Sup. Ct. # 86358

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

DAVID STANLEY ZINK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Clair County, Missouri,
27th Judicial Circuit
The Honorable William J. Roberts, Judge

APPELLANT'S REPLY BRIEF

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[1] David Zink maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein. All arguments are incorporated by reference.

TABLE OF AUTHORITIES

CASELAW:

SUPREME COURT RULES:

MISCELLANEOUS:

JURISDICTIONAL STATEMENT

Zink incorporates the Jurisdictional Statement from page 12 of his Opening Brief.

STATEMENT OF FACTS

Zink incorporates the Statement of Facts from pages 12-32 of his Opening Brief.

ARGUMENT I[2]

The State failed to attempt to obtain Clark's report, even after being ordered to do so, and cannot shift blame to the defense for its late disclosure. The report, provided a month after Clark gave his trial testimony, was effectively suppressed. Zink was convicted and sentenced to die based on evidence that he had no chance to confront or rebut.

A. The court ordered production of the report.

The State mistakenly asserts that the court granted Zink's requests for Morton's arrests and convictions, but denied the request for disclosure of Morton's other contacts with law enforcement, i.e., Clark's report (Resp.Br.21). In fact, on March 1, 2004, the court granted Zink's motion: "Subparagraph (g)[3], records that show Amanda Morton's arrest and contact with law enforcement early on in this case. I order that produced to the Defendant" (Tr.606). When the court asked if

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[2] The motion for new trial alleged only that the report was relevant and admissible to rebut the State's evidence and did not allege late disclosure or prosecutorial misconduct (L.F.1166). To the extent that the issue is not preserved, Zink requests review for plain error. Rule 30.20.

[3] Zink provided a list of the motions he was filing (L.F.569.70). Subparagraph (g) refers to Zink's "Motion for Discovery (Records that Show Amanda Morton's Arrest and Contact with Law Enforcement)" (L.F.570,599-603).

the defense had received an NCIC[4] printout, defense counsel responded that they had, but that the query that had been inputted was too narrow, explaining that "when you run the query you can limit the scope to only convictions, as opposed to arrests or other contacts" (Tr.608). The court indicated that it had not intended to limit the scope (Tr.608). The court added: "I don't know those numbers and things. Bring me somebody that knows what the queries, the proper queries are. Because, those are going to be produced" (Tr.611). The court ordered the State to produce within ten days (Tr.633).

A month later, Zink notified the court that the State still had not disclosed the report. The court commented that what Zink asked for was not an arrest or a conviction, and suggested that Zink serve a subpoena duces tecum on the records custodian of the Strafford Police Department (Tr.655). Zink reminded the court that it had granted his motion to disclose back on March 1st (Tr.655-56,690). He followed the court's instruction and served the subpoena duces tecum, but the Strafford Police Department did not provide the report until a month after Clark's deposition was taken (Tr.3776).

B. The State failed to make a diligent effort to obtain the report and, after violating the court's discovery order, cannot shift the blame to the defense.

Rule 4-3.4(d) of the Professional Rules of Conduct mandates that a "lawyer shall not in pretrial procedure, … fail to make reasonably diligent effort [sic] to

[4] NCIC refers to the National Crime Information Center.

comply with a legally proper discovery request by an opposing party." Although the State allegedly produced the report as soon as it received it from the Strafford Police Department, the State had failed to make a reasonably diligent effort to obtain the report in the first place.

The prosecutor, Robert Ahsens, implicitly admitted that he failed to pursue the report when ordered to do so on March 1, 2005, by stating that the search did not commence until the defense served its subpoena duces tecum (Tr.3378). Ahsens never revealed any attempt on his part to comply with the court's March 1st order that the State produce the report within ten days (Tr.606,611,633).

The State also argues that the prosecutor "has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire" (Resp.Br.26), citing *Williams v. State*, 168 S.W.3d 433, 440 (Mo.banc 2005) (disclosure of medical and psychiatric records of key State witnesses).

Here, Zink did what he could to obtain the report. He questioned Clark about the report during Clark's first deposition, but Clark "was somewhat evasive and unwilling to provide all the information that he had, or he'd simply forgotten it" (Tr.611). Clark indicated that Morton witnessed a fight which resulted in one of the parties being run over by a car (Ex.612-p.9). He recalled that it was an assault case in adult rather than juvenile court and was resolved in city court (Ex.612-p.10). Clark recalled filing a police report but did not recall the date of the incident or the parties' names (Ex.612-p.10). However, he did recall that,

shortly after Morton's death, he had been able to find the assault case when curious about who she was (Ex.612-p.11-12).

Zink reasonably believed that once the court had ordered the State to produce the report, he could rely on the prosecutor's professionalism and ethical obligation to comply with the court's order. Instead, the prosecutor did nothing. Later, once the court indicated that Zink should serve a subpoena duces tecum on the Strafford Police Department, he did so (Tr.3778). The State is "in no position to fault the defense for cutting corners when the prosecution itself created the hasty and disorderly conditions under which the defense was forced to conduct its essential business." *Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001). Police reports, unlike the psychiatric reports in *Williams*, are traditionally within the realm of discovery materials provided by the State. The State should have made diligent efforts, upon the court's order, to produce the report. After failing to do so, it cannot shift blame to the defendant.

The State argues that the prosecutor had a reasonable explanation for the late disclosure (Resp.Br.24-25). Because the State failed to seek the record as ordered by the court, its explanation is not reasonable. Furthermore, under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the State's suppression "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

C. The State fails to address Zink's assertion that admission of the report was a necessary sanction for violation of Rule 25.03, or alternatively, to cure the misperception created by the State's evidence.

In its brief, the State focuses its analysis on *Brady* and ignores Zink's rights to disclosure under Rule 25.03. "The scope of the state's duty to disclose under Rule 25.03 overlaps, yet differs from, the scope of the state's duty to disclose under the doctrine established in [*Brady*]." *State v. Grant*, 784 S.W.2d 831 (Mo.App. 1990). *Brady* deals fundamentally with constitutional implications of a prosecutor's failure to produce evidence favorable to the defense. Rule 25.03 also has constitutional implications, but its purpose "is to permit a party to prepare for trial, eliminate surprise, and afford the accused information with which to formulate a defense and meet opposing evidence." *State v. Goodwin*, 43 S.W.3d 805, 813 (Mo.banc 2001). The scope of materials subject to disclosure under Rule 25.03 is broader than under *Brady*. *State v. Charity*, 637 S.W.2d 319, 322-23 (Mo. App. 1982).

D. The State errs in arguing that no Brady violation can occur of the material is disclosed pre-trial.

The State argues that because the report was provided pre-trial there can be no *Brady* violation (Resp.Br.25). The parties knew that Clark was leaving for active military duty in mid-May, 2004 (L.F.686). Clark's second, videotaped deposition (May 6, 2004) was played to the jury in lieu of Clark's in-court

testimony (L.F.686;Tr.1981). Thus, Clark gave his trial testimony on May 6th; the report, however, was not disclosed until a month after Clark's trial testimony, on June 12th (Tr.3776). By that time, Clark was unavailable and could not be questioned on the content of the report (Ex.611–p.7).

The law is settled that *Brady* material must be disclosed in time for its effective use at trial. *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003); *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001); *United States v. Presser*, 844 F.2d 1275, 1283 (3rd Cir. 1988). Evidence has been suppressed where it is not disclosed in time for the defendant to make proper use of it. *Leka*, 257 F.3d at 100. The issue is whether the timing of the disclosure, under the circumstances, gave the defendant sufficient opportunity to use the evidence. *Id.* "[T]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use." *Id.*

The State argues that Zink cannot complain about the late disclosure, because he could have cross-examined the victim's mother or sister to elicit the same facts as he would have from Clark (Resp.Br.27-28). The defense asked no questions of Morton's mother or sister, apparently believing the court would admit Clark's report into evidence as part of the defense case. Although the defense later could have re-called those witnesses, the court had ruled that the evidence contained in Clark's report was irrelevant (Tr.3380). Bringing Morton's mother or sister to the stand merely to have the evidence deemed irrelevant again would have served no purpose and alienated the jury.

Also, Rule 25.03 does not require that the requested material be unavailable by other means. *Grant*, 784 S.W.2d at 837 (rejecting State's argument that defendant could not complain about non-disclosure of witness's statement, if he had not questioned that witness before trial).

> Indeed one of the implicit reasons for the duty to disclose is the recognition that defense counsel often lack the investigatory resources of the state. A requirement that information sought by defense counsel not be available elsewhere would largely strip the rules of discovery of their purpose of helping defense counsel prepare for trial.

State v. Bebee, 577 S.W.2d 658, 662-63 (Mo.App. 1979); see also *State v. Perry*, 879 S.W.2d 609, 613-14 (Mo.App. 1994) (relief granted despite State's contention that defendant presented other testimony similar to what would have been presented had State produced statement).

E. The State incorrectly argues that because it did not elicit false testimony, there was no misconduct.

Through the testimony of its witnesses, the State created the false impression that Morton habitually obeyed her curfew. Morton's mother explained that Morton had a 1:00 curfew; they routinely kept an alarm clock in their living room, set for 1:00, that Morton needed to shut off (Tr.1997). A detective testified that after Morton's disappearance, "I discussed with the family Amanda's habits and what have you, and you know, her – her responsibilities, and in regard to her

curfew. I learned that she was very prompt and respectful of curfew" (Tr.2121). Although the detective did not necessarily commit perjury, his testimony nevertheless left the jury with a false impression. The detective may not have known of Clark's report; the prosecutors, however, certainly did and they were ethically obligated to correct that false impression. Even if the State witness's testimony, technically, was not perjured, the defense should have been allowed to cure the misperception that resulted.

The State's deliberate exclusion of the report is directly analogous to cases in which the State sought exclusion of certain evidence and then used the absence of the evidence to secure conviction. *State v. Hammonds*, 651 S.W.2d 537, 538-39 (Mo.App. 1983)(even though State had strong case, defendant suffered manifest injustice, warranting new trial, by prosecutor's intentional and inexcusable misrepresentation of facts); see also *State v. Harris*, 870 S.W.2d 798, 810 (Mo.banc 1994); *State v. Weiss*, 24 S.W.3d 198, 204 (Mo.App. 2000)(State's "distasteful tactic" warranted relief under plain error review); *State v. Luleff*, 729 S.W.2d 530, 536 (Mo.App. 1987)(State successfully excluded receipt from evidence, but took advantage by arguing that no receipt existed – new trial even under plain error review). Here, the State elicited testimony creating a misperception of the facts, then barred the defense from curing the misperception, and then used the misperception in closing arguments in both guilt and penalty phase to urge the jury to believe that Morton was kidnapped from the accident scene.

F. Clark's report was relevant and material, because the State had opened the door.

The State incorrectly argues that Clark's report had no relevance because it did not relate to Zink's mental state or to the statutory aggravating circumstances (Resp.Br.26,29-30). It argues that the jury must not have considered the alleged kidnapping at all, since it was not a statutory aggravator and the jury did not find the sodomy aggravator (Resp.Br.31-32).

But the report was both relevant and material, because the State made it so, by (1) by eliciting testimony about the curfew from two witnesses and leading the jury to believe that Morton habitually obeyed her curfew (Tr.1997,2121); and (2) arguing repeatedly in both phases that Morton was kidnapped (Tr.3891-92,3896,4522-23). Once the State created the inference that Morton would have been trying to meet her curfew and thus would not have left voluntarily with Zink, Zink should have been allowed to cure that misperception and rebut the State's evidence. See App.Br.,p.55-56. A capital defendant has a due process right to rebut any information that the jury considers and upon which it may rely in its penalty phase deliberations. *Gardner v. Florida*, 430 U.S. 349, 362 (1997).

Furthermore, evidence is relevant if it establishes "by any showing, however slight," that it is more or less likely that the defendant committed the crime in question. *United States v. Mora*, 81 F.3d 781, 783 (8th Cir.1996). If any doubt exists as to the relevancy of evidence, it should go to the jurors to enable

them to draw their own inferences from it. *State v. Rowe*, 838 S.W.2d 103, 111 (Mo.App. 1992); *State v. O'Neil*, 718 S.W.2d 498, 503 (Mo.banc 1986).

Evidence that Morton did not always obey her curfew, and even very recently had not, was relevant to the issue of whether Zink kidnapped Morton. That, in turn, was relevant to whether Zink was planning to kill Morton from 1:00 on, or whether, as Zink testified, she went with him consensually and he snapped and killed her without deliberation. Whether Zink kidnapped Morton was also highly relevant to penalty phase, where it would be considered as a significant non-statutory aggravator.

The Court must reverse and remand for a new trial.

ARGUMENT II

Zink was justifiably dissatisfied with appointed counsel who neglected his case for one-and-a-half to two years, refused to investigate guilt phase issues, and with whom Zink sharply disagreed on trial strategy. Although two decisions of this Court hold that the attorney makes all trial strategy decisions, two other cases of this Court hold the opposite – that the defendant chooses the defense presented at trial. The conflict over diminished capacity and voluntary manslaughter was irreconcilable and devastated both defenses. Although counsel and Zink communicated, their relationship had degraded so badly that their communication was sporadic, ineffectual, and well below that anticipated by the A.B.A Guidelines.

A. Zink was justifiably dissatisfied with attorneys who perpetually placed his case "at the back of the line" and thereby failed to follow A.B.A Guidelines regarding acceptable representation in capital cases.

The State argues that defense counsel had done plenty of work on the case in the first sixteen months, by the time Zink first brought the problems to the court's attention (Resp.Br.56). It argues that the record shows that defense counsel was making "every effort … to diligently represent [Zink] in the face of very difficult and challenging circumstances facing the Public Defender System" (Resp.Br.57).

On trial for his life, Zink should not have been forced to forego valuable constitutional protections and basic legal services merely because the Public

Defender System was short-staffed. The State cannot merely appoint counsel, yet fail to provide the funds and means to make such representation effective. The Supreme Court has "long recognized" that:

> mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and … a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake v. Oklahoma, 470 U.S. 68, 76-77 (1985); see also *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (new trial granted because defendants did not have the aid of counsel "in any real sense" "during perhaps the most critical period of the proceedings, … from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important"). The fact that Zink's attorneys may have been working hard on other cases does not justify neglect of Zink's case and the resulting loss of favorable defense evidence.

In contrast to the State's claim that defense counsel had done "plenty of work" in the first sixteen months, the record shows that so little was done that the court complained, "I just -- I don't see anything moving or going in this case" (Tr.100). Six months into the case, lead counsel Cynthia Short admitted that she had not yet even read the discovery (Tr.84). Almost one year into the case, counsel admitted that they had just completed a capital trial that had "consumed a

great deal of our time and sources [sic]" (Tr.98). Short was so exhausted from other capital cases that she took three months off work (Tr.103-104,114). Because they were so engrossed in other cases, Zink's case had been placed toward the back of the line for a year (Tr.98,116). When a case is at the back of the line, "of course, we wouldn't be able to attend to that case right now" (Tr.116).

Almost a year after the events, counsel admitted that investigation had only just begun (L.F.102-103). New lead counsel Thomas Jacquinot didn't start actively working the case until it was a year-and-a-half old (L.F.341-42). When the case was already two years old, Jacquinot admitted that counsel "have come and gone from [Zink's] case with limited input from him" and that "[t]he deficient performance of counsel cannot be attributed to any fault of Mr. Zink" (L.F.488). Counsel advised the court that, "a majority of the trial team has had virtual [sic] no time to review the case and prepare for trial" (L.F.490).[5]

[5] Counsel's other admissions regarding the investigation and preparation are set forth in Appellant's opening brief at p.20-24.

1. Counsel's investigation and preparation was far from "model."

The State argues that defense counsel was only slightly behind the model schedule for putting together a capital case (Resp.Br.57). That model schedule anticipates that most capital cases require two-and-a-half to three years of preparation and investigation before trial (L.F. 140). The first year involves intensive investigation with record gathering, locating and contacting initial witnesses, and preliminary decision-making regarding experts; the second year involves deposition and motion practice and expert evaluations (L.F. 139). But that model anticipates three solid years of preparation, not one-and-a-half to two years of inaction and then a frantic race to trial. It also anticipates that investigation and planning for both phases begin *immediately* upon counsel's entry into the case. Commentary to A.B.A. Guideline 1.1, p.5.

2. Counsel admitted that the focus was on penalty phase.

The State argues that defense counsel disputed Zink's allegation that counsel focused too much on penalty phase, to the detriment of guilt phase (Resp.Br.57-58). But counsel squarely agreed with Zink:

> For a year and a half, the primary focus on this case was on records gathering and initial mitigation interviews, which formed the basis for Mr. Zink's belief that the first phase of his case is being sold down the river. Unfortunately, although it is not counsel's intent to represent Mr. Zink deficiently in either phase of this case, the investigation/preparation work in both phases of this case is substantially inadequate at this time.

(L.F.505).

3. Substitute counsel would have investigated the case and hence resolved the problem.

The State asserts that new counsel would not have helped the situation, because the problems were caused by high staff turnover (Resp.Br.57). But largely, the problems were engendered by counsel's refusal to investigate the guilt phase. Defense counsel revealed to the court that Zink's case was handled by the smallest of the three capital offices in the state (Tr. 101). One of the two larger offices likely would have been able to absorb Zink's case better and give it the necessary attention it was not receiving in Jacquinot's office, and as a result, the relationship likely would have been successful. As the Supreme Court of Arizona recognized in *State v. Moody*, 968 P.2d 578, 581 (Ariz. 1998), "[w]hile this conflict might be present regardless of who represented Moody, new counsel may [have been] more successful at persuading the client to follow a different course of action."

4. Zink made specific allegations against counsel.

The State faults Zink for allegedly not citing the specific issues on which he had disagreements with counsel (Resp.Br.37). Twice, Zink requested *ex parte* meetings with the court, to discuss privileged attorney-client documents in support of his claims (Tr.150-51,500-501). It was appropriate, he urged, because it would give the court the chance to either tell Jacquinot to straighten up his act; or to tell Zink that he was out of line and should straighten up his act (Tr.153-54,505,508-

09). Jacquinot joined in Zink's request (Tr.504,506). Zink alternatively requested that his attorneys be required to respond to the allegations in his motion, by either admitting or denying the facts alleged (Tr.509-10). The court rejected all suggestions and refused to consider the privileged documents (Tr.154, 505,508-10).

An indigent defendant should not be forced to relinquish his right to the attorney-client privilege in order to resolve a conflict with his attorney. *Simmons v. United States*, 390 U.S. 392-94 (1968); *State v. Samuels*, 965 S.W.2d 913,920 (Mo.App.1998). The court should have granted Zink's request to support his claims in a way that still protected the attorney-client privilege. The prosecutor had no need to learn the specifics of Zink's complaints. Alternatively, as Zink suggested, the court should have ordered defense counsel to either admit or deny the allegations set forth in his motion. See, e.g., Rule 74.04(c).

Another option would have been the path followed in *State v. Owsley*, 959 S.W.2d 789 (Mo.banc 1997), where the court allowed Owsley to voice his complaints, gave counsel a chance to respond, and resolved the complaints. Because the court conducted a full hearing on the matter, Owsley's interests were sufficiently protected. Here, Zink set forth sufficient facts to support his claims and did his best to bring further specifics to the court's attention; he should not be faulted for the court's failure to take the appropriate actions.

5. Zink's claims were credible.

The State argues that the court must not have believed Zink's claims (Resp.Br.62-64). The record does not bear this out. First, the court itself complained, almost a year into the case, that, "I just -- I don't see anything moving or going in this case" (Tr. 100). Second, defense counsel corroborated Zink's claims that investigation was incredibly lacking (L.F.102-103,135-36,505) and agreed that Zink's claims that guilt phase had been sold down the river had some merit (L.F.505). Third, if counsel had been investigating the case, Zink would have had no need to file motions asking for such investigation (L.F.122-25,457-87,515-23,604-607). Fourth, the court never stated that Zink was not credible, nor reprimanded him, as the court did in *Owsley*, telling the defendant to stop leading counsel on wild goose chases. 959 S.W.2d at 793. In fact, the court specifically accepted as true that Zink had been telling his lawyers to investigate the guilt phase (Tr.509).

The court's denial of the motion to substitute counsel did not automatically mean that the court did not believe Zink, as the State alleges (Resp.Br.63). It could mean that the court did not understand its obligations, or that the court hoped that Zink and counsel would work things out, or it merely could have reflected a policy belief that a defendant represented by the Public Defender should not be allowed to "fire" his attorney. *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979).

B. Conflict over the defense strategy can amount to justifiable dissatisfaction.

The State argues that counsel's refusal to abide by the defense chosen by the defendant cannot constitute good cause for substitute counsel (Resp.Br. 59), citing *State v. Gilmore*, 697 S.W.2d 172 (Mo.banc 1985) and *State v. Turner*, 623 S.W.2d 4 (Mo.banc 1981).

Gilmore held that the refusal to present an alibi defense did not constitute justifiable dissatisfaction, because "determination of what witnesses to call is a matter of trial strategy and the decision is best left to counsel." *Id.* at 174. In *Gilmore*, unlike here, counsel fully investigated the proposed alibi defense, and presentation of such a defense would have constituted perjury. *Id.*

Turner held that, "[t]he determination of what witnesses to call, like other questions involving defenses to pursue, was a matter of trial strategy" properly left to counsel. 623 S.W.2d at 11. The defendant wished to present an alibi defense, even though his confession placed him at the scene of the crime. *Id.* Because his attorney refused to present that defense, the court allowed the defendant to testify in narrative form without questions from counsel. *Id.* *Turner*'s facts do not show that counsel's defense conflicted with and actually defeated the defendant's chosen defense, as was the case here.

Furthermore, these cases conflict with *State v. Thomas*, 625 S.W.2d 115 (Mo.banc 1981), and *State v. Debler*, 856 S.W.2d 641 (Mo.banc 1993). In *Debler*, this Court held that "[t]he defendant has the right to make such basic decisions as

whether to plead guilty or go to trial, what defenses to present at trial, and whether to testify." *Id.* at 655. In *Thomas*, this Court held that a defendant:

> may not be forced to accept major decisions of trial strategy if he is fully informed and voluntarily decides not to follow the advice of his lawyer. It would be absurd to say that a defendant may waive the assistance of counsel entirely and yet may not waive the benefit of counsel's advice with respect to a particular decision, such as whether or not to assert a particular defense. The Court in *Faretta* stated that the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."

Id. at 124, citing *Faretta v. California*, 422 U.S. 806, 820 (1975).

C. Irreconcilable conflict is an independent basis for justifiable dissatisfaction with counsel and should be considered apart from the issue of whether there was a complete breakdown in communication.

The State agrees that justifiable dissatisfaction meriting substitution of counsel includes (1) a conflict of interest; (2) an irreconcilable conflict; or (3) a complete breakdown in communication between the attorney and the defendant (Resp.Br.55). See, e.g., *United States v. Armstrong*, 112 F.3d 342, 345 (8th Cir. 1997). Although citing caselaw that says that irreconcilable conflict is a separate, third basis for substitution of counsel, the State then merges the second and third grounds, arguing that irreconcilable differences are irrelevant unless they cause a complete breakdown in communication (Resp.Br.55). True, an irreconcilable

conflict can cause a complete breakdown in communication, but an irreconcilable conflict also can exist independently, as a separate ground for substitution of counsel.

Zink acknowledges that Missouri state courts typically merge (2) irreconcilable conflict into (3) a complete breakdown in communications. See, e.g., *Owsley*, 959 S.W.2d at 792. The Eighth Circuit, however, acknowledges all three and conducts an analysis of all three. See, e.g., *Owsley v. Bowersox*, 48 F.Supp.2d 1195, 1202 (W.D. Mo., 1999); *United States v. Exson*, 328 F.3d 456, 460 (8th Cir. 2003); *Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995).

Zink respectfully requests that this Court utilize the approach followed by the Eighth Circuit, because the omission of irreconcilable conflict as a third independent basis for substitution of counsel originates from an incorrect interpretation of the caselaw. In *Owsley*, 959 S.W.2d at 792, this Court based its authority for that proposition on *State v. Parker*, 886 S.W.2d 908, 929 (Mo.banc 1994), which in turn cited *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo.banc 1989). *Hornbuckle* relied on *State v. Turner*, 623 S.W.2d 4, 11 (Mo.banc 1989) and *State v. Richardson*, 718 S.W.2d 170, 173 (Mo.App. 1986).[6] *Turner* relied on *State v. Smith*, 586 S.W.2d 399, 401 (Mo.App.1979), which, finally, relied on *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973).

The *Young* case, however, does not support this proposition. It sets forth the three bases – conflict of interest, complete breakdown in communications, or

[6] *Richardson* relied on *Turner* and one other case that also relied on *Turner*.

an irreconcilable conflict – warranting substitution of counsel. 482 F.2d at 995. The federal court denied relief in part because "[t]he record demonstrates no irreconcilable conflict … **or** any breakdown of communication." *Id.* at 996 (emph.added). Thus, *Young* supports Zink's argument that this Court should evaluate whether there was an irreconcilable conflict, apart from the question of whether there was a breakdown in communication. Other courts have granted relief solely on the fact of irreconcilable conflict, without a complete breakdown in communication. See, e.g., *Williams*, 594 F.2d at 1259-61.

1. Irreconcilable conflict

The State argues that the court did not believe that Zink and counsel had a conflict over the defense to be presented, since Zink did not voice his objection to the diminished capacity defense until near the trial date and changed his position on that defense (Resp.Br.59,63). Zink's opening brief sets forth in detail the significant extent of the conflict, App.Br., p.63-67,78-84, but further explanation is needed:

a. The change in Zink's position was understandable.

Zink truly did not understand what the diminished capacity defense was until close to the trial date, due to counsel's failure to keep him informed. Once Zink understood, he voiced his objection. At one point, he briefly anticipated presenting both defenses, but then learned that counsel's evidence would defeat his defense and that counsel felt he could not proffer manslaughter as a defense. Zink adamantly and repeatedly objected to the diminished capacity defense and

only capitulated because (1) the court would not protect his right as a pro se defendant to choose his defense (see Arg.III); (2) counsel would not assist him at all in his defense unless he agreed to counsel's defense; and (3) opening statements were about to take place.

Diminished capacity was first mentioned in April, 2003, when defense counsel gave notice of the defense (L.F.207). Counsel mentioned it briefly in court a few months later, stating only that it "would not negate criminal responsibility, but could be a factor that the jury would consider on the issue of whether or not Mr. Zink was guilty of murder in the second degree" (Tr.400-401).

Within the next six weeks, Zink alerted the court that counsel was not keeping him informed of the status of his case and asked the court to resolve the conflict between him and counsel over major case strategies (L.F.457,485-87,515-23). Zink expressed his continued dissatisfaction with counsel's lack of investigation of guilt phase issues (L.F.460-63,475-77). He asked for new counsel (Tr.457-87).

On March 1, 2004 (three-and-a-half months before trial), Zink moved to represent himself (L.F.604-607). He gave notice of his defense of diminished capacity, but advised the court that "I have no clue what diminished mental capacity defense requires" (L.F.577;Tr.556). When the court attempted to explain, Zink stated that he understood the very basics of the defense but not "the intertwining or the requirements to that defense" (Tr.580-81).

On June 28, 2004, two weeks before trial, the topic arose again. Zink indicated that he would present both diminished capacity and voluntary manslaughter (Tr.772). Yet he again stated, "I don't know what they intend to do as far as this diminished mental capacity thing goes" and "I don't have a clue what that is" (Tr.776-77). He insisted that what had happened to him when he was five years old had no bearing on the crime (Tr.776). He alerted the court that counsel refused to investigate and communicate with him (Tr.776).

On July 6, 2004, Zink told the court that he did not like the diminished capacity defense and had always believed "it's a bunch of hog wash" (Tr.887). He stated, "I really don't want to put it on. But we talked about it this afternoon. And I guess I'm going to allowit" (Tr.887).

But then two days later, Jacquinot sent a letter to the court in which he berated manslaughter as not a rational, reasonable or viable option and one that was fueled by Zink's mental illness (L.F. 975). In response, Zink rejected diminished capacity and asked for new counsel to assist him (L.F.1049-60). He explained to the court that the diminished capacity defense rested on the testimony of Dr. Benedict that Zink suffers from intermittent explosive disorder (L.F.1052). Zink explained that he had just received an internet printout in the mail, informing him that people with this disorder engage in violent and aggressive behavior, "spurred by a minor incident, these acts are grossly out of proportion to the stressor" (L.F.978,1050). Benedict's testimony would directly conflict with his manslaughter defense that he does not anger easily, very rarely gets in fights, and

must have been significantly provoked (L.F.1053-54). Zink stated that he "absolutely" did not want to pursue the diminished capacity defense (Tr.898). Jacquinot in turn responded that he could not proceed on the manslaughter defense, since he did not think the court would instruct on it (Tr.901-902). Zink told the court that Jacquinot lied when he said that the defenses are not inconsistent (L.F.1055-56).

On July 14, at the end of voir dire, Zink again advised the court that he did not want to present a defense of diminished capacity (Tr.1732). Zink explained that earlier, he thought he would be able to put on both defenses, but after receiving counsel's July 8th letter, he realized that counsel was working against him by presenting evidence that defeated his manslaughter defense (Tr.1735). Jacquinot responded that they may just have a misunderstanding because Zink's understanding of Benedict's testimony was wrong, and that they could do the two defenses together (Tr.1735-36). The next morning, with opening statements about to begin, Zink capitulated and allowed counsel to proceed with diminished capacity (Tr.1757-58).

b. The conflict extended to trial, where the jury heard two competing, conflicting defenses.

Counsel presented evidence that directly conflicted with Zink's defense, and vice versa. See App.Br., p.82-84. Despite counsel's statement that Benedict would not testify that Zink got angry at the slightest provocation, Benedict testified that because of his intermittent explosive disorder, Zink could have a

"very intense reaction to something seemingly small"; "[engage in] extremely explosive acts or behaviors that don't seem to add up, based upon what's happening"; and "becom[e] angry on a dime" (Tr.3028-29,3032-33). This directly conflicted with Zink's manslaughter defense that he reacted to provocation from Morton as any ordinary person would have.

At trial, Zink denied the truth of his August 6th statement to the police (Tr. 1813). He explained that at that point in time, he was so devastated by the events that he wanted the death penalty and told the police what he thought he needed to say to get that sentence (Tr.1813-14). Zink explained that he snapped when he killed Morton and did not know what he was doing (Tr.1814-15).

Jacquinot, however, wanted the jury to believe the accuracy of the August 6th confession. He elicited testimony from the defense pathologist that the August 6th statement was consistent with the findings of the State's pathologist (Tr.2778). He also told the jury that "clearly, [Zink] knew what he was doing at the time" of the crime (Tr.1822). He also elicited from Dr. Benedict that Zink's thinking became rigid, such that Zink believed he had only one course of action and that Zink's thinking was distorted as a result of his mental illness (Tr.3103-04).

2. Breakdown in communication

The State argues that there was no complete breakdown in communication, because Zink and counsel spoke to each other before and during the trial (Resp.Br.60). Although Zink did not have a complete breakdown in communication with counsel, the court should look at the nature and quality of

their communication. The test for adequate communication should not be whether a few words were exchanged, but rather, whether the quality of their relationship was such that counsel could not effectively present the defense. Here, although Zink and counsel were on titular speaking terms, their relationship had degraded so badly that counsel could not effectively present Zink's defense. Their communication fell far short of that anticipated under the A.B.A. Guidelines.

Communication between Zink and counsel was so bad that even as late as two weeks before trial, Zink did not understand what the diminished capacity defense was (Tr. 776-77). Zink did not receive information about the intermittent explosive disorder, until someone printed it off the internet and mailed it to him (L.F.978-80,1054). Because communication from counsel was so poor, Zink had to file motions to obtain materials from counsel's file (L.F.122-25,457-87,679-85). Although told by the court shortly before trial to get together with Zink to agree on a unified witness list, counsel ignored Zink and provided his own witness list (Tr.848,878;L.F.974-76,1051-52). Counsel did not understand what Zink intended to present at trial and incorrectly advised the court that Zink believed that the manslaughter defense would be guided by a "prison standard" rather than an "ordinary person" standard (L.F.1055-56). Zink explained that talking to counsel about their conflict was "like talking to a brick wall" (Tr.776). On the morning voir dire started, Zink told the court that counsel had stabbed him in the back by writing to the court that the voluntary manslaughter defense was a product of

mental illness, and thus he didn't think there was any point in talking to counsel about it further (Tr.898).

In some ways, the relationship, with limited communication, was far worse than if there had been a complete breakdown in communication. For example, counsel surely must have known as voir dire ended and opening statements were about to be made, that Dr. Benedict – one of counsel's key defense witnesses – would testify that because Zink has intermittent explosive disorder, he angers easily, with very little provocation. Yet when Zink expressed his concern that Benedict would testify as such and defeat the manslaughter defense, counsel urged Zink and the court to believe that Zink misunderstood the content of Benedict's testimony (Tr.1736). The communication between Zink and counsel, infused as it was with mistrust and accusations of lying and irrationality – was far, far below the expectations of the A.B.A. Guidelines.

Zink demonstrated justifiable dissatisfaction meriting substitute counsel because of both irreconcilable conflict and a breakdown in communications. This Court must remand for a new trial.

ARGUMENT III

Zink never truly "acquiesced" in the diminished capacity defense, because his reluctant concession, with opening statements about to commence, that counsel could present that defense was solely the product of the court's refusal to protect Zink's right as a pro se defendant to choose the defense presented and Zink's justified fear that counsel would refuse all help if Zink did not allow counsel to present the diminished capacity defense.

The State cites caselaw that "once a pro se defendant invites or agrees to any substantial participation by [standby] counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously … request[s] that standby counsel be silenced." (Resp.Br.66). It argues that "absent such a request," the court had no discretion to interfere with defense trial tactics (Resp.Br.66).

The problem with the State's argument is that here, Zink did in fact make such a request, repeatedly. Prior to trial, Zink repeatedly and insistently told the court that he did not want to pursue a diminished capacity defense (Tr.776,898, 1732;L.F.1049-60). Zink thereby requested that Jacquinot be silenced regarding the defense of diminished capacity.

Yet instead of protecting Zink's right as a pro se defendant to present his chosen defense, the court repeatedly urged Zink to compromise and accept the

diminished capacity defense (Tr.1729-36). The court urged Zink to do so, even after Zink explained that it would hurt his chosen defense. The court failed to take any action to rein in counsel in the slightest. Because Zink could not get his rightful protection from the court and because he needed help from advisory counsel, Zink "acquiesced" in the diminished capacity defense. As a pro se defendant, Zink had the undisputable right to control the defense presented.[7] *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

Even well after Zink waived the right to counsel, counsel failed to relinquish control over the direction of the case. As late as July 8th, just days before trial, counsel berated the manslaughter defense, telling the court that he could not proffer it as a rational, reasonable or viable defense (L.F.975). On the first day of voir dire, Jacquinot argued that "I can't get up here and announce that I'm going to proceed on a defense when I think it's – it's overwhelmingly the case where the Court isn't even going to allow that instruction to go to the jury…. I can't sit here and say I'm going to offer this defense and then get shut out in the instructions conference" (Tr.901-902). Jacquinot did not understand that his role was solely to assist Zink, not to decide the defense to be presented. Zink, meanwhile, insisted that he absolutely would not present a diminished capacity

[7] On trial for his life, Zink also had the right to choose the defense to be presented. See Arg.IV.

defense (Tr.776,898,1732;L.F.1049-60). The court had the duty to inform counsel that he must follow Zink's chosen defense. The court failed to do so.

The State argues that Zink's position on his defense changed so much that the court must have thought that Zink again changed his mind and accepted the diminished capacity defense (Resp.Br.71). True, Zink's position on diminished capacity evolved as he learned more about it, but once he discovered what it truly entailed, he rejected it and expressed that decision to the court repeatedly. See Arg.II, supra. Zink reluctantly capitulated in the diminished capacity defense, but only (1) after the court refused to rein in counsel; (2) believing that he had no choice if he wanted counsel to help with Zink's chosen manslaughter defense; and (3) under the pressure that opening statements were, literally, right about to be given. This forced "acquiescence" was not sufficient to override Zink's right as a pro se defendant to choose the direction of his case. Zink should receive a new trial.

ARGUMENT IV

This Court has repeatedly recognized that the defendant, not the attorney, has the right to choose the defense presented.

As discussed in Argument II, supra, *State v. Thomas*, 625 S.W.2d 115,124 (Mo.banc 1981), and *State v. Debler*, 856 S.W.2d 641,655 (Mo.banc 1993), hold that the defendant has the right to decide what defense is to be presented at trial. "The defendant has the right to make such basic decisions as whether to plead guilty or go to trial, what defenses to present at trial, and whether to testify." *Debler*, 856 S.W.2d at 655. "It would be absurd to say that a defendant may waive the assistance of counsel entirely and yet may not waive the benefit of counsel's advice with respect to a particular decision, such as whether or not to assert a particular defense." *Thomas*, 625 S.W.2d at 124.

This Court should grant Zink a new trial where he would not be forced to waive his right to the counsel in order to secure the defense of his choice.

ARGUMENT IX

In the opening brief, in discussing the audio tape of the radio conversation between dispatcher Cook and Sergeant Gibson, appellate counsel mistakenly referred to the tape as Exhibit 1094, instead of Exhibit 711, which was the correct number. Upon realizing the error, counsel notified counsel for Respondent on August 23, 2005, prior to the filing of Respondent's brief on September 12, 2005. Respondent's brief demonstrates that counsel for Respondent fully understood Exhibit 711 to be the correct number of the exhibit at issue.

CONCLUSION

For the foregoing reasons and those set forth in his initial brief, David Zink affirms the Conclusion set forth on page 145 of his initial brief.

Respectfully submitted,

_____
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CERTIFICATE OF MAILING

I certify that on September 30, 2005, two copies of the foregoing and a disk containing the foregoing were mailed, postage prepaid, to the Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

_____
Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Office Word XP, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 7,709 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

_____

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