he was a witness in the post-conviction case. The letter he wrote clearly demonstrated that Ms. Allen received a benefit for her testimony. It raised the issue of whether she was aware, before she testified, that such a benefit would be bestowed. This was a critical factual issue in the case. The only person who could testify as to the circumstances under which the letter was written was the judge; the prosecutor denied knowledge of it.

A judge should recuse when he is a witness in the case and there is no other source for the information he could provide. *Vickers v. State*, 17 S.W.3d 632 (Mo.App. 2000) (Judge required to disqualify himself where he was properly called as a witness.) As this Court stated in *State v. Smulls*, 935 S.W.2d 9, 27 (Mo.banc 1996), "When the judge's on-the-record comments are coupled with his status as a potential witness to off-the-record issues raised in the post-conviction forum, fundamental fairness and the code of judicial conduct demand that he sustain the motion to disqualify himself."

Second, the letter demonstrates that the trial judge had a bias with respect to Ms. Allen's testimony. He characterized it as "crucial." And he sought to have her rewarded for her assistance in bringing about Mr. Barton's conviction and death sentence.

Sup.Ct.R. 2.03, Canon 3.E.1.(a) provides, "A judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where. . . the judge has a personal bias or prejudice concerning a party. . ." This bias must come from circumstances other than evidence the judge has heard in the case. *State v. Jones*, 979 S.W.2d 171 (Mo. 1998). Here, the trial judge apparently learned from sources outside the case about Kathy Allen's pending charge. Then, before sentencing Mr. Barton, he acted as an advocate for Allen and commended her for her presentation of evidence.

Sup.Ct.R. 51.07 provides for the appointment of a new judge when the assigned judge is disqualified for any reason. In *Thomas v. State*, 808 S.W.2d 364, 367 (Mo.banc 1991), the Missouri Supreme Court held:

> Due process concerns permit any litigant to remove a biased judge. To the extent that a movant finds himself

> facing a prejudicial trial court, the right to disqualify the judge no longer proceeds from the grace of our rules, but from a command of the Constitution.

Similarly, in *State v. Garner*, 760 S.W.2d 893, 906 (Mo.App. 1988), the court held, quoting *State v. Lovelady*, 691 S.W.2d 364, 365 (Mo.App. 1985):

> [T]he law is very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that the parties and the public have confidence in the impartiality of the arbiter. Where a judge's freedom from bias or his prejudgment of an issue is called into question, the inquiry is no longer whether he actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he is so.

In *Garner*, the court required the trial judge to recuse himself on remand where the defendant's counsel made an affidavit calling into question the trial judge's impartiality. In *Lovelady*, the trial court reversed a conviction on the ground that the defendant's motion for disqualification of the judge for cause should have been sustained.

Due process requires a tribunal free from both impropriety and the appearance of impropriety.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio,* 273 U.S. 510, 532 [(1927)]. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 [(1954)].
>
> *In Re Murchison*, 348 U.S. 133, 136 (1955).

Because the allegations of this motion were controverted, Mr. Barton was entitled to have this motion determined by another judge.

Counsel sought to call the judge as a witness in support of his motion. PCRT.392. Therefore, under the procedure outlined in *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 699 (Mo.App. 1990), a different judge should have heard the motion because, "[I]n the face of a proper application for a change of judge, the judge lacks jurisdiction to proceed in the action in which his impartiality is questioned." Because the decision on the motion requires the determination of facts which are outside the record in this case, a new judge is required to hear the motion. See *State v. Smulls*, 10 S.W.3d 497, 504 (Mo.banc 1996) (Where the disqualification motion alleges verified, controverted facts, a hearing before another judge is required.)

For the foregoing reasons, in the event that Mr. Barton's conviction is not otherwise vacated, Mr. Barton prays this Court to reverse the decision of the motion court overruling the motion to disqualify, and to remand for a new evidentiary hearing before another judge. Alternatively, this court should remand for a hearing on the motion to disqualify before another judge so that Mr. Barton can present the testimony of the trial judge.

POINT II

THE MOTION COURT ERRED IN DENYING RELIEF ON MOVANT'S CLAIM THAT THE PROSECUTOR FAILED TO DISCLOSE THE CRIMINAL RECORD OF PROSECUTION WITNESS KATHY ALLEN BECAUSE THE EVIDENCE SHOWED THAT DISCLOSURE WAS REQUESTED AND NOT MADE. THE PROSECUTOR'S FAILURE TO DISCLOSE IMPEACHING EVIDENCE VIOLATED THE MOVANT'S RIGHT TO DUE PROCESS OF LAW AND CONFRONTATION OF WITNESSES UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS.

The facts pertinent to this Point have been stated in connection with the previous point, to which the Court is respectfully referred.

Addressing this Claim,[3] the motion court stated, first, that in Ms. Allen's prior testimony, she admitted six prior convictions.[4] LF.237.

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[3] Amended Motion, Claim A, L.F.5.

[4] At the previous trial, Ms. Allen admitted to 5 counts of bad checks and one theft. 1994 TT.811. She also said that she had no other convictions.

The court then went on to hold that the additional convictions which were not disclosed would not have affected the outcome of the trial. Therefore, no prejudice, within the meaning of *Strickler v. Greene*, 527 U.S. 263, 280 (1999), was shown. The court also held that the prosecution had no obligation to discover the full criminal record of Ms. Allen, noting that the defense had great difficulty in doing so. L.F.239.

Of course, the prosecution has access to records systems which are unavailable to the defense. The prosecutor testified, in fact, that it his practice to obtain criminal history information from MULES and to disclose it to the defense. PCRT.252-253. For that reason, Sup.Ct.R. 25.03(A)(7) requires the state to disclose, without limitation, "Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial." Trial counsel testified that he relied on the state to make complete disclosure of the criminal records and did no additional investigation. PCRT.192.

It is clear that the state breached its duty to make disclosure to the defense. The following chart reflects Ms. Allen's actual criminal record, as shown by the evidence before the motion court. Far from having only the six criminal convictions to which she admitted, Ms.

Allen, at the time of Mr. Barton's trial, had been convicted of 18 criminal offenses, all involving deception. The majority of these convictions were on the 1997 printout, which was in the State's possession. That printout certainly put the State on notice of the need to update Ms. Allen's criminal record before the 1999 trial, yet the State failed to do so.

CRIMINAL HISTORY OF KATHERINE ALLEN
11/16/78, Kansas City, MO, 2 cts forgery, Reduced to passing bad check, 2 yr. prob , (RX[5].1,¶1, MX.16)
7/15/82, Marion Co., IN, CR82-180D, Theft, 1 year imp. susp. 1 year, (RX.1,¶4, MX.16)
7/28/83, Marion Co, IN, CR82-362F, Theft, 2 yr imp., (RX.1¶5, MX.16)
4/27/83, Marion Co, IN, 2 cts forgery, 5 years imp., (RX.1,¶6, MX.16)
12/18/85, Madison Co., IN, 3 cts decep. bad check, 1 yr imp., 361 days prob., (Marion Co. PSI, MX.16)
3/24/87, Marion Co., IN, M17-87-518, Criminal conversion, 66 days imp., 299 days susp., 1 yr. prob., (Marion Co. PSI. MX.16)

[5] "RX" and "MX" refer to Respondent's and Movant's PCR Exhibits.

3/31/87, 5/4/87, Madison Co., IN, Bad check, 365 days imp., 299 days susp., 1 yr. prob., (RX.1,¶¶9,10, MX.16)
3/10/92, 1/6/92, Wabaunsee Co., KS, 92-CR-36, 92-CR-17, Misd. theft (reduced from felony theft), 1 yr. imp + 2 yr. prob., (MX.16)
3/17/94, Lawrence Co. MO, CR492-398FX, CR492-567FX, CR492-399FX, 2 cts forgery; escape , 3 yr imp (escape dismissed), (RX.1,¶12, MX.37a-37c)
1/2/98, Marion Co, IN, 49G05-9606CF-087858, 1 ct forgery, 1,460 days imp 4 yrs susp., (RX.1¶15, MX.66)
1/6/98, Marion Co., IN 49G03-9710-CF-147884, 2 cts forgery, 4 yrs. imp. (MX.65)
1/7/98, Marion Co, IN 49G05-9610-CF-155098, 1 ct forgery, 1,460 days imp 4 yrs susp., (RX.1¶16, MX.66)

Ms. Allen again testified, at Mr. Barton's most recent trial, that she had six prior convictions. TT.768. The discrepancy between six and eighteen convictions involving deception is more than merely cumulative. It transforms Ms. Allen's status from that of a petty thief to that of a con artist on a grand scale. Since Ms. Allen's credibility was critical to the state's case, this difference is enough to affect the outcome of the trial.

The criminal history was not the only information the state failed to disclose to trial counsel. The state also failed to disclose that in connection with her Lawrence County, Missouri case, Ms. Allen underwent a psychological evaluation which revealed that she was malingering. MX.53. Trial counsel testified that had he been aware of this evaluation, he would have used it to attempt to have Ms. Allen declared incompetent to testify. PCRT.246.

In addition to breaching its statutory duty to disclose criminal record information, the State also breached its constitutional duty to disclose. Under *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667(1985), the prosecutor has a duty to disclose to the defendant in a criminal case any information in the prosecutor's possession or control which is exculpatory. For the purposes of this duty of disclosure, exculpatory evidence includes evidence which can be used to impeach the testimony of prosecution witnesses.

If exculpatory information is in the possession of law enforcement personnel, knowledge of the information is imputed to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419 (1995). In *United States v. Strifler*, 851 F.3d 1197 (9th Cir. 1988), the court held that the

government could not make a witness's criminal history information unavailable by placing it in the witness's probation file.

"The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The prosecutor's lack of specific knowledge of a witness's criminal record was held not to excuse a *Brady* violation in *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980). Further, the prosecution cannot avoid the duty to disclose by keeping itself ignorant of exculpatory evidence. *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984).

The prosecutor is not excused from his duty to disclose by the fact that the defense could have discovered the withheld information on its own. The defense is entitled to rely on the prosecutor's representations about subjects covered by the duty to disclose. *Duran v. Thurman*, 106 F.3d 407 (9th Cir. 1997) (Unpublished); *People v. Ramos*, 550 N.Y.S.2d 784 (N.Y.Sup.Ct. 1990) (Failure of prosecutor to turn over criminal record of prosecution witness was an inexcusable *Brady* violation requiring reversal); *Commonwealth v. Moose*, 602 A.2d 1265 (Pa. 1992) (Murder conviction reversed where state failed to

disclose deal with jailhouse informant despite a general request by the defense. Defendant's failure to seek criminal records of state witnesses was directly traceable to state's failure to identify the prisoner.)

In considering violations of the constitutional duty to disclose and the discovery rules, the good faith of the prosecutor is irrelevant. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Dayton*, 535 S.W.2d 469, 477 (Mo.App.1976); *State v. Bebee*, 577 S.W.2d 658, 661 (Mo.App.1979). The state was required to make reasonable efforts to discover the criminal history of the witness. *Crivens v. Roth*, 172 F.3d 991, 997 (7th Cir. 1999);(7thCir. 1999); *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir.(9thCir. 1997). This is because of the special status of the prosecutor and his ability to discovery criminal history information:

> These cases. . . illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as

its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Strickler v. Greene, 527 U.S. 263, 282 (1999), citing *Berger v. United States*, 295 U.S. 78, 88 (1935).

Once it has been determined that exculpatory or impeaching information was not disclosed, the question before the court is whether the information which was not disclosed is "material." "Material" information is that information which, had it been disclosed, had a reasonable probability of affecting the outcome of the trial. *United States v. Bagley*, 473 U.S. 667 (1985); *State v. Phillips*, 940 S.W.2d 512, 516-517 (Mo.banc 1997) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."); *State v. Willis*, 2 S.W.3d 801, 803 (Mo.App.2000).

In *Ouimette v. Moran*, 942 F.2d 1 (1st Cir. 1991), the court held that the state's failure to disclose the long criminal record of a prosecution witness was material where the witness's testimony was critical to the conviction. Even when other impeachment evidence was available, the court in *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996) held that a failure to disclose dismissal of charges as part of

a plea agreement in federal court was material. This was because, armed with full disclosure, the defense could have greatly strengthened its cross-examination of the witness.

Where the witness's criminal record included a mental evaluation which reflected that the witness suffered from hallucinations, the failure to disclose the criminal record was material and required reversal. *East v. Johnson*, 123 F.3d 235 (5th Cir. 1997). And in *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), the court reversed a conviction and death sentence where the prosecution withheld from the defense the Department of Correction file of a state's witness. Because the witness had a long criminal history, the prosecution had the duty to turn over all information bearing on his credibility. The DOC file contained not only information that the witness had a long history of burglaries (the crime the witness was now blaming on the defendant), but also that he had a long history of lying to the police and blaming others to cover up his own guilt.

Even if the prosecutor disclosed the criminal history found in the file after the evidentiary hearing (Ahsens depo. RXA), the disclosure would not have been sufficient. MX.65 and 66 reflect that after March, 1997, when the criminal history was produced, Ms. Allen had

additional convictions. In order to comply with his duty to disclose, the prosecutor was required to obtain updated information and disclose it to the defense. In light of Ms. Allen's history as listed in RX.A, a reasonable prosecutor would have done so. See *People v. Buckley*, 501 N.Y.S.2d 554 (N.Y.Sup.Ct. 1986) (Updated rap sheet on prosecution witness, showing disposition of a charge not appearing on sheet given to defense was material which prosecution was obligated to disclose to defense.)

Ms. Allen's testimony was, as the trial judge stated in his letter to the Indiana Judge, crucial to the prosecution's case. The first time Mr. Barton was tried, one jail inmate witness, Larry Arnold, testified for the prosecution. 1993 TT.323-345. His testimony was impeached with evidence that he had previously been shown to have lied when testifying against another jail inmate. 1993 TT.331-334. The jury was unable to reach a verdict.

The case has been tried twice since. The state's evidence concerning the crime has not varied significantly from the first trial. However, after the mistrial, the state located three other jail inmate witnesses. Two of these inmates, Craig Dorser and Katherine Allen, testified that Mr. Barton admitted to them that he had killed

someone. T.771,777-778. Of the two, Katherine Allen was far more credible and effective than Craig Dorser. However, had the jury known that Ms. Allen's criminal record was far more extensive than the "six bad check charges" to which she admitted, there is a reasonable probability that her testimony would not have been believed. Her criminal record includes 18 convictions for offenses involving deception, including forgery, theft, and credit card fraud. Had proper disclosure been made, it would also have been possible to impeach her with the fact that she used numerous aliases, birthdates and social security numbers in committing her crimes.

The state cannot evade its *Brady-Bagley* responsibilities by disclosing only part of the impeaching evidence in its possession and then claiming that the rest would be cumulative. *Carriger v. Stewart*, 132 F.3d 463, 482 (9th Cir. 1997). Nor must the evidence disclosed be independently admissible. It is sufficient if the information could be used to impeach a witness. *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997).

The motion court found that because trial counsel did not question Ms. Allen about the six convictions to which she admitted, there was no reason to believe that he would have made use of the

additional convictions had he known of them. LF.240. But trial counsel testified that had he known of the additional convictions, he would have used them to impeach Allen. PCRT.181. Ms. Allen's testimony in this trial and in the immediate prior trial was the same: That she had six convictions. Had trial counsel been in possession of the ammunition to show that she had additional convictions, his trial strategy would have been different. He would have been able to impeach her with her perjury in the prior trial, and would have been able to show the jury her extensive criminal record. While the court may consider reasonable strategic decisions of counsel in determining whether a defendant received effective assistance of counsel, it is inappropriate for the court to create strategic decisions where none existed. *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999); *Griffin*(5thCir. 1999); *Griffin v. Warden*, 970 F.2d 1355, 1358-1359 (4thCir. 1992). The same considerations should govern the harm analysis in this case.

In light of the controverted evidence in this case, the failure to disclose the information concerning Katherine Allen was material. There is a reasonable probability that had the information been disclosed, the outcome of the trial would have been different. Because

the prosecutor's unconstitutional failure to disclose Ms. Allen's convictions was prejudicial to Mr. Barton, reversal for a new trial is required.

POINT III

THE MOTION COURT ERRED IN FINDING THAT THE PROSECUTOR DID NOT FAIL TO DISCLOSE AN AGREEMENT THAT MISSOURI CHARGES AGAINST STATE'S WITNESS KATHY ALLEN WERE DISMISSED IN EXCHANGE FOR HER TESTIMONY IN MR. BARTON'S CASE IN THAT THE EVIDENCE CLEARLY DEMONSTRATED THAT THIS OCCURRED. THE STATE'S FAILURE TO DISCLOSE INDUCEMENTS FOR THE TESTIMONY OF MS. ALLEN WAS A VIOLATION OF MR. BARTON'S RIGHT TO DUE PROCESS OF LAW AND TO CONFRONTATION OF WITNESSES UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS.

As described in connection with Point I, evidence was developed that prior to Mr. Barton's trial, a case filed in Cass County against

witness Kathy Allen was dismissed in consideration for her cooperation in Mr. Barton's case, and the defense was not informed.

The motion court found that this claim was barred because it was not included in Mr. Barton's amended motion. The factual finding is correct; although the amended motion alleged that the prosecutor failed to disclose information about Ms. Allen's criminal record and mental illness examination (LF.5), it did not allege specifically the failure to disclose the deal with Ms. Allen. The reason for that is clear from the record in this case. Post-conviction counsel for Mr. Barton were not aware of the deal until counsel for the state disclosed Ms. Cole's letter to Mr. Ahsens after the evidentiary hearing in this case. Ms. Allen's Cass County case was filed under the name Catherine Feltner. Thus, investigation by defense or post-conviction counsel did not reveal the case.

While this Court may choose whether to enact post-conviction rules, once it does so, the post-conviction procedure must comport with due process of law. *Young v. Ragen*, 337 U.S. 235 (1949); *Pyle v. Kansas*, 317 U.S. 213 (1942), and *Williams v. Kaiser*, 323 U.S. 471 (1945). See *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (Clark, J., concurring.) To grant the state the benefit of this court's restrictive

pleading rules for post-conviction motions when it is the state's own action in failing to disclose relevant information that results in the failure to plead specifically is a violation of due process. See *Kyles v. Whitley*, 514 U.S. 419 (1995) (State's failure to disclose exculpatory or impeaching information excuses failure to raise issue earlier); *Crivens v. Ross*, 172 F.3d 991, 995 (7th Cir. 1999) ("We will not penalize Crivens for presenting an issue to us that he was unable to present to the state courts because of the state's misconduct.")

After finding that the claim was barred, the motion court then found that there was no "deal" which was not revealed. LF.240. This finding was clearly erroneous.

The following evidence demonstrates that a deal was made. First, Candace Cole, the prosecutor in the county where Ms. Allen's case was pending wrote a letter to the trial prosecutor, Robert Ahsens, confirming the deal, and attached her dismissal motion. Second, Candace Cole stated in an affidavit that Mr. "Ashens" contacted her about Ms. Allen's case. Finally, Mr. Craven, Ms. Allen's Indiana attorney, testified in his deposition that he was assured by Joe Dresselhaus, Mr. Ahsens's investigator, that if Ms. Allen testified against Mr. Barton, her Missouri charge would be dismissed.

Mr. Ahsens, whose duty it was to disclose any deal, has an obvious interest in contending that no deal was made. His is the only testimony contradicting that of Cole and Craven. Under these circumstances, this court should find that there was consideration given to Ms. Allen for her testimony, and that this consideration was not disclosed to the defense.

Failure to disclose agreements with prosecution witnesses violates due process of law. *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667(1985). Relief is required if there is a reasonable probability that the failure to disclose affected the verdict. *Napue v. Illinois*, 360 U.S. 264 (1959). In *United States v. Smith*, 77 F.3d 511, 517 (D.C. Cir. 1996), a new trial was ordered where, as here, the prosecution failed to disclose both inducements for testimony and a witness's mental health history. The court noted, "The prosecutor's obligation to disclose material information to the defense is a fundamental component of the guarantee that criminal defendants receive fair trials. Thus, we do not lightly excuse *Brady* violations." The materiality of *Brady* violations should be considered cumulatively. That is, the court should consider the impact of the

failure to disclose all of the suppressed items together, not separately. *State v. McKinnon*, 2001 Ohio App. LEXIS 261*8 (Oh.App. 2001).

In *Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998), the court reversed where the prosecutor failed to disclose the consideration given for a prosecution witness's testimony. The court held that despite "conflicting arguments" about the importance of the witness's testimony,

> Given the importance of Copas' [the witness] testimony to the prosecution's case, and the impact the disclosure of evidence of the benefits provided to Copas could have had on Copas' credibility, we believe there is a reasonable probability that had the evidence been disclosed to the defense, one or more members of the jury could have viewed Copas' testimony differently.

In *Wilson v. State*, 363 Md. 333, 352 (Md. 2001), the court summarized the criteria for determining when a failure to disclose exculpatory or impeaching information is "material" under the *Bagley* standard.

> the specificity of the defendant's request for disclosure of materials. . .; the closeness of the case against the

> defendant and the cumulative weight of the other independent evidence of guilt. . .; the centrality of the particular witness to the State's case. . .; the significance of the inducement to testify; whether and to what extent the witness's credibility is already in question,; and the prosecutorial emphasis on the witness's credibility in closing arguments. . .

Using these criteria, prejudice is clear in this case. A specific request for discovery, including a request for criminal history of witnesses, was filed by the defense. PCRT.178,251, Ahsens depo.14. The evidence against Mr. Barton, without the jailhouse informant testimony, was so weak that it had resulted in a hung jury on a previous occasion. Ms. Allen was the most credible of the informant witnesses; her testimony was "crucial" according to the trial judge. The prosecutor emphasized the testimony of the jailhouse informants in his final argument. TT.899.

Because the failure to disclose was material, reversal for a new trial is required.

POINT IV

THE MOTION COURT ERRED IN FINDING THAT THE PROSECUTOR DID NOT KNOWINGLY PRESENT THE PERJURED TESTIMONY OF KATHY ALLEN IN THAT THE EVIDENCE SUPPORTED THE CLAIM. THE PRESENTATION OF PERJURED EVIDENCE VIOLATED MR. BARTON'S RIGHT TO DUE PROCESS OF LAW UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS.

The prosecutors knowingly used perjured testimony when they allowed Katherine Allen to testify that her only criminal convictions were for bad checks. Amended Motion, Claim B, LF.6. As noted earlier in this brief, Ms. Allen testified at trial that she had six prior bad check charges. TT.768. She actually had 18 convictions, and some of these were for such offenses as theft, credit card fraud, and escape.

The state conceded that the prosecutors, prior to trial, had in their possession a printout of Katherine Allen's convictions. Ahsens Depo., RXA. This document reflected that Ms. Allen, in addition to bad check charges, had convictions for forgery and theft. Ms. Allen's testimony simply did not reflect her criminal record as known to the

state. But the prosecutors allowed this misstatement to go uncorrected.

Allowing false testimony to go uncorrected violates due process of law under U.S.Const., amend. XIV and Mo.Const. art. I§10. The prosecutor's allowing a false impression to be given to the jury requires relief if there is "any reasonable likelihood that the false testimony could have affected the verdict." *Giglio v. United States*, 405 U.S. 150 (1972); *Brown v. Wainwright*, 785 F.2d 1457, 1465-1466 (11th Cir. 1986).(11thCir. 1986). "A conviction obtained by known false testimony cannot stand because it involves a lack of due process." *State v. McClain*, 498 S.W.2d 798 (Mo.banc 1973); *State v. Brooks*, 513 S.W.2d 168, 173 (Mo.App. 1973); *Napue v. Illinois*, 360 U.S. 264 (1959).

Cases from other states demonstrate that relief is required here. In *Commonwealth v. Wallace*, 500 Pa. 270, 277 (Pa. 1983), a new trial was granted when the prosecutor failed to correct false statements by a key witness about his criminal record, and, as here, also failed to disclose fully the witness's criminal record. Similarly, in *Dinning v. State*, 266 Ga. 694, 697 (Ga. 1996) the court granted relief where the prosecutor failed to disclose an immunity agreement with a witness.

In *Deatrick v. State*, 181 Ind. App. 469, 478 (Ind.App. 1979), the court ordered a new trial where, in response to the defendant's request, the prosecutor and a co-defendant both denied the existence of a "deal" for the codefendant's testimony. On direct examination, the co-defendant denied that any promises for his testimony were made. Prior to trial, the prosecutor made promises and wrote a letter to the parole board about the co-defendant. Analyzing the harm standard, the court held that the perjury could have affected the verdict, where the eyewitnesses could not identify the perpetrators and the prosecutor emphasized the sincerity of the co-defendant.

Ms. Allen's testimony was material. The evidence against Mr. Barton was not overwhelming. As the dissenting judge noted in *State v. Barton*, 998 S.W.2d 19, 30 (Mo.banc 1999),

> In another, previous trial Barton had not been convicted of this killing because the jury was unable to agree on a verdict. Much of the certainty that his most recent trial is afforded, as well as evidence of aggravating circumstances supporting imposition of the death penalty, came from ever-helpful fellow prisoners. Perhaps the evidence of guilt may be subject to nonfrivolous debate. . .

Under these circumstances, the knowing use of perjured testimony requires a new trial.

POINT V

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL REQUESTED A MISTRIAL AFTER THE JURY WAS SWORN WHEN THE STATE HAD FAILED TO ENDORSE ITS WITNESSES. TRIAL COUNSEL'S ACTION WAS NOT REASONABLY EFFECTIVE AND WAS PREJUDICIAL TO MR. BARTON.

On April 5, 1993, a jury had been selected and sworn in Mr. Barton's case. Prior to that time, Mr. Barton's then defense counsel Daniel J. Gralike and Mary E. Young were aware that no witnesses had been endorsed by the prosecution in the court's file as required by Mo. Sup.Ct.R. 23.01(f). After the jury had been sworn, defense counsel pointed this fact out to the trial court. The trial judge indicated that he believed the case could not go forward.

Mr. Gralike then moved for a mistrial. The motion was granted. (Before Mr. Gralike moved for a mistrial, Ms. Young told him not to do so. MX.50, Young depo., 15.) 1993 MT.105. After the mistrial was declared, defense counsel moved for discharge of the defendant. The trial court ruled that the defendant had requested the mistrial and had therefore waived any double jeopardy claim. 1993 MT.107. In his motion under Sup.Ct.R. 29.15 filed after he was convicted in 1994, Mr. Barton raised the issue of ineffective assistance of counsel because of the making of this motion. Relief was denied in the motion court. On appeal, the issue of double jeopardy because of the mistrial was raised in the briefs but not addressed by this Court. *State v. Barton*, 936 S.W.2d 781,782 (Mo.banc 1996).

The motion court found that he, as trial judge, would have permitted the late endorsement of witnesses if the mistrial had not occurred. LF.241. This finding is belied by the fact that during the earlier proceedings, it was the same judge himself who said that the proceedings could not continue. 1993 MT.105. Had defense counsel not moved for a mistrial, there is a reasonable probability that the trial court would have declared a mistrial on its own motion, or would

have precluded the prosecutor from presenting testimony because the witnesses were not endorsed.

Trial counsel's action in moving for a mistrial was not reasonably effective. Since jeopardy had attached when the jury was sworn, Mr. Barton would have been entitled to discharge if the court had declared a mistrial on its own motion. *United States v. Jorn*, 400 U.S. 470 (1971); *Huss v. Graves*, 252 F.3d 952 (8th Cir. 2001); *Johnson v. Karnes*, 198 F.3d 589 (6th Cir. 1999). And if the court had declined to allow the prosecutor to present any witness who was not endorsed, Mr. Barton would have been entitled to an acquittal. Therefore, the action of defense counsel in moving for a mistrial was prejudicial to Mr. Barton.

Trial counsel's action served no purpose beneficial to Mr. Barton. According to Mr. Gralike, he made the motion in the belief that once he did so, Mr. Barton could not be retried. MX.50, Gralike depo. This is supported by the fact that once the mistrial was granted, Mr. Gralike moved for the discharge of Mr. Barton. Predictably, this motion was denied on the ground that once the mistrial was granted on Mr. Barton's motion, he had nothing to complain about. The trial

court's finding that there was no ineffective assistance of counsel for moving for a mistrial was clearly erroneous.[6]

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[6] In support of this contention and his other ineffective assistance of counsel claims, Mr. Barton presented the deposition testimony of Charles Rogers, a distinguished criminal defense attorney. MX.50, Rogers depo. Mr. Rogers said, "By moving for a mistrial,. . . Mr. Gralike let the State off the hook where they had been firmly planted." The motion court, consonant with this Court's prior decisions, declined to consider this deposition on the ground that the motion court did not need expertise on the issue of effective assistance of counsel. The court seized on a minor error in Mr. Rogers's testimony to find it "contradictory and not credible." LF.233. Mr. Barton urges the court to revisit the admissibility of such expert testimony. Many courts throughout the state and federal systems receive expert testimony on ineffective assistance of counsel. See, e.g. *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994); *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983); *Carter v. Bell*, 218 F.3d 581, 589 (6th Cir. 2000); *Hooks v. Ward*, 184 F.3d 1206, 1212 (10th Cir. 1999); *Hendricks v. Calderon*, 864 F.Supp. 929 (N.D. Cal. 1994), aff'd 70 F.3d 1032 (9th Cir. 1995); *Stafford v. Saffle*, 34 F.3d 1557, 1563 (10th Cir. 1994); *Middleton v. Dugger*, 849

The improper use of pretrial motions can be ineffective assistance of counsel. See, e.g., *State v. Galicia*, 973 S.W.2d 926 (Mo. App. 1998) (reversed where counsel did not file a motion to suppress the evidence of the defendant's post-arrest invocation of his rights to counsel and to remain silent); *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), (new trial granted where defense counsel failed to object to the state's presentation of evidence of the defendant's pre-arrest invocation of the right to counsel); *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000) (trial counsel ineffective for failing to move to sever the defendant's trial from that of a co-defendant on the basis of antagonistic defenses; prejudice was found because the motion to sever would likely have been granted.); *Turpin v. Bennett*, 525 S.E.2d 354 (Ga. 2000), (trial counsel was ineffective for failing to move for a continuance when he discovered that the defense expert psychiatrist was suffering from AIDS-related dementia).

Because trial counsel's improper action denied Mr. Barton the right to a discharge, this Court must reverse his conviction and sentence and order that Mr. Barton not be retried for this offense.

F.2d 491, 494 (11th Cir. 1988).

POINT VI

THE MOTION COURT ERRED BY FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO RENEW THE MOTION FOR DOUBLE JEOPARDY FILED BY PRIOR COUNSEL AT TRIAL AND IN THE MOTION FOR NEW TRIAL. HAD THIS MOTION BEEN PROPERLY PRESERVED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Before the first complete trial, Mr. Barton's trial counsel moved to dismiss the case on the ground of double jeopardy. 1994 TT.1-2. The motion was overruled by the trial court. 1994 TT.1-2. The issue was raised in the motion for new trial filed after the 1994 trial. 1995 LF.145-146. The issue was raised on appeal after Mr. Barton's conviction. (Appeal Brief, No. 77147, Point III) This Court did not address it. *State v. Barton*, 936 S.W.2d 781 (Mo. banc 1996).

Present trial counsel failed to renew the motion or to obtain from the judge a ruling that there was no need to do so, and did not include the issue in their motion for new trial. This failure to preserve the

issue for appeal resulted in a waiver of Mr. Barton's right to have the issue considered on appeal for plenary review. Had this issue been given plenary review, there is a reasonable probability that Mr. Barton would have been discharged by this Court. Therefore, the failure to renew this motion was prejudicial to Mr. Barton.

The failure to file appropriate pretrial motions is ineffective assistance of counsel. In Missouri, reversal has occurred where trial counsel: failed to file a motion for change of venue, *Moss v. State*, 1999 Mo.App.LEXIS 761 (Mo.App. June 1, 1999); failed to file a meritorious motion to suppress, *Bonner v. State*, 765 S.W.2d 286, 287 (Mo.App. 1988); *Adams v. State*, 677 S.W.2d 408, 412 (Mo.App. 1984); failed to object to a misleading verdict form, *Salkil v. State*, 736 S.W.2d 428 (Mo.App. 1987); and failed to raise a double jeopardy issue *Gilmore v. State*, 710 S.W.2d 355 (Mo.App. 1986); *Green v. State*, 721 S.W.2d 197 (Mo.App. 1986).

Federal courts have also granted new trials where they found ineffective assistance of counsel for failing to file motions: *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000) (motion to sever based on antagonistic defenses); *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) (failure to move to suppress evidence of the defendant's pre-arrest

silence); *Huynh v. King*, 95 F.3d 1052 (11th Cir. 1996) (motion to suppress evidence seized in search); *Tomlin v. Myers*, 30 F.3d 1235 (9th Cir. 1994) (motion to suppress identification); *Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990) (double jeopardy claim); *Smith v. Dugger*, 911 F.2d 494 (11th Cir. 1990) (motion to suppress confession); *Rice v. Marshall*, 816 F.2d 1126 (6th Cir. 1987).

When trial counsel objects to trial court rulings, it is a part of his responsibility to preserve the issue for appellate review. *State v. Robinson*, 744 So.2d 119 (La.App. 1999). Trial counsel testified that he had no strategic reason for omitting this issue from the motion for new trial. In fact, he admitted that it should have been included. PCRT.210.[7] Appellate counsel did not include this issue in the appellate brief, although he had included it in the earlier appeal, because he did not believe it had been preserved. MX.50, Spangler depo. 11.

The test for determining prejudice from a failure to object or file a motion is not whether the trial judge himself would have sustained the objection or granted the motion, but rather whether, based on the

[7] Trial counsel believed he had raised the issue in a pretrial motion. PCRT.210. He was mistaken.

case law, the motion or objection was valid: "The test of merit is not whether the judge would have reversed his earlier ruling but rather whether, in the light of case law, the objection was a valid one as considered on appeal." *Adams v. State*, 677 S.W.2d 408, 412 (Mo.App. 1984).

The issue which should have been raised had merit. Under *State v. Ivory*, 609 S.W.2d 217, 223 (Mo.App. 1980), and *State v. Fitzpatrick*, 676 S.W.2d 831, 834 (Mo.banc 1984), if the necessity for a mistrial after jeopardy has attached is created by misconduct of the prosecutor, the Double Jeopardy Clause (U.S. Const. Amend. V, XIV), prohibits further prosecution. While the motion court has indicated that it would not have granted the motion, this court would have done so on appeal. Accordingly, Mr. Barton is entitled to discharge.

POINT VII

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO MOVE TO QUASH THE STATE'S DEATH PENALTY NOTICE ON THE CONSTITUTIONAL GROUND THAT THIS COURT'S PROPORTIONALITY REVIEW VIOLATES DUE PROCESS. HAD THE MOTION BEEN FILED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Mr. Barton's trial counsel failed to mount any challenge to this court's proportionality review as rendering the imposition of a death sentence unconstitutional.

In *Harris v. Blodgett*, 853 F.Supp. 1239, 1286 (W.D. Wash. 1994), *affirmed* 64 F.3d 1432 (9th Cir. 1995), Washington's proportionality review statute (RCW 10.95.130(2)), which is substantially similar to that of Missouri, was held to violate due process of law.

Harris' due process rights were violated in the sentence review. While he had notice of the proceedings, he did not

> have adequate, meaningful, notice of the procedure to be followed. . . Harris had no adequate notice of what "similar cases" are, how they are to be selected, or the factors to be compared. He had no notice of what would happen if no "similar cases" were found. He had no adequate notice of the court's standard for review of "similar cases. . ." Because of the lack of appropriate notice regarding the procedure to be followed, Harris did not have a meaningful opportunity to be heard.

This Court's approach to proportionality review, like the Washington Supreme Court's, does not provide death-sentenced defendants with the procedural due process required under MO. REV. STAT. §565.035.3 and the United States and Missouri Constitutions.

Although this claim has been rejected by this Court, it is incumbent upon counsel in a capital case to preserve the issue for federal review. This is particularly true where, as here, the federal court decisions are conflicting. *Foster v. Delo*, 39 F.3d 873 (8th Cir. 1994) acknowledges that where a state grants proportionality review, the review must meet due process requirements, while *LaRette v. Delo*, 44 F.3d 681 (8th Cir. 1995) and *Zeitvogel v. Delo*, 78 F.3d 335

(8th Cir. 1996) suggest that as long as this Court recites that it has conducted proportionality review, no due process violation has occurred. Because this question of law is unsettled, counsel should have raised it at every opportunity. His failure to do so was ineffective assistance of counsel.

POINT VIII

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO REQUEST A PRETRIAL EVALUATION OF THE RELIABILITY OF THE STATE'S JAILHOUSE INFORMANT WITNESSES. HAD THIS MOTION BEEN FILED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

This case depended heavily on the testimony of jailhouse informants. The dissenting opinion on direct appeal expressed concern about this. *State v. Barton*, 998 S.W.2d 19, 30 (Mo.banc 1999). Other courts have also raised concerns, particularly about informants who receive consideration for their testimony:

> The testimony of jail-house informants, or "snitches," is becoming an increasing problem in this state, as well as throughout the American criminal justice system. The present case is one of many across the nation where the truthfulness of the informant has been called into question. Informants. . . are offering evidence against their fellow inmates in exchange for reduced sentences. In the process of reaping their benefit, they are manipulating the system by helping to convict innocent citizens.

McNeal v. State, 551 So.2d 151, 158 (Miss. 1989); Curriden, "No Honor Among Thieves," *ABA Journal*, June 1989, at 51. n2.

While there is no precedent in Missouri for the suppression of this evidence, a reasonably effective trial attorney would have attempted to have it evaluated pretrial in this case. As Mr. Rogers noted, even if the trial court had not suppressed the evidence, having it presented and evaluated in a pretrial hearing would have given trial counsel another statement of the informants which could have been used to impeach any later inconsistent testimony. MX.50, Rogers depo., 37-38.

The court is referred to the authorities concerning failure to file pretrial motions which are discussed in Point V above.

Had such a motion been filed, there is a reasonable probability that either the informant evidence would have been suppressed or that trial counsel would have been able to cross-examine them more effectively. Either result had a reasonable probability of changing the outcome of the trial. Therefore, reversal for a new trial is required.

POINT IX

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON HAD EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE[8], IN THAT TRIAL COUNSEL MISSTATED THE LAW ON MR. BARTON'S FAILURE TO TESTIFY, FAILED TO QUESTION ON PENALTY ISSUES, FAILED TO USE PEREMPTORIES AGAINST VENIREMEN HAAS AND COLE, FAILED TO REQUEST ADDITIONAL STRIKES DUE TO PRETRIAL PUBLICITY, AND FAILED TO OBJECT TO THE STATE'S VOIR DIRE. ABSENT THESE ERRORS, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Trial counsel's conduct of voir dire denied Mr. Barton a fairly-selected jury for the penalty phase of his trial. First, trial counsel failed to question any jurors individually concerning their beliefs on the penalty phase issues. TT.320. They failed to ask a number of questions which were relevant to these determinations and which

[8] Claims FF-KK, LF.29-32,. are combined to save space.

were not asked by the prosecutor. For example, trial counsel failed to ask any of the prospective jurors who stated that they could consider the death penalty whether they would automatically do so upon finding of the particular aggravating circumstances which were present in this case. They failed to ask the prospective jurors who expressed opposition to the death penalty whether they could set aside their beliefs and follow the law. See *State v. Kreutzer*, 928 S.W.2d 854, 865 (Mo.banc 1996). They failed to ask the jurors about the source and depth of their opinions about the death penalty, and about their feelings about it. They failed to determine whether each prospective juror would give weight to mitigating evidence as required by law.

It is apparent that the failure to question the jurors was not due to trial strategy. Trial counsel requested individual penalty phase voir dire prior to trial. TT.84. At the post-conviction hearing, trial counsel testified that he failed to ask further questions because he was told, after the prosecutor's voir dire, that no further questions could be asked. PCRT.213. The trial record belies this. It reflects that trial counsel made no attempt to question individual jurors. TT.320.

But trial counsel's deficiencies did not end there. Trial counsel failed to exercise peremptory challenges against prospective jurors Haas and Cole. Mr. Haas made a point of telling trial counsel during voir dire that he had been the victim of torture when he lived in Yugoslavia. TT.223. In that the evidence in this case indicated that the victim was tortured prior to her death, it was ineffective assistance of counsel to allow Mr. Haas to remain on the jury.

Ms. Cole stated that she had heard pretrial publicity about Mr. Barton's case and that she "thought" that she could set it aside. TT.169-170. She later became more certain that she could set the matter aside, and therefore was not subject to challenge for cause. TT.177-178. She served on the jury. TT. 323. Since the pretrial publicity concerning the case had revealed that Mr. Barton had received a prior death sentence and also contained a motive for the murder concerning which no evidence was presented at trial, a reasonably prudent attorney would have exercised a peremptory challenge against Cole.

Trial counsel's strategy was to minimize the effects of pretrial publicity on the jury. To this end, he moved for a continuance because of pretrial publicity, TT.41, requested individual voir dire on the issue

TT.84, and renewed his motion for continuance when it became apparent that a majority of prospective jurors had been opposed to pretrial publicity. TT.65. There was no strategic reason not to strike Ms. Cole.

Trial counsel also failed during jury selection to protect Mr. Barton's right to be tried by a jury uninfluenced by pretrial publicity. Seven of the sixteen jurors and alternates, and four of the actual jurors, had been exposed to pretrial publicity. TT.88-203,323. t least one of the jurors had formed an opinion about the case based on the publicity. TT.91 (Sroufe). The trial court would not permit the defense to inquire as to the source of the information, so the defense could only assume that the prospective jurors had read the newspaper article which revealed Mr. Barton's prior conviction and death sentence. TT.42.

Under these circumstances, an attorney rendering reasonably effective assistance of counsel would have requested the court to grant additional peremptory challenges when they discovered that they could not exercise peremptory challenges against all of the persons who had been exposed to pretrial publicity. MX.50, Rogers depo. 44.

The trial court had discretion to grant this request. Trial counsel had no strategic reason for failing to make this request. PCRT.215.

Trial counsel's next jury selection error was to misstate the law concerning the defendant's failure to testify. Trial counsel said that the defendant's failure to testify "is not evidence of guilt but it can be considered by you in determining believability and other factors about the defendant." TT.268-269. This, of course, is a misstatement of the law. The defendant's failure to testify cannot be considered for any purpose. Mr. Barton did not testify. Although the jury was ultimately instructed that this could not be considered, it is likely that the jurors remembered that his own lawyer had told them that it could. And, since they did not hear the court's instruction until the end of the case, the misstatement colored their consideration of the evidence as it wsa received.

Finally, trial counsel failed to object to the prosecutor's characterization of the death penalty process.

> You may find they [aggravating circumstances] exist and decide that in your opinion as a jury, and you have to decide unanimously, that in your opinion as a jury that's not good enough for you. You still don't want to give the

death penalty. You may decide that after hearing evidence from the defense in the second part of the trial, and I'm sure you'll hear evidence from both sides, that perhaps something that you've heard from them outweighs the aggravating circumstances. Those are called mitigating circumstances. Aggravating makes it less (sic); mitigators make it less severe. So once you get to that point and you start balancing you consider everything you've heard in both phases of trial and you make up your mind as to which punishment is appropriate.

(TT.287)

This comment was an incorrect statement of the law and was therefore subject to objection. Even if the mitigating circumstances do not outweigh the aggravating circumstances, the jury still may impose life. Mo.Rev.Stat.§565.030.4(4). Further, the statement that the jury must be unanimous suggested to the prospective jurors that they must agree unanimously as to the existence of mitigating circumstances. This is also incorrect. *State v. Petary*, 790 S.W.2d 243, 244 (Mo.banc 1990). This misstatement permitted jurors to be qualified who could not follow the instructions ultimately given by the

court. Further, the misstatement colored the light in which the jurors received the evidence. Therefore, the fact that a proper instruction was given at the close of the evidence did not cure the error.

Jury selection is a critical part of a death penalty case. MX.50, Rogers depo. 41. Defense counsel must attempt to rehabilitate jurors who indicate dissatisfaction with the death penalty. MX.50 Rogers depo., 40. A part of the responsibility of reasonably effective trial counsel is to conduct a proper voir dire. *State v. Price*, 940 S.W.2d 534 (Mo.App. 1997); *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992); *Gov't of Virgin Islands v. Forte*, 865 F.2d 59 (3rd Cir. 1989); *Winn v. State*, 871 S.W.2d 756 (Tex.App. 1993); *Miller v. State*, 728 S.W.2d 133 (Tex.App. 1987).

The foregoing errors of trial counsel, individually and cumulatively, undermine confidence that an impartial jury was selected in this case. Therefore, a new trial is required.

POINT X

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT THE TESTIMONY OF RICHARD AUSMUS AND RICHARD MORRISET.[9] THESE WITNESSES SUPPORTED MR. BARTON'S THEORY OF DEFENSE AND THEIR TESTIMONY HAD A REASONABLE PROBABILITY OF CHANGING THE OUTCOME OF THE TRIAL.

Mr. Ausmus was known to the trial attorneys because his identity was revealed in the pretrial discovery provided by the prosecution. PCRT.342. In fact, his girlfriend Michele Hampton was called as a defense witness. TT.796, MX.50, Ausmus Depo., 12,14,22. A subpoena was issued by the defense for Mr. Ausmus and was actually served. He was clearly available to testify at trial. However, he was not presented as a witness. Mr. Ausmus could account for Mr. Barton's whereabouts during a portion of the afternoon of the crime.

[9] Amended motion, Claims D-E. LF.9-10. These claims, which concern identical legal contentions, are presented in one point to save space.

He could have testified that during that afternoon, he, Mr. Barton, and another man went to the place where Mr. Barton was working to try to get his paycheck. (MX.50, Ausmus depo., 6).

Trial counsel's strategy was to demonstrate that Mr. Barton could not have committed the crime because his whereabouts were accounted for when the crime occurred: a defense of alibi. PCRT.198. Mr. Ausmus's testimony would have contributed in a material way to this defense because it accounted for Mr. Barton's whereabouts during a time that no other witness covered. There was no reasonable strategic reason for failing to interview Mr. Ausmus and present his testimony.

Mr. Ausmus could also have testified that he, Mr. Barton and several other people were moving around the area of the crime scene after the discovery of the body. (MX.50, Ausmus depo., 26).This fact could have been used to demonstrate that Mr. Barton, whose clothing was bloodstained, could have acquired the stains from contact with another person after the discovery of the body.

An earlier trial in this matter resulted in a hung jury. The only material difference between the current trial and that trial was the addition of jailhouse informer witnesses. Accordingly, the

prosecution's fact witnesses were not unassailable. Had Mr. Ausmus's testimony been offered, there is a reasonable probability that the outcome of the trial would have been different.

Like Mr. Ausmus, Richard Morriset's name was revealed to trial counsel in pretrial discovery. PCRT.344. He was also known to Richard Ausmus, who was subpoenaed by trial counsel. Mr. Morriset was never interviewed by defense counsel, but would have been willing to talk to them if they had contacted him. Mr. Morriset saw Mr. Barton three times on the day of Gladys Kuehler's death. He saw him first at 1:00 p.m. when Mr. Barton asked to use his telephone. (MX.50, Morriset depo. 7.) He next saw him in the trailer park at around 4:00 p.m. (MX.50, Morriset depo., 8.) He then saw him around 7:00 p.m. with Carol Horton and Debbie Selvidge. (MX.50, Morriset depo., 10.) Mr. Barton never changed his clothing that day. (MX.50, Morriset depo., 10, 22-23.)

Mr. Morriset saw Ms. Selvidge, Mr. Barton, and Ms. Horton entered Ms. Kuehler's trailer in that order. (MX.50, Morriset depo., 14.) When they came out of the trailer, Mr. Morriset saw blood on Debbie Selvidge's coat. (MX.50, Morriset depo., 17-18,28.) Ms.

Selvidge told Mr. Morriset that she had gotten that from kneeling next to the body. (MX.50, Morriset depo., 17,18.)

Had Mr. Morriset been interviewed and called as a witness, his testimony would have substantially impeached that of Debbie Selvidge. Ms. Selvidge denied kneeling next to her grandmother and denied that Mr. Barton pulled her away. TT.461-462. Mr. Morriset's testimony would also have explained how Mr. Barton came to have blood on his clothing. Since the state's theory of the case was that Mr. Barton had gotten blood on his clothing when he committed the murder, this testimony was material and had a reasonable possibility of affecting the outcome of the trial.

Trial counsel did not recall whether Mr. Morriset was interviewed. He did testify that although he had two investigators whom he instructed to investigate Mr. Barton's alibi, he believed the investigators were hampered by pre-conceived notions and did not start with a clean slate. PCRT.199. Had he known that Mr. Morriset could testify that Ms. Selvidge had blood on her coat, he would have presented this testimony. PCRT.200,202. He might also have presented Mr. Ausmus's testimony that Mr. Barton did not change clothes during the day, although he believed that he had a strong

argument that the state was arguing both that Mr. Barton had changed and that he had not changed, which was inconsistent. PCRT.203.

The motion court first found that these claims were "refuted by the record." LF.241. This is based on the following exchange after Mr. Barton's sentencing:

> Court: Did you ask your attorneys to subpoena or contact any witnesses?
>
> Defendant: Yes, sir.
>
> Court: And are there any people that they failed to do so?
>
> Defendant: No, sir.
>
> TT.1105

Defense counsel's duty to investigate the case is not limited to contacting witnesses suggested by the defendant, although that is certainly a part of his responsibility. Rather, defense counsel must review all information available about the case. Mr. Ausmus and Mr. Morriset were known to trial counsel as persons mentioned in pretrial discovery. Regardless of whether Mr. Barton told them to contact these witnesses, it was incumbent upon defense counsel to do so. If the trial court record "refutes" anything, it would be the claim that Mr.

Barton had asked trial counsel to contact Mr. Morriset and Mr. Ausmus. But Mr. Barton does not make this allegation.

The motion court then found that these witnesses would not have been helpful to the defense. This finding is clearly erroneous. The testimony of these witnesses was consistent with the defense theory of the case, and was not cumulative of other evidence.

Failure to investigate and call witnesses in support of the defense theory of the case is ineffective assistance of counsel. The ineffectiveness is prejudicial, and requires reversal, if there is a reasonable probability that the witnesses' testimony would have affected the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

In *State v. Baldridge*, 857 S.W.2d 243, 259 (Mo.App. 1993), the court held that the failure to investigate witnesses who might provide a plausible defense was ineffective assistance of counsel. Cautioning against insulating all of counsel's "strategic" decisions from review, the court noted, "[S]trategy decisions made in the absence of investigation may be held to be ineffective assistance of counsel." Similarly, in *Thomas v. State*, 516 S.W.2d 761, 767 (Mo.App. 1974), the conviction was reversed because trial counsel was ineffective for

failing to investigate alibi witnesses. Counsel's strategy to rely on the success of his pretrial motion to dismiss "was a dangerous [gamble] and resulted in a deprivation of movant's constitutional right to effective assistance of counsel."

Where counsel is aware of the identity of witnesses who may have relevant information, it is ineffective assistance of counsel not to interview them. *State v. Williams*, 945 S.W.2d 575 (Mo.App. 1997); *Clay v. State*, 876 S.W.2d 760 (Mo.App. 1994); *State v. Ivy*, 869 S.W.2d 297 (Mo.App. 1994); *State v. Hayes*, 785 S.W.2d 661, 663 (Mo.App. 1990).

Counsel may not rely completely on the client's evaluation of the value of the witnesses, but must interview them and make his own decision:

> Regardless of what defendant believed the [witnesses] would testify to, counsel. . . should determine whether those witnesses are in a position to furnish testimony favorable to his client. It is counsel's responsibility, not the client's, to evaluate the value of a witness's testimony to the defense.
>
> *State v. Griffin*, 810 S.W.2d 956, 958 (Mo.App. 1991).

In *State v. Steward*, 936 S.W.2d 592 (Mo.App. 1996), the court found that the defendant was denied effective assistance of counsel when trial counsel failed to call an alibi witness. The court found prejudice even though other alibi evidence was presented because the witnesses who testified were badly damaged on cross-examination, and the omitted witness was much more credible. See also *State v. George*, 921 S.W.2d 638 (Mo.App. 1996); *Perkins-Bey v. State*, 735 S.W.2d 170 (Mo.App. 1987).

Interpreting the *Strickland* standard in a federal habeas corpus case, the court in *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir.) (1990). held that the defendant received ineffective assistance of counsel when trial counsel failed to call a witness who supported Mr. Chambers's claim of self-defense. In *Grooms v. Solem*, 923 F.2d 88 (8th Cir, 1991), and *Tosh v. Lockhart*, 879 F.2d 412 (8th Cir. 1989), the court found ineffective assistance where alibi witnesses were not contacted or called. The court noted in *Tosh* that perceived reluctance of the alibi witnesses to cooperate was no excuse for not contacting them.

Other federal circuit court cases have also granted relief when counsel failed to perform their duty to investigate and call witnesses.

In *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999), counsel was ineffective for failing to call witnesses who would have said that they saw the murder victim the day after the defendant allegedly murdered her. The court found that counsel's explanation, that he did not present the evidence because there were minor inconsistencies in the witnesses' statements, was not a reasonable strategic judgment because the witnesses were all consistent on the main issue, seeing the victim, and counsel had not bothered to interview the witnesses personally before rejecting their testimony.

In *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000), the court found that the failure to develop witnesses who supported the defendant's alibi was ineffective assistance of counsel. Even though the defense was presented at trial through other witnesses, the omitted witnesses would have contributed significantly to the strength of the defense. See also *Martinez-Macias v. Collins*, 979 F.2d 1067 (5thCir, 1992) (counsel was ineffective for failing to call an investigator who had previously obtained a statement from a prosecution witness that was inconsistent with her trial testimony that she saw blood on the defendant's shirt); *Bryant v. Wood*, 28 F.3d 1012 (11th Cir. 1994), (counsel was ineffective for failing to investigate alibi witnesses even

though the defendant gave their names to counsel only three days before trial); *Washington v. Smith*, 219 F.3d 620, 632 (7thCir. 2000); ; *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1262 (2000) (no reasonable strategy not to present witnesses where witnesses were not interviewed); *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992); *Montgomery v. Petersen*, 839 F.2d 407 (7th Cir. 1988); *Sullivan v. Fairman*, 819 F.2d 1382 (7th Cir. 1988); and *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985).

Because trial counsel's failure to investigate and call witnesses was ineffective assistance of counsel which was prejudicial to Mr. Barton, reversal for a new trial is required.

POINT XI

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO INVESTIGATE AND ADEQUATELY CROSS-EXAMINE KATHY ALLEN AND RICKY ELLIS.[10] ADDITIONAL INVESTIGATION WOULD HAVE PERMITTED COUNSEL TO IMPEACH THE TESTIMONY OF ALLEN AND ELLIS AND HAD A REASONABLE PROBABILITY OF CHANGING THE OUTCOME OF THE TRIAL.

In addition to being prejudiced by the prosecutor's failure to disclose Ms. Allen's complete criminal history, Mr. Barton was harmed when trial counsel failed to investigate it themselves. Ms. Allen was in custody during her testimony at Mr. Barton's prior trial. 1994 TT.812. Particularly after trial counsel learned, from the prosecutor's motion for writ of habeas corpus ad testificandum, that Allen was then incarcerated in Indiana, trial counsel were on notice that

[10] Amended Motion, Claims F and H, LF.11-13 are grouped as one point to save space.

criminal history information on Allen was likely to exist. Since they had not received it, they should have sought it themselves. Failure to do so was ineffective assistance of counsel under the *Strickland* standard. As discussed in connection with Points II and III above, the failure to impeach Ms. Allen with her criminal history was prejudicial to Mr. Barton under the *Strickland* standard.

Trial counsel also failed adequately to investigate and cross-examine Ricky Ellis. Mr. Ellis testified that he had heard Mr. Barton make threats against Larry Arnold, another jailhouse informant witness. However, Ellis did not hear Mr. Barton confess to murdering Ms. Kuehler. MX.50, Ellis depo. 11. Because this was not brought out at trial by defense counsel, the jury was left with the impression that Ellis heard Mr. Barton admit the murder of Ms. Kuehler. TT.765-768.

Failing properly to impeach the testimony of a key prosecution witness required reversal in *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999).(8thCir. 1999). The court noted that the impeachment of the county sheriff with his statement to one of his deputies that he "forgets" in court all the time could have provided a reasonable doubt. Similarly, in *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995), the court ordered a new trial where trial counsel failed to impeach a state's

witness with a prior inconsistent statement. And in *Clay v. State,* 954 S.W.2d 344 (Mo.App. 1997), the court found ineffective assistance of counsel when trial counsel failed to impeach an identification witness with prior inconsistent statements which indicated that he was less certain about his identification than his trial testimony indicated.

As these cases illustrate, both the failure to attack a witness's credibility and the failure to attack the substance of his or her testimony can be ineffective assistance of counsel. Here, where the credibility of the jailhouse informants was central to the state's case, the failure to attack this evidence was prejudicial to Mr. Barton and requires reversal.

POINT XII

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO PRESENT THE TESTIMONY OF MICHELE HAMPTON THAT SHE RECOGNIZED THE SHIRT MR. BARTON WAS WEARING WHEN HE WAS ARRESTED AS THE SHIRT HE WAS WEARING ALL DAY THAT DAY. HAD THIS EVIDENCE BEEN PRESENTED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Michele Hampton, a defense witness, was also the only witness for the prosecution or the defense who testified to seeing Mr. Barton in any shirt other than the one he was wearing when arrested. She described him as wearing a "western shirt" earlier in the day. TT.801. The prosecutor adverted to this fact in closing argument and used it to argue that Mr. Barton had changed clothes after committing the offense. TT.898. Before trial, trial counsel never showed Ms. Hampton the shirt Mr. Barton was wearing at the time of his arrest or a photograph of the shirt. MX.50, Hampton depo., 13-14. The shirt

was available and was in evidence when Ms. Hampton testified. TT.605, SX.41.

During her post-conviction deposition, Ms. Hampton was shown a photograph of the shirt seized from Mr. Barton when he was arrested, she testified that she could have described that shirt as a "western" or "westerny" shirt. MX.50, Hampton depo. 7-8,23. She also testified that Mr. Barton was wearing the same clothing each time she saw him on the day of Ms. Kuehler's death. MX.50, Hampton depo. 11,23. Because of lapse of time, she could not be certain that the shirt in the photograph was the shirt Mr. Barton wore that day. MX.50, Hampton depo., 23. However, she testified that the shirt Mr. Barton wore on the day Ms. Kuehler died was not a "cowboy dress shirt" with snaps and a motif in front. MX.50, Hampton depo. 28.

Ms. Hampton's testimony concerning Mr. Barton's clothing was quite significant, because the prosecutor needed to explain why Mr. Barton had so little blood on his clothing if he had committed this offense. He did this by arguing that Mr. Barton must have changed clothes since Ms. Hampton described a different shirt than he was wearing when he was arrested. By failing to present evidence that Mr.

Barton wore the same shirt all day, trial counsel undermined their client's right to a defense.

The court is respectfully referred to the authorities presented in Point X above concerning ineffective assistance of counsel for failing to investigate and present exculpatory evidence. Had Ms. Hampton's evidence concerning the shirt been presented to the jury, there is a reasonable probability that the result of the trial would have been different. Therefore, Mr. Barton is entitled to a new trial.

POINT XIII

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON HAD EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO OFFER INTO EVIDENCE THE PRIOR INCONSISTENT STATEMENTS OF CAROL HORTON, DEBBIE SELVIDGE, AND CLIFF MILLS.[11] HAD THIS EVIDENCE BEEN OFFERED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Trial counsel had available two transcribed statements of Carol Horton to law enforcement officers as well as transcripts of Ms. Horton's testimony at Mr. Barton's prior trials. MX9,10. 1994 TT.442, 1993 TT.9. On each of these occasions, Ms. Horton testified that Mr. Barton left her home at 3:00 p.m. and returned no later than 3:30 p.m. At Mr. Barton's 1998 trial, for the first time, Ms. Horton testified that Mr. Barton was gone from 3:00 p.m. to 4:00 p.m. TT.379. She denied making earlier statements that Mr. Barton had only been gone 15 to 20 minutes. TT.436,437. Because other evidence placed the time of

[11] This Point combines claims OO-QQ to save space.

Ms. Kuehler's death between 3:30 and 4:00 p.m., trial counsel needed to account for Mr. Barton's whereabouts during that time. Ms. Horton's earlier statements placed him at her home.

Debbie Selvidge testified at trial that Mr. Barton never approached Ms. Kuehler's body and never touched her in the bedroom. TT.461. The day after Ms. Kuehler's death, however, she gave a statement indicating that she had knelt next to Ms. Kuehler and Mr. Barton had pulled her away. MX.11. This evidence was relevant to the defense theory of the case because it explained how Mr. Barton could have been in contact with Ms. Kuehler's blood without having been implicated in her death.

Govan Clifton (Cliff) Mills, the locksmith, testified at trial that he saw Ms. Selvidge, Ms. Horton, and Mr. Barton enter and leave Ms. Kuehler's trailer only once. TT.461. At the hung jury trial, Mr. Mills testified that they went in and out at least twice before Officer Hodges returned. 1993 TT.130. Like Ms. Selvidge's statements, this evidence helped to explain the bloodstains on Mr. Barton's clothing.

Under Mo.Rev.Stat. §491.074, the prior statements of each of these witnesses were admissible as substantive evidence to prove Mr. Barton's alibi. Trial counsel, however, failed to introduce them. There

was no reasonable strategic reason for failing to introduce the statements as substantive evidence. PCRT219-220, MX50, Rogers depo. 56.

Adequately impeaching prosecution witnesses is a critical component of effective assistance of counsel. *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999); *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995) (failure to impeach with prior inconsistent statement); *Moffett v. Kolb*, 930 F.2d 1156 (7th Cir. 1991) (Failure to introduce prior inconsistent statement), *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989); *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984).

Had trial counsel presented any of this evidence, there is a reasonable probability that the outcome of the trial would have been different. Therefore, Mr. Barton is entitled to a new trial.

POINT XIV

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO CALL BOB RILEY TO IMPEACH THE TESTIMONY OF KATHERINE ALLEN. HAD THIS EVIDENCE BEEN PRESENTED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Mr. Riley was interviewed by defense counsel and a subpoena was issued for his testimony, but he was not called as a witness. He provided an affidavit for the post-conviction hearing. MX.44. Mr. Riley would have testified that he was an inmate in the Lawrence County Jail when Walter Barton and Katherine Allen were also there. Ms. Allen and Mr. Barton were never alone without officers present. Mr. Riley saw the two together when Ms. Allen gave out food and laundry, but never heard any threats by Mr. Barton. Specifically, he did not hear Walter Barton say that he would kill Ms. Allen "like he killed her" or "like he killed the old woman". Mr. Riley would also have testified that Ms. Allen's reputation for truth was bad. MX.44.

Trial counsel was unable to recall Mr. Riley or why he did not call him to testify. PCRT.221. In light of Riley's affidavit, there was no reasonable strategic reason not to call him. The court is referred to the authorities presented under Point X above concerning trial counsel's duty to investigate and present favorable testimony.

Had Mr. Riley's testimony been presented to the jury, there is a reasonable probability that the outcome of the trial would have been different. The court is referred to the discussion in Point II above for the reasons why Ms. Allen's testimony was so important, and thus the failure to impeach it was prejudicial to Mr. Barton under the *Strickland* standard. Mr. Barton is entitled to a new trial.

POINT XV

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED ADEQUATELY TO PREPARE THE TESTIMONY OF CHARLES RENTSCHLER AND, AFTER MR. RENTSCHLER REFERRED TO MR. BARTON'S PRIOR DEATH SENTENCE, FAILED TO MOVE TO STRIKE HIS TESTIMONY AND FOR A MISTRIAL. HAD TRIAL COUNSEL HANDLED MR. RENTSCHLER'S EVIDENCE COMPETENTLY, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Defense witness Charles Rentschler was called to impeach the credibility of Larry Arnold, an informer witness whose prior testimony was read to the jury because he refused to testify against Mr. Barton at this trial. TT.688,727-742. On cross-examination, Mr. Rentschler volunteered the fact that Mr. Barton had previously received a death sentence. This statement was not responsive to any question

propounded by the prosecutor. TT.786. Trial counsel made no motion to strike this testimony and no motion for mistrial. TT.786.

In a post-conviction affidavit, Mr. Rentschler stated that he had not been warned by trial counsel not to mention the prior death sentence. Therefore, he used the fact of the death sentence and reversal to explain how he knew that Larry Arnold was referring to Mr. Barton. MX?.

Since trial counsel had previously objected that the jury might have been exposed to a pretrial news story which referred to this fact, it is clear that trial counsel sought to keep the previous death sentence from the jury. In order to do this, it was incumbent upon defense counsel to prepare his witness so that no damaging statements would have been made. If counsel was unsure whether the witness could or would follow his instructions, counsel should have refrained from presenting the witness. And if, despite counsel's best efforts, the witness nonetheless volunteered the damaging statement, it behooved counsel to move to strike it and to move for a mistrial.

The failure to make proper objections requires reversal when it is prejudicial to the defendant. *Gravley v. Mills*, 87 F.3d 779 (6th Cir.

1996) (Failure to object to references to post-arrest silence); *Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996) (Failure to object to reference to prior statement of defendant that he "killed a cop"); *Atkins v. Atty. Gen. of Alabama*, 932 F.2d 1430 (11th Cir. 1991) (Failure to object to fingerprint card with notation about prior arrest); *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1985) (Failure to object to improper evidence of prior conviction).

It is difficult to imagine a more damaging statement to a jury that must decide, first, the defendant's guilt, and then punishment than a statement that he had previously been convicted and sentenced to death but that the sentence had been overturned. Trial counsel's ineptitude was clearly prejudicial to Mr. Barton, and a new trial is required.

POINT XVI

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO REQUEST AN INSTRUCTION ON THE INHERENT UNRELIABILITY OF INFORMER TESTIMONY. HAD SUCH AN INSTRUCTION BEEN REQUESTED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Trial counsel failed to request the court to instruct the jury concerning informer testimony. Such an instruction was necessary in this case to provide Mr. Barton with due process of law. Examples of two instructions which could have been requested are:

> The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you

find it to be entitled in the light of all the evidence in the case.

Calif. Penal Code §1127a(b).

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the

criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.

OUJI-CR 2d. 9-43, as set out in *Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App. 2000). This instruction is required in all Oklahoma cases in which the trial court admits jailhouse informant testimony.

Although there is no comparable Missouri precedent, a reasonably effective attorney would have requested such an instruction. Sup.Ct.R. 28.03 permits the giving of non-MAI instructions where there is no applicable MAI instruction.

In *Luchenburg v. Smith*, 79 F.3d 388 (4th Cir. 1996), the defendant was granted a new trial where trial counsel failed to request instructions limiting the definition of the offense. In *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996), trial counsel was found ineffective for failing to request proper self-defense instructions. The same result is required here.

There was no reasonable strategic reason not to request such an instruction; discrediting the informant witnesses was obviously part of the defense strategy. Since the state called no fewer than four jailhouse informants as witnesses, TT.688–781, there is a reasonable

probability that this instruction would have affected the outcome of the case.

Therefore, Mr. Barton is entitled to a new trial.

POINT XVII

THE MOTION COURT ERRED IN FINDING THAT THE PRESENTATION OF PRISON ADJUSTMENT EVIDENCE WOULD NOT HAVE AFFECTED THE OUTCOME OF THE PENALTY PHASE OF MR. BARTON'S TRIAL. THIS FINDING WAS CLEARLY ERRONEOUS, AND THE FAILURE TO PRESENT THIS EVIDENCE VIOLATED MR. BARTON'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE MISSOURI AND UNITED STATES CONSTITUTIONS.

The following general information relates to this and the following points concerning ineffective assistance of counsel at the penalty phase of trial. As between the two attorneys who represented Mr. Barton at trial, Louis Nolan was assigned primary responsibility for the penalty phase. PCRT.68. Mr. Nolan had prepared one previous

capital penalty phase, but had not had to present the evidence at trial. PCRT.72. Mr. Price, who had primary responsibility for Mr. Barton's case, did not feel comfortable presenting penalty phase evidence. PCRT. 177. He had conducted one prior capital penalty phase, and had attended seminars in 1990, some eight years before Mr. Barton's trial. PCRT.176.

Counsel did not retain the services of an investigator skilled in penalty phase or mitigation investigation. Mr. Nolan testified that he did not believe one was necessary. PCRT.73. He relied on the fact investigators he had and on prior counsel's files. PCRT.73. Mr. Price testified that he and Mr. Nolan together were paid only $16,000 by the Missouri State Public Defender for Mr. Barton's trial. PCRT.173. He would have charged a private client at least $100,000. PCRT.174. He was told by the Public Defender System that the case had been previously tried and that they would not be sympathetic to requests for resources. This influenced counsel's decisions about such requests. PCRT.175.

At the post-conviction proceeding, Mr. Barton presented the deposition testimony of Jill Miller, a social worker. MX50, Miller depo. During the deposition, the attorney representing the state

acknowledged Ms. Miller's qualifications an "an expert in investigation and presentation of mitigation evidence in capital cases." MX50, Miller depo. 8. However, at the evidentiary hearing, the state objected to Ms. Miller's qualifications. PCRT.163. The motion court found that Ms. Miller was "not a qualified expert in mitigation." The motion court further found that Ms. Miller "offers nothing but hearsay." L.F.233. These legal rulings are incorrect, and Mr. Barton requests that this court consider Ms. Miller's testimony in deciding this and other issues in the case.

Ms. Miller testified that she had worked on approximately 80 capital cases since 1986 as a forensic social worker. She has trained others in the techniques of mitigation investigation through the National Legal Aid & Defender Association, the National Association of Criminal Defense Lawyers, and various state systems, including Missouri. MX50, Miller depo., 5-6. She holds a bachelor's and master's degree in social work from the University of Wisconsin, and is licensed as a clinical social worker in the State of Wisconsin. MX50, Miller depo., 4. She has attended training for death penalty mitigation experts approximately 14 times. MX50, Miller depo., 8. She has previously been permitted to testify as an expert. MX50, Miller depo.

7. The motion court's refusal to accept her as an expert is probably based on his acknowledged preconception that "these experts are very expensive, show no evidence of any 'expertise' that any intelligent layperson could not provide, and are not very helpful." LF.242-243. The record clearly reflects both Ms. Miller's expertise and the fact that her testimony is helpful in evaluating the claims before this court.

Mr. Barton made no claim that trial counsel was ineffective for failing to hire Ms. Miller in particular. Nor did he retain Ms. Miller to perform a mitigation investigation. He offered Ms. Miller's testimony to assist the court in determining whether the failure to hire a mitigation expert was ineffective assistance of counsel. Ms. Miller testified that an adequate mitigation investigation included "a very extensive social history investigation of the life of the client." MX50, Miller depo. 11. The aim is to obtain all relevant evidence, particularly that which has been identified by the United States Supreme Court as relevant. MX50, Miller depo. 13. Standards for penalty phase representation have been promulgated by the National Legal Aid and Defender Association and the American Bar Association. Ms. Miller participated in the drafting of these standards. MX50, Miller depo. 14.

Ms. Miller testified that a trained mitigation investigator is needed because the skills required for assembling evidence for the penalty phase of a capital case are not those typically used by attorneys. MX50, Miller depo. 16. In particular, a mitigation specialist has the interviewing skills to establish trust and to induce people to disclose sensitive information, and also is able to recognize indicators of such issues as abuse or mental illness. MX50, Miller depo., 24-25.

Ms. Miller evaluated the investigation performed in 1992 by Vicki Wendt, who was employed by the Missouri Public Defender System. MX50, Miller depo. 18. She noted that although Ms. Wendt "did some things that were good, . . . there were many things she didn't do." MX50, Miller depo. 18. As far as Ms. Miller could see, little additional investigation was performed before Mr. Barton's 1998 trial. MX50, Miller depo. 17.

Ms. Miller explained why the jury is likely to find the defendant's early life important in assessing punishment, and noted that there was little information offered about it in either of Mr. Barton's trials. MX50, Miller depo. 19-20. She noted that the investigator who interviewed witnesses for Mr. Barton's 1998 trial apparently spent very little time with the witnesses and worked on

the case so close to the trial date that there was insufficient time for an adequate investigation. MX50, Miller depo., 21-22.

Ms. Miller reviewed the information which had been gathered by post-conviction counsel's investigator. She testified that this information, which included information concerning Mr. Barton's work history, family life, and prison adjustment. MX50, Miller depo., 23-30. She testified that much of this information would have been helpful at Mr. Barton's trial.

The prison adjustment evidence, which was not presented at trial but was presented in the post-conviction proceeding consisted of the following:

1. **Bob Christerson**. According to prison records and the affidavit of Mr. Christerson's son, Mr. Christerson was Mr. Barton's supervisor at Hudson Foods when Mr. Barton worked there as part of an inmate work-release program in 1987. MX3. He gave Mr. Barton a good evaluation and thought highly of the inmate release program. The evaluation was included in Mr. Barton's prison records which were available to defense counsel. He was never interviewed by any of Mr. Barton's trial counsel. Mr. Christerson was easy to locate through Hudson Foods and was also listed in the telephone directory. He lived

in the same place from the time Mr. Barton worked for him until his death some months after the 1998 trial. At the time of trial, he was healthy and would have been available to confer with defense counsel and to testify. MX29.

Mr. Christerson's testimony would have provided evidence in the penalty phase that Mr. Barton, when properly supervised in a structured environment, was a productive worker. This was clearly relevant to the issue of penalty. Accordingly, had Mr. Christerson been interviewed and his testimony presented, there is a reasonable probability that the outcome of the penalty phase would have been different.

2. **Prison records of Mr. Barton**. Walter Barton's prison records are public records which are available to trial counsel upon request. His prison medical file is available with a signed release, which he would willingly have given trial counsel had they requested it. Neither Mr. Price nor Mr. Nolan requested prison records for the period between 1992 and Mr. Barton's trial in 1998. PCRT.73-74.

Mr. Barton's prison record reflects very few disciplinary infractions. In fact, it reflects that at the time he left the institution to return to county custody before his second trial, Mr. Barton was a

"lead man" in the prison chair factory, a position only given to inmates with a good institutional adjustment. Inmates who work at the factory are contributing to the department of corrections by making chairs and other items for the department and other state agencies. (MX3, MX33).

This evidence was relevant to the penalty phase of Mr. Barton's trial because it showed that Mr. Barton was able to adjust and would not pose a threat to inmates and guards if he were sentenced to life in prison without parole. (MX50, Miller depo, 31-32). Had this information been obtained and presented to the jury, there is a reasonable probability that the outcome of the penalty phase would have been different. (MX50, Rogers depo., 35.)

3. Jim Kennon was Mr. Barton's supervisor in the "chair factory," a metalworking shop at Potosi Correctional Center which employs prison labor. PCRT.21. Employees perform such jobs as welding which could be considered dangerous. PCRT.19. Work in the chair factory is restricted to cooperative, hardworking inmates with good discipline records. PCRT.21. Mr. Barton worked over 2000 hours in the facility, and earned a training certificate. MX.49. He was a good worker, and, although he had minor conduct violations, had never

acted aggressively during the six to seven years Mr. Kennon had known him. PCRT.30-31.

4. Jim Perko provided an affidavit, MX.32. He was at that time an inmate at Potosi Correctional Center who had known Mr. Barton for several years. He reported that Mr. Barton got along well with both inmates and guards. He had never seen Mr. Barton lose his temper.

5. **Bill Elgie** also provided an affidavit, MX31. He was the maintenance team supervisor at Ozark Correctional Center in Fordland, Missouri when Mr. Barton was there. He relied on Mr. Barton to work as needed on the maintenance of the facility. Mr. Barton did not have a problem following the prison rules, and Mr. Elgie trusted him to work outside the prison without escaping. Mr. Barton took directions well and worked hard. Mr. Elgie allowed Mr. Barton to come to his home when he was on work release, and once lent him money, which he paid back. It is unusual for Mr. Elgie to give an inmate his home address. Mr. Elgie was surprised that Mr. Barton had been convicted of murder. He was aware that Mr. Barton had a "hot head" but believes that he has mellowed over the years.

In overruling Mr. Barton's claim of ineffective assistance of counsel for failure to present prison adjustment evidence, the motion court conceded that such evidence is relevant and admissible in the penalty phase of capital trials. *Skipper v. South Carolina*, 476 U.S. 1 (1986). However, the motion court believed such evidence would not have been consistent with the theory of the defense case: That Mr. Barton was brain-damaged, irretrievably "broken", and unable to control himself. PCRT.78.

Unfortunately, the penalty phase strategy was fatally flawed and unreasonable. In Ms. Miller's expert opinion, the theory of the case for a capital penalty phase should include several different areas, and should not focus on a single mitigation issue. MX50, Miller depo. 34. Here, the focus on Mr. Barton's head injury led to the inference that Mr. Barton was dangerous and needed to be stopped. Had evidence that when incarcerated, his behavior is generally good been presented, the outcome might have been different. MX50, Miller depo. 35. Mr. Rogers came to a similar conclusion from the standpoint of a defense attorney. MX50, Rogers depo. 33-35.

In *Williams (Terry) v. Taylor*, 120 S. Ct. 1495, 1514 (2000), the U.S. Supreme Court was confronted with a contention that evidence

about the defendant's early life might be both helpful and detrimental to his defense. Finding ineffective assistance of counsel, the court held,

> Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system -- for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. . . But. . . the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession.

In *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001), the court held that trial counsel was ineffective when inadequate mitigation evidence was presented. The court cited with approval Stephen B. Bright, *Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 Santa Clara L. Rev. 1069, 1085-86 (1996):

> The responsibility of the lawyer is to walk a mile in the shoes of the client, to see who he is, to get to know his

> family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community.

The court held that no strategy excused counsel's choice to only beg for sympathy and mercy. "[T]here was no stategic decision at all because [counsel] was ignorant of various other mitigation strategies he could have employed." The same is true of counsel here.

While trial counsel here may have felt that residual doubt was an important mitigating factor, it was nonetheless ineffective to limit so drastically the mitigation case. In *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000), the court found counsel ineffective for focusing almost exclusively on residual doubt where there was available evidence concerning the defendant's mental defects and abusive childhood. The fact that the defendant did not volunteer this information did not excuse counsel: "The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility."

In *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), the court held that the rationale of defense counsel that mitigation evidence would not do any good was not a reasonable strategic decision and reversed a death sentence. In *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997), the court granted a new penalty phase when available mitigation evidence, including the testimony of a correctional officer concerning the defendant's good prison adjustment, was not presented. See also *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 764 (2001), where the court noted that trial counsel's inexperience led to his failure to investigate and present mitigating evidence. Other cases which reversed death sentences for failure to prepare and present available evidence include *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir.), *cert. denied* 1116 S.Ct. 385 (1995) and *Jackson v. Herring*, 42 F.3d 1350 (11th Cir.), *cert. denied* 515 U.S. 1189 (1995).

The "strategy" of trial counsel to avoid mention of Mr. Barton's prison adjustment undercut the strategy to demonstrate Mr. Barton's limitations and deficiencies. It turned the testimony about Mr. Barton's brain damage from an asset to a liability. Far from being a

reasonable strategic decision, this decision placed trial counsel outside the pale of effective assistance of counsel.

If Mr. Barton's case is not dismissed or remanded for a new trial, he is entitled to a new penalty phase.

POINT XVIII

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO PRESENT EXPERT EVIDENCE CONCERNING THE NATURE OF INCARCERATION. SUCH EVIDENCE WOULD PROBABLY HAVE CHANGED THE OUTCOME OF THE PENALTY PHASE.

Joseph Brandenburg, or a similarly qualified expert on prison conditions in Missouri could have testified that Missouri prisoners sentenced to life without parole for first degree murder are classified as high security inmates and are confined in institutions designated for such inmates. Amended Motion Claim R, LF.25.

According to Mr. Brandenburg's affidavit, "Inmates in these institutions are closely monitored. They are housed in cells containing

no more than two inmates. Their property is strictly controlled and the inmate and his property are subject to search at any time. Inmates are not permitted to move freely about the prison. Inmates who are not working or participating in an organized prison activity can be locked in their housing areas." Mr. Brandenburg also observed that inmates are subject to disciplinary sanctions when they violate institutional rules, including restrictions on visits, extra work, or segregation. They can be transferred without warning from one institution to another. Missouri institutions for high security inmates are extremely secure, with perimeters surrounded by walls or electric fences and razor wire. Escape from these institutions is almost non-existent. (Brandenburg affidavit)

Mr. Brandenburg could further have testified that he has reviewed Mr. Barton's prison records, and that "He does not appear to be an aggressive inmate." He does not have an unusually high number of conduct violations for a person who has been incarcerated for most of his adult life. Mr. Barton's violations have decreased with age. This is consistent with Mr. Brandenburg's knowledge and experience, which indicates that older inmates often become a stabilizing influence in the prison. (Brandenburg affidavit)

The motion court discounted this evidence on the ground that Mr. Brandenburg was not credible and had no helpful expertise. He further noted that on cross-examination, Mr. Brandenburg would have had to concede that Missouri prisons are "escape-proof" and that assaults do occur there. Mr. Brandenburg's evidence was in the form of an affidavit. LF.245. The motion court stated no basis for his conclusion that the evidence is not credible. A review of his affidavit reflects no basis for this conclusion, and it should be rejected as clearly erroneous.

Further, the court's speculation concerning Mr. Brandenburg's cross-examination is not borne out by the record. The state stipulated that Mr. Brandenburg's affidavit could be offered without cross-examination. It is not for the motion court to supply that cross-examination for the state. Finally, the court's conclusions belie common sense. No one could ever prove that any penal institution is completely safe or escape-proof. Where a jury is weighing the difficult question of the death penalty, however, it is likely to be influenced by the knowledge that a reasonably safe alternative exists. Particularly coupled with the evidence that Mr. Barton's prison record is not a

violent one, this evidence was likely to have changed the outcome of the penalty phase. Reversal for a new penalty phase is required.

POINT XIX

THE TRIAL COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO PRESENT THE TESTIMONY OF RALPH BARTON AND MARY REESE[12] IN THE PENALTY PHASE. HAD THESE WITNESSES TESTIFIED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME FOR THE PENALTY PHASE.

Ralph Barton is the older brother of Walter Barton. Although Ralph Barton was at first reluctant to be interviewed, he was cooperative when interviewed by Caryn Tatelli, a mitigation investigator in Mr. Barton's post-conviction case. MX.42 (Ralph

[12] Due to a typographical error, this witness is identified in the amended motion, Claim O, as Mary *Reeves*. LF.21. The failure to interview Ralph Barton is discussed in Claim N. LF.18-19. The two are combined into one point to save space.

Barton affidavit). According to Ralph Barton's affidavit, another investigator working on Walter Barton's case came to see Ralph about two years ago. That was the first time anyone came to talk to Ralph Barton about Walter Barton. The investigator was with his wife. He talked with Ralph Barton for ten or fifteen minutes, at the most. He did not sit down. Had anyone taken the time to sit down and talk with Ralph Barton at length, and explain the status of Walter Barton's case, Ralph Barton would have provided significant information. MX.42, MX.50, Miller depo. 25.

Had Ralph Barton been properly interviewed by trial counsel, he would have reported[13] much information about the family background, including the fact that Walter had difficulty with his schoolwork, that the Barton parents whipped their children regularly, that Mrs. Barton had a number of affairs of which the children were aware, and that the Barton parents fought at times. Ralph could also have testified that each of the Barton siblings have been in trouble with the law; his younger sister Diane is currently in prison in Texas. MX42.

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[13] For purposes of clarity, this paragraph uses "Ralph" to mean "Ralph Barton, Jr." and "Walter" to mean Walter Barton, the appellant.

Mary Reese is Walter Barton's aunt; her older sister, Anne Barton, was his mother. Ms. Reese has lived in Blytheville, Arkansas since 1965. Two or three years ago a man called several times to talk with Mrs. Reese about Walter Barton and the family. The man wanted to talk with Mrs. Reese when he came to her area next and she agreed. But the investigator did not schedule an appointment, and Mrs. Reese was not home when he called at her home. Had she known he was coming, she would have spoken with him and would also have been testified at Mr. Barton's sentencing hearing. (MX.30)

Mrs. Reese could have testified that Walter[14]'s mother Anne Barton whipped Walter and his brother, Ralph, leaving welts. Walter was self-conscious about letting anyone see the welts his mother left on him. Walter and his siblings did not have any freedom. They were not allowed to go to ball games, or events after school. Mrs. Reese was aware of two of Anne Barton's extra-marital relationships, and knew that the Barton children knew what their mother was doing. Ralph Barton, Sr. was gone most of the day. He tried not to see what his wife was doing. MX.30.

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[14] Again, "Walter" here refers to the movant, and "Ralph" refers to Ralph Barton, Jr.

The testimony of Ralph Barton and Mary Reese was relevant to the penalty phase of the trial because it shows the trauma to which Walter Barton was subjected as a child. Such evidence is important in the penalty phase of a capital trial because it explains the life path which brought the defendant to the present offense. MX.50, Miller depo. 36. Had this information been presented to the jury, particularly in combination with the information from Ralph Barton, Jr., there is a reasonable probability that the outcome of the penalty phase of Mr. Barton's trial would have been different.

The court is referred to the authorities cited in Point XVII above concerning the failure to investigate penalty phase evidence. This case is particularly similar to *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000), where trial counsel was found ineffective in part because of his deficient investigation of his client's family background.

Because of the failure to present this evidence, a new penalty phase is required.

POINT XX

THE MOTION COURT ERRED BY FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED ADEQUATELY TO DEVELOP AND PRESENT THE TESTIMONY OF DR. JAMES MERIKANGAS IN THE PENALTY PHASE. HAD THIS EVIDENCE BEEN PROPERLY PRESENTED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME OF THE PENALTY PHASE.

Dr. James Merikangas presented expert testimony during the penalty phase of the trial. Dr. Merikangas testified that Mr. Barton had organic brain damage which affected his impulse control and judgment. TT.1049,1058-1064,1067,1073. Trial counsel then argued that Mr. Barton should not be executed because of his brain damage. TT.1086-1088. The prosecutor argued that Dr. Merikangas's testimony should not be credited because he reported that Mr. Barton had lost the hearing in his right ear before he entered the armed services. TT.1093.

Dr. Merikangas was not questioned about Mr. Barton's early family life and how his reported behavior supported the doctor's diagnosis. Trial counsel also failed to ask Dr. Merikangas about treatment for the symptoms of brain damage which Mr. Barton exhibited. Had trial counsel discussed this subject with Dr. Merikangas prior to trial, they would have learned that medication does exist to treat these symptoms and that if Mr. Barton were to become aggressive in prison, with proper treatment his impulsive behavior would become much less frequent. MX.50, Merikangas depo. 50-51.

Trial counsel also failed to discuss with Dr. Merikangas the effect of a structured environment such as that provided in prison on a person with Mr. Barton's disorder. Had trial counsel asked Dr. Merikangas about this subject, they would have learned that Mr. Barton, despite his brain impairment, would be expected to function safely and competently in a prison setting. This is consistent with Mr. Barton's prison record. MX.50, Merikangas depo., 48-49.

The failure to develop this evidence was prejudicial to Mr. Barton during the penalty phase of the trial because without it, the prosecutor was able to argue that Mr. Barton's disorder had no

relation to his functioning and was "smoke and mirrors." Further, the jury was left with the impression that Mr. Barton's brain damage was untreatable and dangerous because of trial counsel's failure to develop the contrary evidence. This can be a "silent aggravator" for the jury. MX.50, Miller depo., 35; MX.50, Rogers depo. 30.

Trial counsel could have presented considerable additional evidence through Dr. Merikangas which they completely failed to develop. Had Dr. Merikangas's testimony been complete, the jury would have known that Mr. Barton suffered from brain impairment throughout his life, and not just as a result of a head injury. They would have been aware that his hearing loss and headaches as a result of the injury were documented in his military and prison medical records, corroborating Dr. Merikangas's neurological findings. They would have known that the behavior pattern of his prior offenses was consistent with the doctor's diagnosis. They would also have known that treatment is available for this behavior, and that Mr. Barton is unlikely to be dangerous in a prison setting because its structure and regularity help him to control his impulses.

Dr. Merikangas testified that he spent about an hour with defense counsel before his testimony. This was an unusually short

time. MX.50, Merikangas depo., 55. Had Dr. Merikangas been properly prepared and questioned, there is a reasonable probability that the outcome of the penalty phase would have been different.

The situation here is similar to that in *Blankenship v. State*, 23 S.W.3d 848 (Mo.App. 2000). There, defense counsel presented the testimony of an expert, but failed to prepare him. The expert's testimony hurt the defendant more than it helped. Blankenship was awarded a new trial. The same result is required here. The execution of the trial counsel's penalty phase strategy was flawed, and the existence of a strategy does not excuse the bad result. Mr. Barton is entitled to a new penalty hearing.

POINT XXI

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO PRESENT TESTIMONY FROM LUCY ENGELBRECHT CONCERNING HER CLOSE, LONG-TERM RELATIONSHIP WITH MR. BARTON AND WHAT HE MEANT TO HER FAMILY. HAD THIS EVIDENCE BEEN PRESENTED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

The motion court found that Lucy Engelbrecht's additional testimony would not have been helpful to Mr. Barton. LF.235. This finding was clearly erroneous. First, the trial court criticized Ms. Engelbrecht's testimony on the ground that it showed that Mr. Barton could adjust well in prison. As discussed in connection with Point XVII above, this evidence is consistent with a reasonable penalty phase strategy to show that Mr. Barton's prison conduct is not aggressive.

Second, Ms. Engelbrecht's testimony aided in humanizing Mr. Barton, which is an important aim of any reasonable penalty phase presentation in a capital case.

Ms. Engelbrecht testified at the post-conviction hearing that that she has known Mr. Barton for 22 years, and that Mr. Barton is the only inmate she has met in connection with her ministry with whom she has an ongoing relationship, and the only inmate she has ever permitted to visit with her in her home. In fact, her allowing Mr. Barton to do this is a violation of the normal policy of the prison ministry. PCRT.34. Walter Barton treats her and her family with utmost respect. She regularly took her children to visit Walter when they were growing up. To this day, Walter considers her family to be his family. He still writes to her mother, who is very interested in him even though she is elderly. In addition to how well Walter treats her, Ms. Engelbrecht has also noticed that he has total respect for women, and is very protective of her in particular. She has found him to be consistently honest with her. Ms. Engelbrecht also described Mr. Barton's close relationship with her husband. Mr. Barton's relationship with her family enriched her children's lives. She showed

photographs taken with Mr. Barton and members of her family. PCRT53, MX25-28.

Ms. Engelbrecht's trial testimony was quite sparse. TT.1002-1008. By contrast, her post-conviction testimony comprised twenty-four pages. PCRT.32-58. Ms. Engelbrecht was a personable, impressive witness who could have been used by effective trial counsel to give the jury a reason to spare Mr. Barton.

The court is referred to the authorities presented in Point VIII above concerning the legal standards for effective assistance of counsel in the penalty phase. This case is particularly similar to *Collier v. Turpin*, 177 F.3d 1184, 1201-1202 (11th Cir. 1999). There, trial counsel presented little evidence of the defendant's character and circumstances. The court characterized the presentation as "a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death, '" citing *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). The court went on,

> In failing to present any of the available evidence of Collier's upbringing, his gentle disposition, his record of

> helping family in times of need, specific instances of his heroism and compassion, and evidence of his circumstances at the time of the crimes—including his recent loss of his job, his poverty, and his diabetic condition—counsels' performance brought into question the reliability of the jury's determination that death was the appropriate sentence.

The description in *Collier* fits Mr. Barton's case as well. Ms. Engelbrecht's testimony would have enabled the jury to give Mr. Barton the *individualized* consideration he deserved. Because the presentation of this evidence had a reasonable probability of changing the outcome of the penalty phase, Mr. Barton is entitled to a new penalty phase.

POINT XXII

THE MOTION COURT ERRED IN RULING THAT MR. BARTON HAD NOT ADEQUATELY PLEADED HIS CLAIM TO PERMIT THE CONSIDERATION OF THE AFFIDAVITS OF PAT BARTON, SHIRLEY CURBOW, LESLIE CURBOW, AND BRADLEY BURR IN THAT THE RESTRICTIVE PLEADING RULES FOR POST-CONVICTION PROCEEDINGS VIOLATE DUE PROCESS.

In Claim Y of his Amended Motion (LF.27), Mr. Barton alleged that trial counsel should have interviewed other family members and associates for the penalty phase in addition to those listed in other paragraphs. These persons were not identified in the motion. After the amended motion was filed, counsel obtained the affidavits of Bradley Burr, Robert Hardy, Lynwood Mills and Donna Potts. These affidavits were received as offers of proof, but the motion court ruled that the pleading was insufficiently specific under *Morrow v. State,* 21 S.W.3d 819, 822 (Mo.banc. 2000) and *White v. State,* 939 S.W.2d 887, 893 (Mo.banc 1997) to allow for this evidence to be presented. (MX41, PCRT.384-385, MX45, PCRT.386-387, MX48,51, PCRT.378-384).

Briefly, the affidavits presented the following facts:

Bradley Burr works for the Department of Corrections. He supervised Mr. Barton on the maintenance team at the state prison in Fordland. Mr. Barton worked his way up the hierarchy of maintenance jobs because he was responsible and willing to work hard. MX.45.

Robert Hardy was the owner of Hardy Construction and the employer of Ralph Barton, Sr., Walter Barton's father, from 1971-1982.. Mr. Hardy was familiar with Walter Barton's mother. Ms. Barton was very selfish and controlling. Although Ralph Barton, Sr., was well paid, Anne Barton had control of his money and did not spend it on necessities for the family. Walter's sister ran around barefoot because she had no shoes. MX.48.

Lynwood Mills has known the Barton family since 1972. He was Ralph Barton, Sr.'s direct supervisor at Hardy Construction. Ralph, Sr. "lacked initiative, but was totally reliable." He was totally dominated by his wife Anne. On one occasion, when Mr. Mills's wife and daughter and Ralph's wife and daughter were visiting a construction site, Mrs. Barton gave Mr. Mills's wife a "terrible tongue lashing", calling her "a whore and a number of other foul names."

When Mr. Mills reported this to Ralph, Sr., he said that he could not control Anne. Anne attempted to have Mr. Mills give her Ralph's paycheck. Although she controlled the family's money, she never provided a comfortable home or adequate clothing or food.

Mr. Barton's brothers Ralph, Jr. and Robert worked for Mr. Mills at Hardy Construction. Neither was a good worker. Mr. Mills got to know Walter during a period when Walter used to come to work with his father; he remembers him as more likeable than his brothers. MX.51.

Donna Potts testified briefly at trial. TT.1009-1113. She provided a six page affidavit in which she described in detail her relationship with Walter Barton. At the time of the 1998 trial, she had corresponded with him and visited him for over ten years. She has visited him at several institutions.

Ms. Potts believes Mr. Barton has mellowed with age, although she never experienced him as very aggressive. Mr. Barton is friendly with other inmates and tries to support them. He is happier when he is working in the institution. The only work problem that Ms. Potts is aware of occurred when he walked off from a work release position.

This was done at the invitation of a woman Mr. Barton was dating. Ms. Potts sees this as an example of Mr. Barton's impulsiveness.

Ms. Potts believes that she has never had an opportunity to provide full testimony about Mr. Barton, although she testified at two of his trials. Until she was interviewed by the investigator working on the post-conviction motion, no one connected with Mr. Barton's defense ever had an extended conversation with her. MX.41.

As discussed in more detail in Point XXVI below, the pleading requirements for post-conviction motions must comport with due process. At the time the amended motion was filed, counsel for Mr. Barton had identified and interviewed many witnesses whose testimony related to the claims of ineffective assistance of counsel. Counsel had identified, and presented to the court, sufficient evidence to require a hearing on the majority of his claims. Given the volume of the record and the long history of this case, the time permitted under Rule 29.15 was insufficient to allow counsel to identify and interview all of the witnesses who supported Mr. Barton's claims.

In *Morrow*, this Court stated the view that an amended motion should be fact-specific so that the court could determine from its face whether a hearing was required. The court here did made that

determination and did conduct a hearing. Under these circumstances, there is little savings in judicial economy from refusing to admit four affidavits of persons described but not named in the amended motion.

On the other hand, the harm to Mr. Barton is great. If he is not permitted to present his constitutional claim of ineffective assistance of counsel fully in Missouri court, he will most likely not be permitted to present it later. See 28 U.S.C. §2254(d).

Therefore, if Mr. Barton is not granted relief from his conviction, this Court should remand the case to the motion court with instructions to consider this evidence in determining Mr. Barton's ineffective assistance of counsel claims.

POINT XXIII

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S FAILURE TO ALLOW ARGUMENT AT FINAL SENTENCING. HAD COUNSEL BEEN PERMITTED TO ARGUE, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Under Missouri law, the trial court is the final sentencer. Even if a jury has recommended a death sentence, the trial court must consider whether this is the appropriate punishment. Sup.Ct.R. 29.05; *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991).

When the sentencing proceedings began, the court asked counsel if he wished to argue the motion for new trial. Counsel declined. The court then asked Mr. Barton if he knew of any lawful reason why he should not be sentenced; Mr. Barton replied that he did not. Without further ado, the court then sentenced Mr. Barton to death. TT.1103-1104. Trial counsel did not object. At the post-conviction hearing he described himself as "stunned" by the procedure. PCRT.235. He

testified that he had an argument prepared, but that it was obvious that the trial court had already made a decision.

The motion court found that "counsel's objection to lack of argument would have been denied." LF.250. This indicates an unwillingness on the part of the motion court (which was also the trial court) to consider any arguments trial counsel might have presented. This was anomalous; trial counsel testified that this was the first felony he was aware of where there was no argument at sentencing. PCRT.237.

The right to final argument is an element of the right to due process of law in a criminal trial, whether to the jury or to the judge. *Herring v. New York*, 422 U.S. 853, 858 (1975); *United States v. Kellington*, 271 F.3d 1084 (9th Cir. 2000); *Conde v. Henry*, 198 F.3d 734 (9th Cir. 2000); *United States v. King*, 650 F.2d 534 (4th Cir. 1981). While these cases address specifically the closing argument, which occurs at the end of the presentation of evidence, the proceeding at which a judge makes a life-or-death decision about a criminal defendant is no less critical.

The trial court had a responsibility not only to permit argument, but to listen to it and consider it. Trial counsel had a duty to object

when the trial court failed to permit argument. Had such an objection been made, there is a reasonable probability of a different outcome. Therefore, Mr. Barton is entitled to a new penalty phase. In light of the statements of the motion court, that penalty phase should be conducted before a different judge.

POINT XXIV

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN THAT APPELLATE COUNSEL FAILED TO RAISE ISSUES OF THE TRIAL COURT'S LIMITATION ON DEATH PENALTY VOIR DIRE, THE TRIAL COURT'S LIMITATION ON SENTENCING ARGUMENT, DOUBLE JEOPARDY, UNCONSTITUTIONAL PROPORTIONALITY REVIEW, AND THE FAILURE OF THE INDICTMENT TO PROVIDE NOTICE.[15] HAD THESE ISSUES, OR ANY ONE OF THEM, BEEN RAISED, THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

In addition to effective assistance of trial counsel, Mr. Barton is also entitled to effective assistance of direct appeal counsel. Appellate counsel raised five points of error on direct appeal. They were: the denial of Mr. Barton's request to ask specific questions of prospective

[15] Claims

jurors concerning pretrial publicity; the denial of a continuance because of pretrial publicity; that the testimony of Ricky Ellis should have been excluded because it was prior bad act evidence, that the prosecutor's argument that "every legal nicety" had been observed in Mr. Barton's case was improper; and that the death penalty would be disproportionate.

The same counsel represented Mr. Barton in the prior appeal. In that appeal, he raised a double jeopardy issue arising from the mistrial which was declared when the state had failed to endorse witnesses. This court reversed on other grounds, and failed to address this issue at all.

In the appeal following Mr. Barton's most recent trial, appellate counsel failed to raise an issue concerning the refusal of the trial court to allow defense counsel the right to ask the prospective jurors about the source, nature, and depth of their feelings and beliefs about the death penalty. Appellate counsel testified that he was sure that he had considered and rejected this issue, but could articulate no strategic reason for doing so. MX50, Spangler depo. 8-9.

The issue presented has considerable merit. While Mr. Barton is mindful of this Court's ruling in *State v. Kreutzer*, 928 S.W.2d 854

(Mo.banc 1996) that it is within the trial court's discretion to restrict open-ended questions to jurors, that opinion focused almost totally upon the right of a defendant to a legally qualified panel of jurors. That right is certainly important, but another right is almost equally important: The right to exercise intelligently the peremptory challenges allowed by statute. Further, the restrictive language of *Kreutzer* was a departure from previous holdings of this court.

In *State v. Smith*, 649 S.W.2d 417, 428 (Mo.banc1983), this Court held,

> The purpose of voir dire is to enable each party to participate in selection of a fair and impartial jury and to that end, wide latitude is allowed in examination of the panel. *State v. Lumsden*, 589 S.W.2d 226, 229 (Mo.banc 1979). During voir dire the defendant should be permitted to develop not only facts which might manifest bias and form the basis of a challenge for cause, but also such facts as might be useful to him in detecting the possibility of bias and intelligently utilizing his peremptory challenges. *State v. Brown*, 547 S.W.2d 797, 799 (Mo.banc 1977); *State v. Thompson*, 541 S.W.2d 16, 17 (Mo.App. 1976)

In fact, "The only legitimate limitation would be at that point where the inquiry tended to create prejudice." *State v. Finch*, 746 S.W.2d 607, 613 (Mo.App. 1988), citing *State v. Granberry*, 484 S.W.2d 295, 299 (Mo.banc 1972).

In *State v. Brown*, 547 S.W.2d 797 (Mo.banc 1977), the court held that the defense has the right to question the jurors about their bias concerning the law which they will be asked to apply. This inquiry is relevant not only to the right to challenge jurors for cause, but also to the right to intelligently exercise peremptory challenges. Reversals have also occurred for undue restrictions on the ability to ask prospective jurors their opinions about the credibility of police officers, *State v. Hyzer*, 729 S.W.2d 576 (Mo.App. 1987); *State v. McCormack*, 700 S.W.2d 520 (Mo.App. 1985); whether the prospective jurors in a non-support case had personal experience with non-support in their families, *State v. Coleman*, 553 S.W.2d 885 (Mo.App. 1977); and whether prospective jurors would automatically believe the testimony of a rape victim, *State v. Finch*, 746 S.W.2d 607 (Mo.App. 1988).

This Court apparently softened the restrictions of *Kreutzer* in *State v. Johnson*, 968 S.W.2d 686, 691 (Mo.banc 1998) where it

upheld the right of the state to ask, "[Is] there any member of this panel, just based on that, [who] would refuse to listen to and consider the testimony of these two witnesses because of ***feelings*** that the State should never make such agreements in return for testimony?" (Emphasis added)

In so holding the court noted, "Voir dire is the 'most practical method for probing the minds of the prospective jurors to ascertain those who are fair and impartial and those who are biased and prejudiced.' [*State v. Hobby*, 706 S.W.2d 232,233 (Mo. App. 1986)] The State is entitled to elicit from prospective jurors any preconceived notions that they might have concerning the law." *State v. Johnson*, 968 S.W.2d 686, 691 (Mo.banc 1998).

When appellate counsel fails to raise a meritorious issue, he has not provided effective assistance of counsel. In *Jackson v. Leonardo*, 162 F.3d 81 (2nd Cir. 1998), the court found that ineffective assistance of counsel was shown where appellate counsel omitted a clearly meritorious issue in favor of more dubious issues. See also *United States v. Mannino*, 212 F.3d 835 (3rd Cir. 2000); *Brown v. United States*, 167 F.3d 109 (2nd Cir. 1999).

The second meritorious issue which appellate counsel omitted was Mr. Barton's claim that he was tried in violation of the Double Jeopardy Clause. Appellate counsel raised this issue in the first appeal. He testified that he did not raise it in the second appeal because it was not preserved at trial and in the motion for new trial. MX.50, Spangler depo. 11. However, the failure to raise plain error claims is ineffective assistance of counsel if there is a reasonable probability of plain error relief. *Roe v. Delo*, 160 F.3d 416 (8th Cir. 1998). Such a probability exists here. The court is referred to the arguments presented in Point XII above for the merits of this issue.

The final two claims which should have been presented by appellate counsel were claims that this court's proportionality review process is fatally flawed and that the distinction between first and second degree murder in Missouri law is so unclear that an indictment for first degree murder does not provide sufficient notice for the accused to prepare a defense. These claims have been previously rejected by this Court. However, in a capital case, it is incumbent upon appellate counsel to raise claims which have arguable merit and have won relief in other jurisdictions. The proportionality review claim is based on the Washington case of

Harris v. Blodgett, 853 F.Supp. 1239, 1286 (W.D. Wash. 1994), *affirmed* 64 F.3d 1432 (9th Cir. 1995). The notice issue is based on the Tennessee case of *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992). Preservation of these issues for federal review is important in death penalty jurisprudence.

Because the failure of appellate counsel to effectively represent Mr. Barton was prejudicial, he is entitled to a new appeal if his case is not otherwise reversed.

POINT XXV

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE EVEN IF NO ONE OF THE ERRORS LISTED ABOVE IS SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME OF THE TRIAL AND PENALTY PHASE, THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL.

This Court has been reluctant to grant relief for ineffective assistance of counsel based on cumulative error. However, the

standard of *Strickland* and *Williams (Terry)* clearly requires this Court to consider whether counsel's errors, taken as a whole, undermine confidence in the outcome so as to be prejudicial. For example, in *Lindstadt v. Keane,* 239 F.3d 191 (2nd Cir. 2001), the court held that the combination of four errors of counsel was sufficient to show prejudice under *Strickland* even if two of them, taken alone, would not have done so. In *Moore v. Johnson,* 194 F.3d 586, 619 (5th Cir. 1999), the court held that "the question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable." It answered that question in the affirmative and granted relief.

In *Washington v. Smith*, 219 F.3d 620, 624-635 (7th Cir. 2000), the court found a number of instances of ineffective assistance of counsel. The court analyzed the prejudicial effect of these errors cumulatively:

> Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess "the totality of the omitted evidence" under *Strickland* rather than the individual errors. . . Considering the "totality of the evidence before the . . . jury," [Citation omitted], Engle's

> unprofessional errors were prejudicial to Washington. Engle did not just botch up one witness or one argument or one issue--he repeatedly demonstrated a lack of diligence required for a vigorous defense. Engle's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Appellant submits that this case presents a scenario where the multiple errors of trial counsel were prejudicial to Mr. Barton even if this Court cannot find that any single error undermined confidence in the outcome of the case.

POINT XXVI

THE MOTION COURT ERRED IN FINDING THAT SUP.CT.R. 29.15 PROVIDES A CONSTITUTIONALLY ADEQUATE REMEDY IN THAT POST-CONVICTION COUNSEL HAD INSUFFICIENT TIME AND RESOURCES TO PLEAD AND RAISE ALL OF THE ISSUES IN THE CASE AS REQUIRED BY THE RULE AND THIS COURT'S DECISIONS. THEREFORE, MR. BARTON WAS DENIED DUE PROCESS OF LAW IN THE POST-CONVICTION PROCEEDING.

Due process requires that a criminal defendant have an adequate forum to raise his constitutional claims. Under Missouri law, claims of constitutional error that cannot be raised on direct appeal must be raised in a post-conviction proceeding under Sup. Ct. R. 29.15. That rule requires that the action be commenced within 90 days of the denial of relief on direct appeal, and provides for another period of up to 90 days for counsel to amend the motion. The amended motion is subject to rigorous pleading requirements. *Morrow v. State,* 21 S.W.3d 819, 822 (Mo.banc. 2000); *White v. State,* 939 S.W.2d 887, 893 (Mo.banc 1997).

As interpreted by the motion court here, the movant was required to describe in his motion every witness and every piece of evidence he would present at an evidentiary hearing. This is a far more onerous task than pleading an ordinary civil case, where the plaintiff must merely state a cause of action and need not include all of the evidence supporting it.

Within the constraints of the rule, post-conviction counsel were unable, despite due diligence to complete their investigation of the possible claims before the due date for filing the amended motion. In particular, they were unable to:

- Complete their review of Mr. Barton's prison employment and medical records since 1992
- Complete their investigation of Craig Dorser, and Ricky Ellis
- Complete interviews with Mr. Barton's family members
- Complete investigation of Mr. Barton's military and employment records
- Complete investigation of the prior record of Katherine Allen

Even if Sup.Ct.R. 29.15 is sometimes adequate to permit the prosecution of constitutional claims, it was not adequate in this case because of its unusual complexity. Post-conviction counsel, who had

not previously represented Mr. Barton, were required to familiarize themselves with the record in three trials and two appeals, as well as the defense work product and discovery associated with those trials before investigating the case to determine whether Mr. Barton received effective assistance of counsel.

Further, the trial court denied Mr. Barton the right to be present at the hearing. While the court has discretion to deny the movant the right to be present, that discretion must be exercised with the movant's due process rights in mind. *Scott v. State*, 717 So.2d 908, 912 (Fla. 1998); *Teffeteller v. Dugger*, 676 So.2d 369, 371(Fla. 1996). Here, where multiple witnesses were presented, many of whom testified about matters within Mr. Barton's knowledge, he was entitled to be present so that he could assist his counsel in questioning them.

A state's post-conviction procedures must comply with due process. *Young v. Ragen*, 337 U.S. 235 (1949); *Pyle v. Kansas*, 317 U.S. 213 (1942), and *Williams v. Kaiser*, 323 U.S. 471 (1945). See *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (Clark, J., concurring.) Because Missouri's procedures do not, in the event that Mr. Barton's case is not otherwise reversed, he should be granted a new post-conviction proceeding and evidentiary hearing at which he can present those

issues and evidence deemed outside the limited remedy afforded by Rule 29.15.

POINT XXVII

MR. BARTON'S SENTENCE OF DEATH VIOLATES DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE BECAUSE OF THE ARBITRARY AND CAPRICIOUS NATURE OF THE CLEMENCY PROCESS, AND THE MOTION COURT ERRED IN FINDING OTHERWISE.

Mr. Barton presented evidence that he is under punishment of death while a similarly-situated defendant, Darrell J. Mease, was granted clemency by Governor Mel Carnahan for the sole reason that Pope John Paul II (who has no legal clemency authority in Missouri) visited Missouri near the time of Mr. Mease's scheduled execution date and requested that the Governor commute Mr. Mease's death sentence to life in prison without parole. MX.6.

The Eighth and Fourteenth Amendments require heightened reliability in all aspects of the capital sentencing and execution process. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). A death

sentence must be, and appear to be, based on reason, rather than caprice or emotion. *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977). Discretion given to the sentencing entity in a death penalty case must be limited, directed and channeled to reduce the risk of arbitrary and capricious action. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

These requirements also apply to the clemency process. While clemency is committed to the discretion of the executive branch, the Due Process Clause safeguards defendants from arbitrary and capricious action of the executive. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring). Due process requires that the procedures used to make a clemency decision "not be wholly arbitrary, capricious, or based upon whim, for example, flipping a coin. *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998), , *citing Woodard*.

If Mr. Mease's sentence can be commuted because of the fortuitous circumstance that his execution was scheduled near the time of the Pope's visit, then Missouri process is completely arbitrary. Because clemency is the "safety valve" for errors that cannot be corrected in court, *Herrera v. Collins*, 113 S.Ct. 853 (1993), this arbitrariness cannot be tolerated. The imposition of death on Mr.

Barton violates his right to due process of law, and his sentence must be set aside.

CONCLUSION

For the foregoing reasons, appellant prays the court:

1. For the reasons stated in Points V and VI, to vacate his conviction and sentence and order that he be discharged from custody, or, in the alternative

2. For the reasons stated in Points II-IV, VIII-XVI and XXV, to vacate his conviction and sentence and order that he be granted a new trial as to guilt and punishment, or, in the alternative

3. For the reasons stated in Points XVII-XXI and XXIII, to vacate his sentence and order that he be granted a new sentencing hearing, or, in the alternative

4. For the reasons stated in Points VII and XXVII, to vacate his sentence and order that he be sentenced to life in prison without parole, or, in the alternative

5. For the reasons stated in Point XXIV, to vacate this court's judgment affirming the conviction and sentence on appeal and permit re-briefing and re-argument, or in the alternative,

6. For the reasons stated in Points I, XXII, XXVI and XXV, to grant Mr. Barton a new post-conviction proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 28,912 words.

The disk submitted with this brief has been scanned for viruses and is virus-free.

ELIZABETH UNGER CARLYLE

I hereby certify that a copy of the foregoing brief was served upon John M. Morris, counsel for respondent, by U.S. Mail on December 6, 2001.

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Elizabeth Unger Carlyle