I.

Exceptional circumstances, State's concessions and lack of evidence require remand so that Ferguson can file a motion for a new trial and a fundamental miscarriage of justice will be avoided.

The State appears to recognize the magnitude of Erickson's new testimony and the effect it could have on the final disposition of this case. In response to Ferguson's motion to remand, the State concedes that it is "not averse to holding a full and fair evidentiary hearing to test the validity of the newly available evidence set forth in Ferguson's motion." (Suggestions in Opposition to Appellant's Motion to Remand at 2). The State also concedes that it is "not averse to a full and fair hearing on the issues presented by Ferguson's motion, including whether Erickson's newly available testimony is material." *Id.* at 7. In its brief on appeal, the State makes further concessions, agreeing that "a hearing on Mr. Ferguson's motion **is necessary** to determine whether Mr. Erickson's newly available statement is voluntary, reliable and admissible." (St.Br.63). (Emphasis added). Further, the State explains that due to Erickson's new statement there are issues that "**must be investigated** and subjected to the crucible of an adversarial proceeding." *Id.* (Emphasis added).

While the State then ultimately requests that the Court deny Ferguson's motion, the concessions set forth above should not be lightly disregarded. The State's position reflects that this is a rare case. Granting Ferguson a remand would not set a dangerous precedent because of this case's unique circumstances. Ferguson has always proclaimed his innocence and the trial evidence was anything but overwhelming. Even if legally

sufficient, the evidence was suspect. Erickson's trial testimony was not corroborated. At the bloody murder scene where a struggle obviously ensued, there was no physical evidence against Ferguson or Erickson. Rather, both men were excluded forensically from evidence left at the scene. The State does not even argue that the new evidence could have been obtained earlier or that due diligence is lacking.

Also setting this case apart is the fact that Erickson came forward on his own. He was not approached by any agents of Ferguson. He requested that his statement be taken by Ferguson's attorney. He had never met the attorney that responded to his invitation. Erickson had written his entire statement in advance unassisted prior to memorializing it on videotape. With the new testimony, Erickson has put himself at risk of spending the rest of his life in prison. In contrast, his testimony at trial benefited him greatly. Absent his deal with the prosecution, his sentence would have been decades longer, if not life in prison. This time, he has put himself at great risk while receiving nothing in return. The new evidence demands that Erickson's prior perjury not be believed.

In requesting a remand, Ferguson cited numerous cases, including *People v. Terry*, 304 S.W.2d 105 (Mo.banc. 2010), *State v. Mooney*, 670 S.W.2d 510 (Mo.App. E.D. 1984) and *People v. Williams*, 673 S.W.2d 847 (Mo.App. E.D. 1984). In those cases, the Court reviewed the unique circumstances presented and granted remands in accordance with fundamental principles of justice. In the case at bar, after acknowledging that Erickson's sworn testimony is "new" and without any argument that his testimony is irrelevant, cumulative or not credible, the State argues simply that the motion is untimely.

However, the State has already conceded that claims of newly discovered evidence may be brought in a Rule 29.15 motion when it comes to light that the prosecution knowingly relied on perjured testimony to obtain the conviction. (Suggestions in Opposition to Appellant's Motion to Remand at 3). As a result of Erickson's new sworn statement, it is now known that that is precisely what happened here. At trial, the State presented Erickson's testimony knowing it was perjury and convicted Ferguson based on that perjury. In his new sworn statement, Erickson relates how he accused Ferguson to "satisfy the police." He now explains that when he began to admit to strangling the victim himself, the officer "did not want to hear that [he] might have done it." Finally, Erickson admits he previously lied about many things to "pacify the police and prosecution." The motion to remand is timely.

For its proposition that the motion is untimely, the State cites *State v. Warden,* 753 S.W.2d 63 (Mo.App.E.D.1988) where, in a footnote, the Court refused to apply *Mooney* and *Williams* because they were still on direct appeal when the defendant filed his motion. For this limitation, the *Warden* court relied upon *State v. Davis*, 698 S.W.2d 600 (Mo.App. E.D. 1985). However, *Davis* drew no such limitation. In any event, this case is still on direct appeal from the denial of post-conviction relief. The case is still properly before this Court as Ferguson was convicted relatively recently. Further, Missouri law lacks any explanation as to why a fundamental miscarriage of justice should be avoided while a case is still on direct appeal, but not later. Logic dictates that this Court should instead focus on the exceptional circumstances presented. As explained in *Davis*:

> A careful reading of [*Mooney* and *Williams*] reveals that they involved exceptional circumstances and thus are limited ... A case will only be remanded on the basis of newly discovered evidence after appeal where the court, in its discretion, determines that its inherent power must be exercised in order to prevent a miscarriage of justice. *Davis*, 698 S.W.2d at 603.

Ferguson requests that this Court exercise its discretion and prevent the miscarriage of justice that is occurring. It would be a perversion of justice to refuse to consider the new evidence simply because of the passage of time. As stated in W*illiams:*

> Under the unique circumstances of this case, **we are willing to overlook the time constraints** of rule 29.11 as they relate to newly discovered evidence. The basis of the granting of relief for such reason is that it was not known, or could not reasonably have been discovered earlier. That this evidence was not discovered before **the expiration of the time for the filing of a motion for a new trial should not defeat the laudable concept of a new trial based on such evidence** ... Mindful though we are of the exclusivity of this Court's jurisdiction once a notice of appeal is properly filed, we are equally cognizant of the perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence. *Williams*, 673 S.W.2d at 848. (Emphasis added).

There are no Missouri rules that provide a means to order the granting of a new trial for newly discovered evidence outside of the time limits imposed by Rule 29.11 but the Missouri Appellate Courts have the inherent power to prevent miscarriages of justice

in certain cases of newly discovered evidence. *Mooney*, 670 S.W.2d 510, 515-16 (Mo.App. E.D. 1984). Very recently, in *Terry*, the Court acknowledged this responsibility and remanded a case pursuant to an untimely motion to remand to avoid a perversion of justice. Rather than relying on the lack of any rule addressing the situation, the *Terry* court explained what a defendant seeking a remand must show:

1) The facts constituting the newly discovered evidence have come to the movant's knowledge after the end of the trial;
2) Movant's lack of prior knowledge is not owing to any want of due diligence on his part;
3) The evidence is so material that it is likely to produce a different result at a new trial; and
4) The evidence is neither cumulative nor merely of an impeaching nature.

The State has nearly conceded that Ferguson has met the requirements of this test. The State labels the evidence as Erickson's "newly available statement." (St.Br.62-63), an admission that satisfies prongs one and two. The State even suggests that the new evidence may be material, as determining the statement's materiality is one of the reasons the State offers for holding a hearing. (St.Br.63). As to the final prong, the State has never suggested in its filings that Erickson's new testimony is cumulative or merely impeaching. The State's position seems to acknowledge that if considered and believed, the new evidence destroys the credibility of the prosecution.

The test was applied after *Terry* in the even more recent case of *State v. Cook*, 307 S.W.3d 189 (Mo.App. E.D. 2010). After the time limits for filing a motion for a new trial

had expired, the defendant moved to remand the case based upon the recantation of the only witness against him. Instead of relying upon the time limit, the court explained that the defendant had met the requirements justifying a remand. The *Cook* court explained:

> The evidence of the victim's recantation, if believed, does not merely impeach her testimony, but the newly discovered evidence directly refutes the victim's entire trial testimony and would show [the] conviction was based on false testimony as in *Mooney*. Because [the defendant] has satisfied all the elements, it is appropriate for this court to remand to the trial court to permit [the defendant] to file a motion for a new trial based on newly discovered evidence. *State v. Cook*, 307 S.W.3d at 192.

The type of evidence that led to the remand in *Cook, Terry* and *Mooney* is present here. In all of those cases, the new evidence suggested that the defendant was convicted based on perjured testimony. That perjury triggered the Appellate Court's responsibility to correct the injustice. That is what should be done here.

II.

The motion court violated Ryan Ferguson's constitutional right to due process when it failed to exercise independent judgment and merely "rubber-stamped" the State's proposed findings of fact and conclusions of law.

Waiver

The State argues this issue was not raised in a timely manner because Ferguson did not file a motion for a rehearing after the court's ruling was issued, citing *Gill v. State*, 300 S.W.3d 225 (Mo.banc 2009). However, the Court in *Gill* noted that the defendant had not asked this issue to be reviewed for plain error. Ferguson asks that his claim be reviewed for plain error. *Id.* at 234. Plain error review involves a two-step process. *State v. Dudley*, 51 S.W.3d 44, 53 (Mo.App. W.D. 2001). The first step requires an examination to determine whether the claim for review "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *Id.*, citing *State v. Brown,* 902 S.W.2d 278, 284 (Mo.banc 1995). If plain error is found on the face of the claim, the second step is to determine whether the claimed error resulted in manifest injustice. *Id.* [Citations omitted].

Reversal is necessary[1]

Missouri courts have expressed concern when judges adopt a party's proposed findings. *See Massman Construction Co. v. Missouri Highway and Transportation*

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[1] The citation to *pp14-19* in Ferguson's opening brief should have been to *pp17-22*. Petitioner apologizes to the Court for this citation error.

Comm'n, 914 S.W.2d 801,804 (Mo.banc 1996). In *State v. Kenley,* 952 S.W.2d 250, 281(Mo.banc 1997), Judge Stith dissented on this issue noting courts will reverse when there is evidence that adoption of the findings was not done with independent judgment. The factors showing a lack of independent judgment in that case were: (1) adoption of respondent's twenty-nine pages of complex findings; and (2) respondent's findings uniformly found every State's witness credible and every defense expert not credible. *Id.* at 284. It was "exceedingly indicative of a lack of independent judgment that the motion court made all of [the findings] in exactly the terms suggested by the attorney general." *Id.*

Mirror Image Legal Analysis

In the instant case the motion court used every case proposed by the State in the same sequence and for the very same proposition. The court interpreted (or misinterpreted) every case the exact same way the State did. In doing so the court has failed to fulfill its role as a detached neutral fact finder. Justice Easterbrook has described the danger of this practice:

> "A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. [Citations omitted].

> Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views." *DiLeo v. Young*, 901 F.2d 624, 626 (7th Cir. 1990).

Adoption of Credibility Findings

Making credibility findings in a Rule 29.15 proceeding is a role sacrosanct to the motion court. The Missouri Supreme Court rules require deference be given to the motion court's findings of credibility. Rule 84.13(d)(2). Here the motion court merely parroted the credibility findings proffered by the State without any independent reasoning or support.

For example, Ferguson's other defense attorneys, Kathryn Benson and Jeremy Weis, offered testimony on many of the issues raised in the Rule 29.15 proceedings. However in the motion court's findings the court completely ignored Weis's testimony. Benson's testimony was deemed credible when it favored the State (i.e. fn2, wherein she was complimented for her trial strategy in the face of an ineffective assistance of counsel claim (PCLF.276)), yet carried no weight when it supported Ferguson's arguments.

Stylistic Adoptions

One reason reviewing courts have cautioned against carte blanche adoption of one party's proposed document is that "advocates are prone to excesses of rhetoric and lengthy recitals of evidence favorable to their side but which ignore proper evidence or inferences from evidence favorable to the other party." *Massman*, 914 S.W.2d at 804. Here the motion court has become an advocate for the State. By adopting one side the

court has removed itself from the role of a neutral fact finder. This deprives Ryan Ferguson of his right to due process and an objective evaluation of the evidence that was presented.

From the choice of emphasis on particular words, to the presentation of facts, to typos, the court's ruling is identical to the State's proposal. For example, the unusual phrase "grasping at straws" appears twice in two identical sentences. (PCLF.269). The State's contention that the court made independent credibility findings lacks merit. The court's deletion of "Moreover, Dr. Leo was not credible" did not substantively change the ruling.

The court adopted numerous typos and grammatical errors in its judgment. For example, "There is no reasonable probability that the verdict would have **different**." (PCLF.244, 285). (Emphasis added). Within the word limitation imposed on this reply it is not possible to identify each and every incidence in which the rubber stamp approach taken by the motion court clearly demonstrates the lack of independent judgment.[2] These findings were not made with the "sharp eye of a skeptic and the sharp pencil of an editor." *Massman*, 914 S.W.2d at 804. Instead, these oversights evince a lack of judicial independence.

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[2] Examples include, but are not limited to, omitting an end quotation (i.e. PCLF.222, 253, 264, 294), the identical bolding of words (i.e. PCLF.228, 230, 270, 271), and the misspelling of Mike Schook's name "Shook." (PCLF.236, 277).

Factual Errors

The motion court and State's reference to the program through which Trump was employed is in error. Trump was employed through the "personnel advantage program," yet the State's proposed findings and the motion court's ruling both describe it as the "personal advantage program." (PCTr.533). Additionally, Ronald Hudson's public defender Rob Fleming testified that there was a proffer. (PCTr.28). However, the court ruled there was no proffer. (PCLF.269). Ferguson also incorporates by reference Section IV of this reply as to additional factual errors made.

State's Arguments

The State argues that the court did not err in adopting most of the State's proposed findings and conclusions. Ferguson does not dispute that adoption in whole of proposed findings from one party is permissible. However, adoption of clearly erroneous findings is not. In summary, the Court erred in finding no Brady violation, in holding admissible evidence was required for a Brady violation to exist, and in ruling there was effective assistance of counsel (*See Sections III-V, infra).* The motion court has failed to satisfy even the appearance of justice. "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...But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955), citing *Offutt v. United States*, 348 U.S. 11 (1954).

III.

Ferguson's constitutional right to due process was violated when the State failed to disclose Clarence Mabon's statements to Ronald Hudson.

Ryan Ferguson proved by a preponderance of the evidence that his right to due process was violated by the State's failure to disclose Clarence Mabon's inculpatory statements, and the motion court's holding otherwise is clearly erroneous.

The materiality standard set forth by *Brady* and its progeny does not require that admissible evidence be presented in order to demonstrate that a defendant's right to due process was violated. *Brady v. Maryland*, 373 U.S. 83 (1963). The State argues that admissible impeachment or exculpatory evidence must be presented to establish a *Brady* violation. The State bases their argument solely on the theory that Ronald Hudson's testimony would have been inadmissible at trial.

The recent decision by this Court in *Duley v. State* provides guidance as to this issue. 304 S.W.3d 158 (Mo.App. W.D. 2009). In *Duley*, a police investigative report identified a witness who stated Duley, the defendant, was not the shooter. The witness identified someone else as the shooter. The witness also identified two other potential eyewitnesses to the shooting. *Id.* at 160-61. The report of this interview was not turned over prior to trial. *Id.* at 161. Duley was convicted at trial and his conviction was affirmed on appeal. He filed a Rule 29.15 motion in part on the basis of this *Brady* violation. The trial court granted Duley's Rule 29.15 motion, vacated his conviction and ordered a new trial. *Id.* The State appealed and argued the trial court erred because Duley did not demonstrate that the withheld evidence was admissible. Duley did not

present the two new potential eyewitnesses at the Rule 29.15 hearing. The alleged shooter testified that he would have invoked his Fifth Amendment rights had he been called at trial. *Id.* at 164. This Court rejected the argument that Duley had to present admissible evidence to establish a *Brady* violation, holding:

> The State's argument ignores the fact that the nondisclosure deprived Duley of any opportunity to contact [the witnesses] prior to trial and use information from those witnesses in preparing his defense of innocence. There is no way of knowing what additional witnesses or evidence might have been developed from those contacts...[the eyewitness's] account may have been presented through his own testimony or as a prior inconsistent statement admissible as substantive evidence under (Section) 491.074. *Id.* at 165.

As in *Duley*, Ferguson's theory of defense presented at trial was that he was innocent and someone else had committed the crime. As in *Duley*, Ferguson was unable to identify anyone else at trial for there was insufficient evidence to do so. *Id.* at 164. As in *Duley*, had the withheld evidence been disclosed Ferguson's attorneys would have attempted to locate and interview the witnesses identified. *Id.* Similarly, because this evidence was withheld one can only speculate as to what changes in trial strategy would have been made and what additional evidence would have been found from further investigation. *Id.*

The State relies primarily upon *Wood v. Bartholomew*, in support of the proposition that inadmissible evidence kept from the defense never results in a *Brady* violation. *Wood v. Bartholomew*, 516 U.S. 1 (1995); *see also* St.Br.25 ("a defendant must still ultimately show that admissible exculpatory or impeachment evidence would have been obtained but for the State's failure to disclose").

Wood is factually distinguishable from this case. The defendant (Bartholomew) walked into a laundromat and fatally shot the attendant. *Id* at 2. Another bullet was found lodged in a counter nearby. *Id.* From the outset, Bartholomew admitted he committed the robbery and that the shots came from his gun. *Id.* The sole issue at trial was whether premeditation existed. *Id.* at 3. Bartholomew's strategy at trial was that the gun, a single action revolver, was accidentally discharged twice. *Id.* Before trial, the prosecution requested that defendant's brother Rodney and Rodney's girlfriend Tracy take polygraphs. *Id.* at 4. Their answers were consistent with their testimony at trial, but Rodney indicated deception in answering whether he had assisted his brother in the robbery and whether he and his brother were ever in the laundromat together. *Id.* The results were never disclosed to the defendant. *Id.* At the post conviction hearing Bartholomew's trial counsel stated that his cross examination of Rodney was not limited by the nondisclosure, and had the evidence been disclosed he would not have conducted the cross any differently. *Id.* at 10-11.

In *Wood*, the evidence against the defendant was overwhelming. *Id.* at 11. Immediately after the crime, the defendant stated that he was the perpetrator. In this case, Ryan Ferguson has always proclaimed his innocence. Rodney was a witness known to

the defense and they were not precluded from deposing him. In this case, Ferguson had never heard of Ronald Hudson or Clarence Mabon. All three of Ferguson's criminal defense attorneys agreed they definitely would have investigated this information and that it was exculpatory and potentially impeaching. (PCTr.346, 372-73, 401, 516). It is untrue that Rogers affirmatively stated it would not have changed his trial strategy.

Finally, the Court found that even if Rodney had been involved, it was still consistent with the defendant's pre-established defense. *Wood* at 11. Here, an individual told the police another man was involved in the crime, and the sketch being circulated was not of the actual perpetrators. Mabon's statement is not consistent with Ferguson and Erickson's trial defense.

The motion court's holding and the State's sole argument that admissible evidence must be presented at the Rule 29.15 hearing for a *Brady* violation to be established is without merit and clearly erroneous as a matter of law.

IV.

Ferguson's constitutional right to due process was violated when the State failed to disclose Shawna Ornt's definitive statements to the State's Attorney that neither Ferguson nor Erickson was the individual she saw in the parking lot the night of the murder.

Ferguson does not dispute that it is the role of the motion court to make credibility determinations and those findings are to be given deference. Here, however, the motion court's adoption of the State's proposed credibility findings demonstrates a lack of independent judicial evaluation that is clearly erroneous.

The motion court made several factual errors that undermine its ruling. The most blatant of these is holding that "Ms. Ornt testified at the evidentiary hearing that Kevin Crane, the prosecutor, showed her pictures of Movant and Chuck Erickson during their meetings together preparing for trial." (PCLF.271). This is flatly untrue. Shawna Ornt never testified at the evidentiary hearing that Kevin Crane showed her photographs of Ferguson and Erickson during their meetings together.

The motion court makes a second factual error in stating that Kevin Crane testified he never asked whether Ornt could identify Movant or Chuck Erickson as the persons she saw by Kent Heitholt the night he was killed. "Did you ever ask her – in your trial preparation, if she could identify Mr. Ferguson as one of the persons that night. Answer: Well I am sure she was asked. Her response, either to the police or by me was I can't tell – I'm can't be sure who that was." PCTr.745.

The motion court erred a third time in its assertion that Ornt either lied at her deposition or the post conviction hearing. (PCLF.272). Ornt's deposition testimony and post-conviction testimony are consistent. Ornt told the prosecution that neither Ferguson nor Erickson was the individual she saw that night. Because she only saw one person clearly, the one with blond hair, she couldn't know whether either of the individuals in the photographs she had seen was the person she did not see clearly. Additionally, Ornt was cut off in the deposition from explaining what she meant when said she couldn't say for sure whether the picture in the paper is one of the two people she saw. The deposition neither resolves the identification issue nor does it establish she was lying when she testified at the post-conviction hearing.

The motion court erred a fourth time in its assertion that "no statements were made by Ms. Ornt that Movant and Erickson were not involved." (PCLF.272). This is false. Alicia Shelton testified at the hearing that very shortly after the arrest, Ms. Ornt told her that she did not think those were the persons she saw in the parking lot. (PCTr.258) The motion court failed to make a finding Ms. Shelton was not credible and even failed to acknowledge her testimony even occurred. Ms. Ornt also testified that she told her boyfriend immediately after the arrest that Erickson and Ferguson were not the persons she saw that night.

Ornt testified that she definitively told Crane and William Haws that neither Ferguson nor Erickson was the individual she saw in the parking lot, by Heitholt's car,

the night of the murder. (PCTr.118-20). The motion court's finding that Ornt was not credible is tainted by the court's lack of independent evaluation.[3]

[3] The State's brief contains an error when it avers that Ornt would not agree to make a videotaped statement for the prosecutor. (St.Br.34). At no time did they ask her to make a videotaped statement.

V.

The motion court clearly erred in denying Ferguson's claim that he was denied effective assistance of counsel.

Failure to impeach Charles Erickson

Ferguson's trial counsel committed an egregious error by failing to interview the Boone County inmates housed with Chuck Erickson. Keith Fletcher testified that Erickson told him on several occasions Erickson did not believe he had killed Heitholt and that he confessed because he was tired of sitting at the station. (PCTr.84-85). Erickson admitted to John James that he may have perpetrated the murder with someone other than Ferguson. (PCTr. 94).[4] Erickson continued to tell the inmates that he may have only dreamed he participated in the murder. (PCTr.77, 94). Trial counsel's failure to secure this crucial testimony is constitutionally deficient representation.

Trial counsel must exercise reasonable diligence to produce exculpatory evidence on his client's behalf. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). The decision to interview a potential witness is not trial strategy, but instead is related to adequate *preparation* for trial. *Id.* (Emphasis added). See also *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991). Strategy resulting from a lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. *Id.*

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[4] The State's assertion that John James' testimony is equivocal strains credibility. Read in context, "one other person" clearly refers to someone other than Ferguson.

Ferguson's defense team admitted their error on this issue. Kathy Benson stated, "we should have interviewed [the inmates], and we wanted them interviewed, and we didn't get it done." (PCTr.532). There is no acceptable reason for the failure to interview these witnesses. In fact, the State offers none.

The inmates' testimony was crucial to Ferguson's defense because it impeached Erickson's trial testimony that he was certain that he and Ferguson killed Heitholt. (Tr. 650). Erickson repeatedly told Fletcher he did not believe he had killed the victim. (PCTr. 84). There was no custodial interrogation pressure for Erickson at this point. While Erickson testified his memory was accurate at the jail he continued to tell James and Gathings that his memory of murdering Heitholt was akin to a dream. (Tr.800, 878, PCTr.77, 94).

The State argues that Ferguson has not "overcome the strong presumption that counsel had a strategic reason" for failing to interview the inmates. Citing *People v. Tokar*, 918 S.W.2d 753 (Mo. banc 1996). Ferguson's defense team admittedly knew the inmates had exculpatory information yet failed to obtain this information. Their lack of diligence had nothing to do with strategy.

Tokar is distinguishable. The allegation in *Tokar* was that his attorney failed to object to an improper State argument. 918 S.W.2d at 768. Although the Court agreed the argument was improper the Court determined the error was based on the strategy of not unduly emphasizing to the jury the remark. *Id.* Failing to object is completely dissimilar to the failure to present exculpatory witnesses.

The State is incorrect that the inmates' testimony would have been cumulative. The inmates' testimony – including that Erickson did not believe he had killed Heitholt, that he confessed only because he was tired of sitting at the station, and that he may have perpetrated the murder with someone else – were not otherwise presented at trial. The inmates' testimony otherwise impeached Erickson's explanation of his previously inaccurate statements to police as the product of police "pressure" and having not thought about the crime for two years. There is a reasonable probability but for trial counsel's deficient performance Ferguson would not have been convicted.

Failure to impeach Jerry Trump

Christine Varner's testimony establishes that Jerry Trump committed perjury. Trump told Varner that he could not identify the individuals by the victim's car. (PCTr.173). Trial counsel could have easily located Varner. Varner was an employee pf Trump's employer. (PCTr.172). The staffing agency was Trump's employer. (PCTr.172). Interviewing the staffing agency about Trump would have uncovered Varner's impeaching information.

The State's argument that Varner was only "tangentially related" to Trump is untrue. Varner's staffing company hired Trump and issued Trump's paychecks. (PCTr.172). Varner had semi-regular contact with Trump through her employment. Trial counsel failed to do any investigation of Trump. (PCTr.436).

Trump told Varner he could not see the individuals due to the lighting, which would have completely impeached his identification of Ferguson. (PCTr.173). Had the

jury heard Varner's testimony there is a reasonable probability that Ferguson would not have been convicted.

CONCLUSION

For the reasons stated herein, Defendant-Appellant, Ryan Ferguson, respectfully requests that this Court reverse and remand for a new trial, and/or afford him any and all other relief deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 13th day of July, 2010, two true and correct copies of the foregoing reply brief and CD-ROM(s) containing a copy of this brief were mailed, postage prepaid, to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

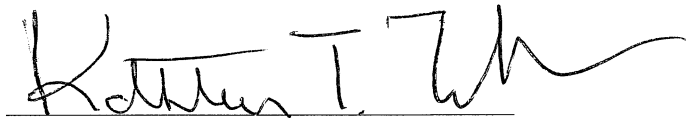
Kathleen T. Zellner

CERTIFICATE OF COMPLIANCE

I, Kathleen T. Zellner, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, signature block, certificate of service and this certification, this brief contains 5080 words, which does not exceed the 5115 words allowed by Special Rule XLI for a reply brief.

The CD-ROM(s) filed with this reply brief contain(s) a copy of this brief. The CD(s) has/have been scanned for viruses and are virus-free.



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