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

REPLY BRIEF FOR APPELLANT

ELIZABETH UNGER CARLYLE
SPECIAL PUBLIC DEFENDER

ATTORNEY FOR APPELLANT
200 S.E. Douglas St., Ste. 200
Lee's Summit, MO 64063
(816) 525-6540
FAX (816) 525-1917
Missouri Bar Number 41930

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Error! No table of authorities entries found.

NO. 83615

IN THE SUPREME COURT OF MISSOURI

WALTER BARTON,

Appellant,

v.

STATE OF MISSOURI

Respondent.

Appellant Walter Barton files this reply brief in response to the brief of respondent. This brief discusses only those issues raised in the respondent's brief which, in the belief of appellant, require a response. The failure to reurge any contention made in the opening brief is not intended as a waiver of that contention, and appellant relies on each and every point and contention in his opening brief. Because there are so many points in the opening brief, this brief

preserves the numbering of the points even though no reply is made to some of them. Therefore, there are gaps in the numbering of the reply points so that, for example, Reply Point IX" corresponds to Point IX in the opening brief.

STATEMENT OF FACTS

In its brief, the State presents as a "Statement of Facts" the evidence presented at the trial of the underlying criminal case, not the evidence presented at the trial of THIS post-conviction case. Mr. Barton does not accept this statement as correctly stating the facts of the underlying case.

REPLY POINTS

REPLY POINT I

THE MOTION COURT ERRED IN OVERRULING THE MOVANT'S MOTION TO DISQUALIFY THE MOTION COURT WITHOUT A HEARING BEFORE ANOTHER JUDGE.

REPLY 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.

REPLY 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

REPLY POINT IV

THE MOTION COURT ERRED IN FINDING THAT THE PROSECUTOR DID NOT KNOWINGLY PRESENT THE PERJURED TESTIMONY OF KATHY ALLEN.

REPLY 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.

REPLY 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.

REPLY POINT IX

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON HAD EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE.

REPLY 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.

REPLY 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.

REPLY 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.

REPLY 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.

REPLY 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.

REPLY 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.

REPLY POINT XX

THE MOTION COURT ERRED IN 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.

REPLY POINT XXIV

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

REPLY 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.

ARGUMENT AND AUTHORITIES

Standard of review. In addition to the authorities cited in the opening brief, this Court should consider its recent opinion in Deck v. State, 2002 Mo. LEXIS 43*19-20 (Feb. 26, 2002) in determining

prejudice. In *Deck*, this Court clarified the showing required for a finding of prejudice under the *Strickland* standard:

> Appellate review of preserved error is "for prejudice, not mere error, and [it] will reverse only if the error is so prejudicial that it deprived the defendant of a fair trial." *State v. Tokar,* 918 S.W.2d 753,761 (Mo.banc 1996). If no objection was made or the error was otherwise not preserved, then the trial court cannot normally be accused of error in its rulings, much less prejudicial error. In order to serve the need for accuracy in the outcome of a trial, appellate courts have the discretion to nonetheless review for plain error if manifest injustice would otherwise result. Rule 30. 20, *State v. Johnson*, 968 S.W.2d 123,127 (Mo.banc 1998). But, both of these standards presuppose "that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." *Strickland*, 466 U.S. at 694.
>
> By contrast, when a post-conviction motion is filed alleging ineffective assistance of counsel, defendant is asserting

"the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Id*. The ultimate determination thus, is not the propriety of the trial court's actions with regard to an alleged error, but whether defendant has suffered a genuine deprivation of his right to effective assistance of counsel, such that this Court's confidence in the fairness of the proceeding is undermined.

REPLY POINT I

THE MOTION COURT ERRED IN OVERRULING THE MOVANT'S MOTION TO DISQUALIFY THE MOTION COURT WITHOUT A HEARING BEFORE ANOTHER JUDGE.

At the outset, certain procedural issues need to be addressed. Counsel for the state asserts that the letter from Judge Scott to the Indiana Judge was not filed in the motion court. This is incorrect. The letter was included as part of Movant's Exhibit 16. At the evidentiary hearing, State's witness Robert Ahsens was shown a copy

of the letter and testified about it without objection from the state that the letter was not properly before the court. Tr.268. And, of course, since it was a part of the proceedings in Mr. Barton's trial, it was a part of the records of which the court took judicial notice. Tr.13-14.

The motion to disqualify was filed by e-mail pursuant to the authorization of the motion court. Attached to this brief is a copy of the e-mail notification sent to counsel by the court urging this method of procedure. However, because the e-mail filings were in word processor format, attachments were not possible, so the clerk's file did not reflect the attachment. The original motion, with the letter attached, was available at the time the motion was heard by the court. No one objected at that time that the letter was not before the court. At the evidentiary hearing, counsel for Mr. Barton attempted to call Judge Scott as a witness and referred to the letter in his offer of proof. Again, there was no objection that the letter was not before the court. Tr.392.[1] While it would have been preferable to file the original motion as well as the e-mailed version, it is clear that the letter was considered by the court. Finally, the State's brief indicates that

[1] Dean Price, appellant's trial counsel, also testified about the letter without objection. Tr.192.

counsel for the State reviewed the letter; she argues that the letter does not show bias because it does not express an opinion on the merits of Mr. Barton's case. State's Brief, p. 24. For the convenience of the court, a copy of the letter is attached to this reply brief; it is the basis for Mr. Barton's claim that the motion court was biased.

The State asserts that Judge Scott's bias did not have an "extrajudicial source" because he acquired it while hearing Mr. Barton's criminal case. This proceeding, however, is not Mr. Barton's criminal case. It is his post-conviction case. Biases acquired while hearing another case pertaining to Mr. Barton require disqualification. "[A] disqualifying bias and prejudice is one with an extrajudicial source that results in the judge forming an opinion on the merits based on something *other than what the judge has learned from participation in the case.*" *State v. Cella*, 32 S.W.3d 114, 119 (Mo. banc 2000), emphasis added, citing *State v. Nicklasson*, 967 S.W.2d 596, 605 (Mo. banc 1998). Put differently, "In cases requiring recusal, the common thread is either a fact from which prejudgment of some evidentiary issue in the case by the judge may be inferred or facts indicating the judge considered some evidence properly in the case for

an illegitimate purpose." *Smulls v. State*, 10 S.W.3d 497, 499 (Mo. banc 2000).

The State further asserts that Mr. Barton did not present an issue as to which the judge would be an essential witness. The motion asserted,

> The letter describes for the Indiana judge the crucial nature of Ms. Allen's testimony in Mr. Barton's case, and suggests that she receive consideration in her pending Indiana case for her testimony in Mr. Barton's case. This suggests that Judge Scott knew of Ms. Allen's pending Indiana case, probably at the time of Mr. Barton's trial. Trial counsel, however, was not informed of this information by the prosecutor or the trial judge. If Judge Scott received his information from the prosecutor (as is likely, since the prosecutor requested a writ of habeas corpus *ad testificandum* from Judge Scott), then Judge Scott's evidence is relevant to the knowledge of the trial prosecutors.
>
> L.F.83-84.

The amended post conviction motion contains the assertion that the prosecutor failed to disclose to Mr. Barton's counsel that Katherine Allen "had a record of felony convictions for offenses involving deceit in… Indiana…" L.F.5. Judge Scott's letter—and testimony—was clearly relevant to this claim.

Of course, the record on Judge Scott's disqualification was not fully developed because he refused to order that the motion be determined by another judge, and refused to be called as a witness. The State fails to address this issue in its brief.

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.

REPLY 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.

Again, it is necessary to address the state of the record. At page 30 of its brief, the State asserts, without citation of authority that "although appellant requested the motion court to reopen the evidence, the motion court refused and did not accept the depositions or exhibits." This is a gross misstatement of the record. At the conclusion of the evidentiary hearing, a colloquy occurred in which the court agreed that the record would remain open for the receipt of records. Tr.390-392. The evidence was not closed at that time. After the hearing, the State searched the prosecutor's file and found, for the first time, a printout of the criminal record of Katherine Allen. Also produced for the first time was a letter from Cass County Assistant Prosecutor Candace Cole stating that she had dismissed charges against Ms. Allen. The State requested that Mr. Barton's counsel agree to depose Robert Ahsens, the trial prosecutor, on the subject of these disclosures and submit the deposition to the court. Attached to

this brief is a copy of the prosecutor's letter to the court transmitting the deposition and exhibits by agreement; the deposition itself will be filed with the other exhibits before submission of this case. The motion court did not refer specifically to the deposition in his findings of fact and conclusions of law, but he certainly never indicated, there or elsewhere, that he had not considered it.

On p. 32 of its brief, the State asserts that Mr. Barton did not produce evidence of any convictions that were not disclosed prior to trial. To the contrary, each of the convictions on the chart below, reproduced from the opening brief, were presented to the court.

CRIMINAL HISTORY OF KATHERINE ALLEN
11/16/78, Kansas City, MO, 2 cts forgery, Reduced to passing bad check, 2 yr. prob , (RX[2].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)
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,

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

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)

The State asserts that Mr. Barton's claim that the state failed to disclose a psychological examination of Ms. Allen is "nowhere to be found in his point relied on." State's Brief, p. 33. To the contrary, the point alleges the state's failure to disclose the "criminal record" of Ms. Allen. A forensic mental examination is clearly part of the criminal record. Further, since the State had possession of the records of Ms. Allen's Lawrence County conviction, which were disclosed to the defense, the mental evaluation in the same case was clearly in the State's possession or control.

REPLY 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.

It its brief, the state fails entirely to address Mr. Barton's argument that due process requires consideration of this claim. Mr. Barton will therefore rely on the presentation of that argument in the opening brief. Without discussion, the State asserts that no evidence was presented to support this claim. Again, the substantive evidence discussed in the opening brief was not addressed.

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

REPLY POINT IV

THE MOTION COURT ERRED IN FINDING THAT THE PROSECUTOR DID NOT KNOWINGLY PRESENT THE PERJURED TESTIMONY OF KATHY ALLEN.

Again, the State misstates the evidence in the record in this case. Movant's Ex. 65-66 and Respondent's Exhibit A were all accepted by the motion court.

The State describes the evidence against Mr. Barton as "overwhelming." That characterization is surprising in that the jury was unable to agree on a verdict until the State multiplied its prisoner witnesses. As the dissenting judge noted in *State v. Barton*, 998 S.W.2d 19, 30 (Mo.banc 1999), "Perhaps the evidence of guilt may be subject to nonfrivolous debate. . ."

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

REPLY 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.

Mr. Barton is not collaterally estopped from raising this issue. Although the issue was raised in a prior post-conviction motion, this Court never reached the appeal from that motion because it reversed the conviction on direct appeal. Accordingly, unlike the situation in *Carrow v. State*, 766 S.W.2d 463, 464 (Mo.App.E.D. 1989), cited by the State, there was no ruling on the merits in this Court on the claim.

The State also asserts that Mr. Barton "ignores this Court's holding in *Sidebottom v. State*, 781 S.W.2d 791, 795 (Mo.banc 1989)" that expert testimony is inadmissible on the issue of ineffective assistance of counsel. To the contrary, Mr. Barton's brief urged this Court to "revisit" this issue based on the holdings in *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 F.2d 491, 494 (11th Cir. 1988).

Failure to file a double jeopardy motion was recently found to be ineffective assistance of counsel requiring reversal in *State v. Bishop*, 639 N.W.2d 409 (Neb. 2002), and *State v. Allah*, 787 A.2d 887 (N.J. 2002).

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.

REPLY 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.

The State first argues that failure adequately to preserve issues for appeal is not cognizable in a Rule 29.15 proceeding. Of course, if the motion had been filed and the trial court had ruled correctly, there would have been no trial at all. Thus, the claim here is not simply that trial counsel failed to preserve the issue for review, but that counsel failed to make a trial objection.

To the extent that various decisions of the courts of appeals hold that failure to preserve an issue for review is not cognizable under Rule 29.15,[3] that holding is in error. Rule 29.15 exists in large part to provide a forum for claims of ineffective assistance of counsel. Reasonably effective trial counsel must preserve erroneous rulings of

[3] The State does not cite a decision of this Court and Mr. Barton is aware of none.

the court for review on appeal. *Stanford v. Stewart*, 274 Ga. 468, 554 S.E.2d 480, 482 (Ga. 2001) (Trial counsel ineffective for failing to preserve jury charge error for review.); *Mallett v. State*, 28 S.W.3d 603, 609 (Tex. Ct. App. 2000) ("Appellant's trial counsel did not preserve the misjoinder of the offenses charged against him for our review, nor did he raise the double jeopardy bar to his prosecution for criminal mischief and theft. Appellant has thus shown that his trial counsel's performance was below an objective standard of reasonableness..."); *State v. Turner*, 67 Conn. App. 708 (Conn. App. 2002) (Failure to preserve right to appeal from denial of motion to suppress statements); *Flores v. Demskie*, 215 F.3d 293 (2nd Cir.), *cert denied sub nom. Keane v. Flores*, 121 S Ct. 606 (2000) (Trial counsel ineffective in child sodomy case for waiving reversible error.)

Numerous cases have found ineffective assistance of counsel for failing to perfect appeal. *Hernandez v. United States*, 202 F.3d 486 (2nd Cir. 2000); *McHale v. United States*, 175 F.3d 115 (2nd Cir. 1999); *United States v. Nagib*, 56 F.3d 798 (7th Cir. 1995); *United States v. Peak*, 992 F.2d 39 (4th Cir. 1993); *Bonneau v. United States*, 961 F.2d 17 (1st Cir. 1992); *Hannon v. Maschner*, 981 F.2d 1142 (10th Cir.

1992). It is clear that preserving the record for appeal is a part of trial counsel's duty to insure justice for the client.

REPLY POINT IX

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON HAD EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE.

Incorrect statement regarding defendant's silence.

Once again the State refers to the evidence against Mr. Barton as "overwhelming." (State's brief, p. 54). As noted above, the evidence was far from overwhelming, and there is a reasonable probability that the incorrect comment of defense counsel that they could consider Mr. Barton's silence to determine the "believability" of his defense was prejudicial to him.

Failure to question individual jurors.

The State would impose an impossible burden on Mr. Barton to show prejudice from trial counsel's failure to question individual jurors about their views on the penalty phase.[4] The State suggests

[4] In support of this contention, the State cites only *Clemmons v. State*, 785 S.W.2d 524,529 (Mo.banc 1990). Mr. Clemmons's conviction was

that in order to prevail, Mr. Barton must identify venirepersons who would have shown bias when asked the omitted questions. This standard can never be met. Rather, this court should consider the fact that when such questions are asked, it is not uncommon for jurors to be shown to be subject to challenge for cause. Because this is true, there is a reasonable probability that the result would have been different had a proper voir dire been conducted by defense counsel.

Failure to strike Haas and Cole.

The State suggests that because Mr. Barton did not ask trial counsel if he had a strategic reason for not striking prospective jurors Haas and Cole, he cannot demonstrate that no strategic reason exists. This again places an impossible burden on the post-conviction litigant. It suggests that only if trial counsel *admits* that there was no strategic basis for a decision can ineffective assistance be shown. It should be noted that the State did not ask trial counsel to articulate a strategic reason for this decision when trial counsel was cross-examined. Since it would be expected that the State would do so if a

---

vacated by the Eighth Circuit in *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997).

strategic decision existed, placing this burden upon the movant is inappropriate.

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

REPLY 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.

Richard Ausmus

The State first contends that Mr. Barton should be faulted for not asking trial counsel if he had a reasonable strategic reason for not calling Mr. Ausmus. As the State concedes, trial counsel did not even recall whether Mr. Ausmus *was* called as a witness. PRCT.202. It would clearly have been futile to ask whether he recalled a strategic reason for not calling him, and it defies common sense for this Court to assume that he must have had one. Trial counsel did testify that he

should have presented evidence from Mr. Ausmus that Mr. Barton had not changed clothes on the day of the murder. PCRT.203. Accordingly, Mr. Barton has met his burden to show the lack of reasonable trial strategy.

The State then suggests that Mr. Ausmus's testimony was not helpful to Mr. Barton. As this Court recently held in *Deck v. State*, 2002 Mo. LEXIS 43*19-20 (Feb. 26, 2002), Mr. Barton need not show that he would have been acquitted if Mr. Ausmus had testified. Rather, he need only show a reasonable probability of a different outcome. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

While Mr. Ausmus's testimony would not have provided Mr. Barton with a *complete* alibi, it would have filled a gap in the period during which the offense may have occurred. A defense of alibi need not be based on the testimony of only one witness who covers the whole period; if several witnesses are needed, it will be ineffective assistance of counsel to fail to call any one of them. Further, Mr. Ausmus's testimony that Mr. Barton and others were moving around the area after the discovery of the body, coupled with Mr. Morriset's testimony that Ms. Selvidge had blood on her clothing, would have provided an alternative explanation for the blood on Mr. Barton. This

was consistent with the defense theory to which trial counsel testified. PCRT.200. Given the inconsistencies in the State's evidence, Mr. Ausmus's testimony would have been of significant help to Mr. Barton.

Richard Morriset

Mr. Morriset testified at deposition that he would have been willing to cooperate with the defense if they had contacted him, but he was never interviewed. (MX.50, Morriset depo. 7.) The State made no suggestion that, having agreed to talk to the defense, he would have been unwilling to testify at trial.

The State concedes that Morriset's testimony that Ms. Selvidge had blood on her coat impeaches Ms. Selvidge's testimony that she never approached the blood. It also supports her earlier statement that she knelt in the blood and Mr. Barton pulled her away. While this testimony does not "establish" an alternate means for Mr. Barton to get blood on itself, it does create a reasonable probability of a different outcome. And that is all that is required for *Strickland* prejudice. *Deck v. State,* 2002 Mo. LEXIS 43*19-20 (Feb. 26, 2002).

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.

REPLY 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.

Michele Hampton testified that she would have described the shirt in which Mr. Barton was arrested as a "westerny" shirt, and it *could* have been the shirt she saw him wearing on the day of the murder. Because of the lapse of time, she was unable to identify it definitively. She did say that Mr. Barton was wearing the same clothes every time she saw him that day. MX.50, Hampton depo. 7-8,11,23. This testimony effectively refuted the state's argument that

Mr. Barton was wearing a jacket over his shirt at the time of the murder, which was based entirely on Ms. Hampton's statement that she saw him wearing a western shirt. TT.898. The failure to present Ms. Hampton's testimony had a reasonable probability of affecting the outcome of this case, and reversal is therefore required.

REPLY 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.

The State argues that the prior statements of Debbie Selvidge and Govan Mills were not inconsistent with their trial testimony. Debbie Selvidge testified at trial that Mr. Barton never approached Ms. Kuehler's body and never touched her in the bedroom. She specifically denied having any blood on her. TT.461, 484. 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 is clearly inconsistent testimony, and it is significant to Mr. Barton's theory of the case.

Whether two statements are inconsistent for the purposes of Mo.Rev.Stat §491.074 "is to be determined by the whole impression and effect of what has been said and done." *State v. Dunn*, 731 S.W.2d 297,300 (Mo.App. 1987), citing *State ex. rel. State Highway Com'n v. Fenix*, 311 S.W.2d 61,64 (Mo.App. 1958); *State v. Nimrod*, 484 S.W.2d 475,478 (Mo. 1972). The statements at issue, when considered as a whole, are clearly inconsistent.

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 once. TT.466-467. While he was not specifically asked how many times they went in and out, his testimony makes clear that he recalled only one occurrence before Officer Hodges returned. This is inconsistent with his 1993 testimony that they went in and out at least twice before Officer Hodges returned. 1993 TT.130. Like Ms. Selvidge's statements, Mr. Mills' prior testimony helped to explain the bloodstains on Mr. Barton's clothing.

Contrary to the State's contention, the time Mr. Barton was at Ms. Kuehler's home was not conclusively shown by the State. Each of

Ms. Horton's prior statements put Mr. Barton at her home at 3:30 p.m. Since Ms. Kuehler's death likely occurred between 3:30 and 4:00, Ms. Horton's prior statements gave Mr. Barton a clear alibi. Contrary to the State's assertion, the testimony of Bill Pickering that he called Ms. Kuehler's home and a man answered did not contradict Ms. Horton's earlier statements; Mr. Pickering said he called no later than 3:15. TT.562.

Because witness recollections of time can be inaccurate, none of this evidence conclusively proves Mr. Barton's innocence. But that is not the standard. 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.

REPLY 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.

Trial counsel was unable to recall Mr. Riley or why he did not call him to testify. PCRT.221. His statement that he had a general

strategy which governed his witness decisions does not meet the *Strickland* standard. That standard requires a *reasonable* strategy. When trial counsel cannot recall his strategy, he certainly has not established that it 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).

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.

REPLY 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.

The State asserts that Mr. Barton failed to show that trial counsel failed to instruct Charles Rentschler not to mention Mr. Barton's prior death sentence because Mr. Barton failed to ask trial counsel about his actions. But the testimony of trial counsel is not the only source for evidence of ineffective assistance of counsel. Mr. Rentschler himself provided an affidavit in which he asserted that he had not received this instruction. The State agreed that the affidavit could be presented as evidence, and did not insist that Mr. Rentschler be available for cross-examination. PCRT.386. Nor did the State attempt to examine trial counsel about his instructions to Rentschler. Mr. Barton met his burden to show that Mr. Rentschler was not properly instructed. The motion court acknowledged that Mr. Rentschler's statement that Mr. Barton had previously been sentenced to death was prejudicial when it found that the failure to

move to strike the statement was not ineffective because such a motion would have "highlighted" the unresponsive answer. Reversal is required.

REPLY 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.

The State argues that Joseph Brandenburg's testimony would not have been admissible because it was not relevant to Mr. Barton's particular case. Of course, the motion court did not so find. And Mr. Brandenburg's affidavit individualized his observations about prison life to Mr. Barton based on Mr. Brandenburg's review of Mr. Barton's prison record.

Under the United States Constitution, "[A] criminal defendant who is charged with a capital offense has the right to present virtually

any evidence in mitigation at the penalty phase…" *Bryan v. Gibson*, 276 F.3d 1163,1181 (10th Cir. 2001).

Mr. Brandenburg's testimony is "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death,'" *Skipper v. South Carolina,* 476 U.S. 1,4-5, quoting *Lockett v. Ohio,* 438 U.S. 586,604 (1978). The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.

The Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280,305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); see also, *e.g.*, *Godfrey v. Georgia,* 446 U.S. 420,427-428 (1980); *Mills v. Maryland*, 486 U.S. 367,383-384, (1988). Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia,* 428 U.S. 153,190 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination," *Beck v. Alabama,* 447 U.S. 625,638 (1980).

That same need for heightened reliability also mandates recognition of a capital defendant's right to require that the jury be informed of relevant information concerning the sentences a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. See, *Simmons v. South Carolina*, 512 U. S. 154,172 (1994) (Souter, J. and Stevens, concurring).

Unlike evidence about the nature of execution or the lack of deterrence of the death penalty, the subject of the two cases cited by the State, the evidence proffered here was extremely relevant to the effect of a life sentence on Mr. Barton. Mr. Brandenburg's testimony would have performed two important functions in the penalty phase of Mr. Barton's case. First, it would have dispelled the jury's fears that Mr. Barton would continue to be dangerous even if incarcerated. Second, it would have negated any impression that Mr. Barton's life would be easy if he were sentenced to life in prison without parole. Because Mr. Barton was denied this mitigating evidence, he is entitled to a new penalty phase.

REPLY 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.

Again the State attempts to argue that Mr. Barton has not met his burden to show lack of reasonable trial strategy. In this Point, the State argues that because Mr. Barton did not ask trial counsel whether they had a strategy for failing to ask each omitted question of Dr. Merikangas, he cannot claim that trial counsel's strategy was unreasonable. Trial counsel was asked about his strategy with regard to Dr. Merikangas in some detail. He testified that he confined his questions to the theory that "if someone is essentially damaged goods we should not be executing someone who is in that particular position." PCRT.78-79. It is this strategy which was unreasonable, and it is this strategy which led to trial counsel's failure to use Dr. Merikangas ineffectively. If trial counsel had other justifications for his actions, the State was free to bring them out on cross-examination. Even *State v. Tokar*, 918 S.W.2d 753,761 (Mo.banc 1996) does not

purport to require that post-conviction counsel, after eliciting a strategy from trial counsel, to then attempt to rehabilitate trial counsel by eliciting further strategies.

Both common sense and the expert testimony of Jill Miller and Charles Rogers indicate that without information about how a brain-damaged defendant can be managed in prison, a jury is likely to believe that he will continue to be dangerous. This defeats the purpose of trial counsel's theory. Under the *Strickland* standard, reliance on this theory was ineffective assistance of counsel, and Mr. Barton is entitled to a new trial.

POINT XXIV

THE MOTION COURT ERRED IN FINDING THAT MR. BARTON RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Since the filing of the State's brief, this Court has decided *Deck v. State*, 2002 Mo. LEXIS 43*19-20 (Feb. 26, 2002). In that case, this Court made clear that the State's assertion on p. 119 of its brief that relief can be granted on the basis of ineffective assistance of appellate counsel only if the claim which was not asserted would have warranted plain error relief is incorrect:

> [W]hen a post-conviction motion is filed alleging ineffective assistance of counsel, defendant is asserting "the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." citing *Strickland v. Washington*, 466 U.S. 668 (1984)]. The ultimate determination thus, is not the propriety of the trial court's actions with regard to an alleged error, but whether defendant has suffered a genuine deprivation of his right to effective assistance of counsel, such that this Court's confidence in the fairness of the proceeding is undermined.

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

REPLY 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.

It is unclear to appellant whether the State concedes that cumulative prejudice may be grounds for reversal. Since the filing of the opening brief, counsel for Mr. Barton has become aware of an additional case which holds that reversal is required where the total impact of counsel errors undermines confidence in the outcome of the proceeding even though no one error does so on its own. That case is *Pavel v. Hollins*, 261 F.3d 210,228 (2nd Cir. 2001). In *Pavel*, the court found that a combination of trial counsel's errors

> leads us to a disturbing conclusion: Had [trial counsel] performed in a constitutionally effective manner, there is--at the very least--a "reasonable probability" that Pavel

would not have been convicted of the crimes with which he was charged, and for which he has been punished these past eleven and a half years.

The same is true of Mr. Barton. Reversal is required.

CONCLUSION

For the foregoing reasons and the reasons stated in his opening brief, appellant prays the court to grant relief as requested in the opening brief.

Respectfully submitted,

Elizabeth Unger Carlyle
Special Public Defender
200 S.E. Douglas, Ste. 200
Lee's Summit, MO 64063
Missouri Bar No. 41930
(816)525-6540
FAX (816) 525-1917
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 7,397 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 Stephanie Morrell, counsel for respondent, by U.S. Mail on March 14, 2002.

_____
Elizabeth Unger Carlyle