

No. \_\_\_\_\_

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# **In the Supreme Court of the United States**

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**IN RE JAMES ERIC MANSFIELD**

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**ON PETITION FOR A WRIT OF HABEAS CORPUS  
TO THE SUPREME COURT OF THE UNITED STATES**

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## **PETITION APPENDIX**

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**JAMES ERIC MANSFIELD  
Jefferson City Correctional Center  
8200 No More Victims Road, 2D206  
Jefferson City, MO 65101**

**Petitioner, Pro Se**

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No: 24-3235

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James Eric Mansfield

Petitioner

v.

Kelly Morris, Acting Warden

Respondent

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City  
(4:96-cv-00443-DW)

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**JUDGMENT**

Before LOKEN, KELLY, and GRASZ, Circuit Judges.

The motion for authorization to file a successive habeas application in the district court is denied. Mandate shall issue forthwith.

November 22, 2024

Order Entered at the Direction of the Court:  
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Maureen W. Gornik

United States Court of Appeals  
FOR THE EIGHTH CIRCUIT

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No. 98-1486

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James Eric Mansfield,

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Appellant,

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v.

\* Appeal from the United States  
\* District Court for the Western  
\* District of Missouri.

David Dormire,

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Appellee.

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Submitted: September 15, 1999

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Filed: February 4, 2000

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Before BEAM, HEANEY, and FAGG, Circuit Judges.

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BEAM, Circuit Judge.

James Eric Mansfield appeals the denial of his petition for habeas corpus relief under 28 U.S.C. § 2254. We affirm.

**I. BACKGROUND**

Mansfield was convicted in Missouri state court of first-degree murder and armed criminal action for the stabbing death of Mark Trader. He was sentenced to two concurrent terms of life imprisonment.

Before trial, the state filed a motion in limine to exclude evidence that other people had a motive and an opportunity to commit the murder. Because there was no evidence directly linking the others to the crime, the trial court granted the motion. The case then proceeded to trial before a jury.

At trial, the state presented evidence showing that Mark Trader had been stabbed to death outside his apartment after an evening of drinking. The evidence centered around a group of regular patrons and employees of Papa Leone's Italian Deli and Bar in Independence, Missouri ("the bar"). The state's principal witness was John Hertlein, a friend of Mansfield, who testified to events that occurred on the night of the murder.

Hertlein testified that he, Mansfield, and several others, including Mark Trader, had been drinking at the bar. After the establishment closed, one of their party called a cab for Mark Trader, who was too inebriated to drive. Mansfield assisted Trader into the cab and gave the cabdriver Trader's address.

At that point, Hertlein and Mansfield drove to Trader's apartment building in Mansfield's car. On the way, Mansfield stated, "I'm going to Gerber him,"<sup>1</sup> and then pulled a knife from under the seat of the car. When they arrived at Trader's apartment, Mansfield confronted Trader outside the apartment building. After arguing for a few minutes, Trader and Mansfield walked to a place between the two apartment buildings where Hertlein could no longer see them. Hertlein testified that he overheard Trader say, "kill me" or "try and kill me," and then heard thumping and gurgling sounds. Mansfield returned to the car with blood on his hands. Hertlein asked what had happened and Mansfield replied, "the first shot he took was in the Adam's apple" and admitted that he had stabbed Trader ten to twenty times.

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<sup>1</sup>The evidence shows that the term "Gerber" refers to a kind of knife. There was also evidence that Mansfield owned such a "Gerber gator" knife and had been heard to refer to the term "to Gerber" as meaning "to stab" or "to cut."

Hertlein then took the wheel and the two men returned to the bar, where they encountered Jon David Couzens. After talking to Couzens for a few minutes, Hertlein drove to a nearby gas station so that Mansfield could clean up. Because there were people present at the station, the two decided not to use the station's restroom and drove instead to the apartment of Hertlein's cousin, Angela Cascone, where Mansfield washed and borrowed a clean shirt. Mansfield then drove Hertlein back to the deli. Hertlein then went home.

The next day, Hertlein contacted the police and was brought to the police station, where he later gave a written statement and videotaped testimony outlining the night's events. That same day, the police arrested Mansfield as he was leaving his home. Hertlein agreed to assist police officers by audiotaping a conversation with Mansfield in the hope that Mansfield would incriminate himself. Hertlein was placed in the cell next to Mansfield with two other men. Hertlein told his cell mates that he had been arrested for the murder of Mark Trader and stated that he had assisted in the murder. Mansfield made no incriminating statements in response.

Hertlein's version of the night's events was corroborated by several other witnesses. Jon David Couzens testified that Mansfield asked "why don't I just go pop him?" before leaving Papa Leone's with Hertlein and that Mansfield was holding a knife and had blood on his hands when he returned. A bar patron, Katherine Halsey, testified that she overheard Mansfield remark, "do you want me to pop him?" The cabdriver, Scott Blanz, identified Mansfield as one of the two men arguing outside Trader's apartment.<sup>2</sup> An elderly resident of the apartment building testified that she heard raised voices, followed by gurgling and then saw a male running from the scene. Jon David Couzens also testified that Mansfield stated, "we have a bond between us and this is to go no further, but Trader is dead, I killed him." Hertlein testified that he overheard this remark. A gas station patron testified that he saw a car matching the description of Mansfield's circling through the gas station. Hertlein's cousin, Angela Cascone,

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<sup>2</sup>Blanz had also identified Mansfield in a police photographic lineup.

testified that Hertlein asked if a friend could use her bathroom to clean up and that she later heard the water running. A police officer testified that physical evidence of blood was later found in Cascone's sink. Another police officer substantiated Hertlein's testimony that he had been placed in a cell next to Mansfield to entice Mansfield into a confession.

Mansfield presented an alibi defense. Mansfield's mother testified that he was home by 2:20 a.m. on the night of the murder. An expert testified that it would have been impossible for events to have occurred as Hertlein testified they did under the time sequence that had been presented. Mansfield also testified in his own defense and denied committing the murder.

Mansfield was convicted of murder in the first degree and armed criminal action. He filed a joint motion for a new trial and for post-conviction relief, which was denied by the trial court. He then jointly appealed his conviction and filed for post-conviction relief under Missouri Rule 29.15. The Missouri Court of Appeals affirmed his conviction and denied post-conviction relief, finding that Mansfield had not properly preserved his points for review. See State v. Mansfield, 891 S.W.2d 854, 855 (Mo. App. 1995).

Mansfield then filed for habeas corpus relief in federal district court under 28 U.S.C. § 2254. He alleged violations of his Sixth Amendment right to adequate representation by counsel and violations of his Fifth Amendment right to due process of law. The state argued that Mansfield's claims were procedurally barred. The district court found the claims were not procedurally barred, but nevertheless denied relief because it found that Mansfield had not shown that his counsel's representation fell below an objective standard of reasonableness. The district court later denied Mansfield's motion for a certificate of appealability, finding that Mansfield had made no substantial showing of the denial of a constitutional right.

Mansfield moved for a certificate of appealability in this court. We found that Mansfield had made a sufficient showing of the denial of his Sixth Amendment right to effective assistance by counsel in the following particulars: (1) counsel's failure to develop and present evidence showing others were responsible for the murder; (2) counsel's failure to effectively impeach the state's chief witness with evidence that the witness had earlier implicated himself in the murder; and (3) counsel's failure to object to the state's cross-examination of defendant when the state asked defendant why the state's witnesses were lying.

## II. DISCUSSION

As a threshold matter, the state argues that Mansfield's ineffective assistance of counsel claim is procedurally defaulted. It asserts that federal review is precluded because Missouri state courts relied on an adequate and independent state ground for its disposition of the case. Although we are inclined to agree with the district court that our review is not barred in this case, we need not reach this difficult question. Since we find that Mansfield cannot prevail on the merits, we see no need to belabor the procedural bar issue. See Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999) (en banc) (stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 120 S. Ct. 120 (1999).

Mansfield's ineffective assistance claims center on his counsel's failure to present evidence implicating Hertlein, Couzens, and another bar patron, J.R. Howerton, in the murder. The record shows that Mansfield's counsel was prevented from presenting such a defense by the trial court's ruling on the government's motion in limine.<sup>3</sup> In

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<sup>3</sup>The court's ruling on this motion prevented Mansfield from presenting evidence relating to certain events that preceded the murder. That evidence included testimony that Trader had been drunk and obnoxious at the bar earlier on the night of the murder and had been involved in a physical fight with Couzens and Howerton. Mansfield was also barred from presenting evidence showing that Trader had been involved in a

connection with that ruling, Mansfield contends that counsel was ineffective in failing to present to the court a police report that stated that Hertlein had been overheard in jail bragging that he was responsible for the murder. The record shows that the report was obtained at the behest of Mansfield's counsel, who asked that the police interview the prisoners who had shared a cell with Mansfield and Hertlein. Mansfield's counsel was thus aware of the existence and contents of the report. Mansfield argues that, had this evidence been presented, the trial court would not have prevented him from mounting the defense that Couzens, Hertlein and Howerton were responsible for the murder.

To prevail on his ineffective assistance of counsel claim, Mansfield must first show that his attorney's performance fell below an objective standard of reasonableness and must further show that the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). With respect to attorney performance, Mansfield must overcome the strong presumption that "the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). To show prejudice, Mansfield must establish a reasonable probability that he would have been acquitted absent the allegedly unprofessional error. See Strickland, 466 U.S. at 694. We do not set aside a conviction or sentence solely because the outcome would have been different but for counsel's error, rather, the focus is on whether "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

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botched drug deal with Couzens and owed Couzens and Howerton money. However, if Mansfield's counsel had been permitted to delve into these earlier events and the relationships between the parties, the state could have presented evidence that Mansfield had also been involved in physical altercations with Trader and had been known to have violent outbursts. Additionally, evidence that Couzens, Hertlein, and Howerton may have had a motive to kill Trader could have been equally damaging to Mansfield in that the state sought to show that Mansfield was a "wise guy wanna be," who wanted to prove his toughness to the others and who had bragged about his violent exploits. In light of the comment, "do you want me to pop him?" a jury could have imputed the others' motive to Mansfield, with Mansfield in the role of a "hit man."

The trial court granted the government's motion in limine in reliance on State v. Umfrees, 433 S.W.2d 284, 287-88 (Mo. 1968) (en banc).<sup>4</sup> That case provides that evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible "without proof that such other person committed some act directly connecting him with the crime" and evidence that clearly points to someone other than the accused as the guilty person. Id. at 288. Mansfield asserts that the police report furnishes such direct proof of others' involvement.<sup>5</sup>

We question the value of Mansfield's purported evidence. In light of Hertlein's testimony, corroborated by a police officer, that Hertlein had been "planted" in the cell

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<sup>4</sup>We address this issue of state law only as it relates to the issue of effectiveness of counsel. Admission of evidence is generally a question of state law that will not form the basis for habeas corpus relief. See Clark v. Groose, 16 F.3d 960, 963 (8th Cir. 1994).

<sup>5</sup>The parties debate whether the "Umfrees rule" requires only direct evidence that links another to the crime or instead requires evidence that clearly exonerates the accused. The district court found that Mansfield's purported evidence "did not tend clearly to exonerate" him. Whatever the subtle distinctions between "evidence that clearly exonerates," and "evidence that points to others as the guilty persons," the import is the same—the evidence must tend to show that someone else did it. Such evidence generally exonerates the accused. Mansfield's purported evidence, however, while it may point to others, does not do so to the exclusion of Mansfield. Cases allowing admission of evidence that another committed the crime involve direct evidence that points to the others and excludes the accused. See, e.g., State v. Butler, 951 S.W.2d 600, 606-08 (Mo. 1997) (en banc) (involving evidence linking victim's nephew, not husband, to the crime); State v. Woodworth, 941 S.W.2d 679, 692 (Mo. App. 1997) (involving a prior statement by victim that another was his assailant); State v. Wells, 804 S.W.2d 746, 748 (Mo. 1991) (en banc) (involving a letter from an eyewitness clearly implicating another and exonerating the accused). See also State v. Rousan, 961 S.W.2d 831, 848 (Mo. 1998) (en banc) (finding no direct evidence to connect another to the crime but noting that evidence that another contracted for the murder would inculpate rather than exculpate the accused), cert. denied, 118 S. Ct. 2387 (1998).

next to Mansfield in order to obtain a taped confession, any admissions he made in the jail cell can be explained as part of the scheme to trick Mansfield into confessing. The report thus lacks any real probative value. In addition, we find the statements by the other prisoners are equivocal and contradictory. One prisoner stated that Hertlein said that "three of them" followed the cab and each one stabbed Trader. Another prisoner stated that Hertlein said that he had stabbed the victim and the others watched. Significantly, none of the statements exclude Mansfield as a perpetrator.

Most importantly, the police report only substantiates evidence that the trial court actually heard. Hertlein himself testified that he had made the admissions at the jail. The trial court heard the substance of the evidence that supposedly incriminated others and could have reversed its ruling on the motion in limine had it been inclined to do so.

We are not convinced that the police report amounts to evidence that satisfies the Umfrees standard. Mansfield's purported evidence would show only that he either aided or was aided by others in the murder, or that he committed the murder at the behest of others. It does not point to others as the guilty persons to the exclusion of Mansfield. We thus find it doubtful that the presentation of this evidence would have caused a contrary ruling by the trial court.

Thus, we find Mansfield's counsel's failure to present this evidence to the court was not objectively unreasonable. Counsel may have had compelling strategic reasons for his failure to press the evidence upon the court. Counsel could have reasonably assumed that the evidence was damaging to Mansfield's case, in that it undermined his alibi defense. The statements also could have been viewed as damaging in that they provided further corroboration of Hertlein's version of events. The evidence lacked any real benefit to Mansfield because it was "explained away" by Hertlein's testimony that the statements were part of a ruse to get Mansfield to confess.

Moreover, even if Mansfield were able to show that his counsel's actions were objectively unreasonable, he is unable to show prejudice. Contrary to Mansfield's assertions, the state's case against him was not weak.<sup>6</sup> The damaging testimony by Hertlein was corroborated by the testimony of several others, most importantly, the cabdriver. Although the cabdriver later faltered in his identification of Mansfield by testifying at trial that the perpetrator had a mustache, Mansfield's counsel pointed the inconsistency out in closing argument. We have reviewed the record and find that Mansfield has not shown that the result of his trial is unreliable or the proceeding was fundamentally unfair. We have considered Mansfield's other arguments and find them lacking in merit.

To the extent that Mansfield contends he is actually innocent of this crime, we add that a claim of "actual innocence" is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. See Herrera v. Collins, 506 U.S. 390, 404 (1993). "[T]he traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." Id. at 417.

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<sup>6</sup>In support of his contention that the case against him was weak, Mansfield points to the lack of any apparent motive and to the state's inability to find evidence of blood in his car through the use of Luminol. Neither of these undermine the state's case to any significant degree. The lack of a motive was due, in part, to the exclusion of evidence of Mansfield's propensity for violence and revenge. The absence of Luminol evidence is not particularly probative because, although Mansfield had blood on his hands and clothing, there was no showing that there was any abundance of blood present in the car. In addition, both of these points were argued to the jury.

### III. CONCLUSION

The district court's denial of Mansfield's petition for a writ of habeas corpus is affirmed.

HEANEY, Circuit Judge, dissenting.

While in custody, Hertlein admitted to at least four people that he was an active participant in the murder of Mark Trader. I cannot excuse counsel's failure to present this evidence to the trial court as simply an acceptable trial strategy. Had this evidence been presented, the trial court would have had reason to admit the evidence referred to in footnote three of the majority's opinion--evidence that was consistent with Mansfield's theory of defense.

As explained by the majority, Mansfield presented an alibi defense at trial. Clearly in such a defense, evidence of another's motive and opportunity to commit the crime is of great importance, for it provides the jury with an explanation of who, if not the defendant, may be guilty. However, under Missouri law at the time of Mansfield's trial, he was prohibited from presenting evidence of another's motive and opportunity to commit the crime unless he could provide the trial court with some direct link connecting the alleged perpetrators to the crime. See State v. Umfrees, 433 S.W.2d 284, 287-88 (Mo. 1968) (en banc).

Mansfield had an abundance of evidence which tended to prove that Hertlein, Couzens, and Howerton had both a motive to commit the murder and the opportunity to do so. However, as stated above, under Missouri law this evidence was inadmissible without some other evidence directly linking them to the crime.

Such evidence was available in this case, but Mansfield's counsel failed to present it. Officer Cavanah's police report details his interviews with four inmates, Joseph Snodgrass, Leonard Berryman, Nick Nichols, and Jessie Kessler, each of whom

indicated to him that Hertlein admitted involvement in the murder while in jail with them. According to Cavanah,

Snodgrass stated that the other person who was talking believed to [be] Hertl[ei]n made many statements about the homicide as if he knew about it. He made the statement that the suspect [sic] had been stabbed 21 times. It was obvious to him that Hertl[ei]n knew about the murder as if he were there.

Berryman stated something about putting the dude in a cab and three of them followed him to his house. Hertl[ei]n stated that all 3 of them got out and each one stabbed him. He stated that [Mansfield] played dumb as if he did not know what was going on. He stated that he told [Mansfield] that [Hertlein] was involved by the way he was talking.

Nichols stated that Hertl[ei]n stated that we all stabbed him. He stated that [Hertlein] stated that he was involved and that he and two others stabbed the victim. . . .

Kessler stated that he heard Hertl[ei]n say that he stabbed him 9 times and that a couple other people helped him watch.

(Appellant's Add. at 39-40.)

To consider these statements equivocal and contradictory requires an overly critical reading of the statements. All of the inmates agreed that Hertlein's statements made it clear that he was involved; three of the inmates noted that Hertlein was bragging about personally stabbing the victim. Although there are inconsistencies among the statements, one would expect such an outcome from different witnesses, each relating his recollection of the events. Moreover, despite their minor differences, all the statements have a common thread: all directly link Hertlein to the crime, meeting Missouri's threshold evidentiary requirement. In such a context, it is indisputable that not presenting the police report in question to the trial court was deficient conduct by counsel.

The majority regards these confessions by Hertlein to be of little probative value, in part because Hertlein testified about them at trial. I disagree. During his trial testimony, Hertlein admitted that he told his fellow inmates that he was being held for first degree murder, but claimed he was doing so as part of a plan to elicit a confession from Mansfield. Standing alone, this would likely not satisfy the Umfrees standard. However, Hertlein's statements in the police report contain a disturbing amount of detail of the crime, calling into question Hertlein's professed innocence, and at the very least directly linking him to the crime. Thus, had the police report been presented to the trial court, it would have provided a sufficient link between Hertlein and the crime for the trial court to have then properly admitted motive and opportunity evidence.

Failing to present the police report to the trial court was deficient performance under the familiar test of Strickland v. Washington, 466 U.S.668, 687 (1984). Because I believe that counsel's failure to present this evidence produced an unreliable result, Mansfield's petition should be granted.<sup>7</sup>

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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<sup>7</sup>The other evidence introduced against Mansfield was weak. Most of the incriminating evidence was provided by Hertlein, Howerton, and Couzens, the same three individuals whom Mansfield claimed were the true perpetrators. Thus, had evidence of their motive and opportunity to commit the murder been admitted, the jury may well have discredited their testimony as self-serving. That being the case, the most damaging independent testimony against Mansfield would have been the cabdriver's eyewitness identification, which was impugnable because it was inaccurate.

United States Court of Appeals  
FOR THE EIGHTH CIRCUIT

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No. 98-1486

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James Eric Mansfield,

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Petitioner-Appellant,

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\* Appeal from the United States

v.

\* District Court for the

\* Western District of Missouri.

David Dormire,

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Respondent-Appellee.

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O R D E R

Missouri inmate James Eric Mansfield seeks a certificate of probable cause, or in the alternative, a certificate of appealability from the district court's denial of his 28 U.S.C. § 2254 petition. The court has reviewed the application. For the following reasons, the court GRANTS the application.

Petitioner was convicted in Missouri state court for the murder of Mark Trader. Following unsuccessful appeals in the state courts, petitioner filed for habeas relief under 28 U.S.C. § 2254. The district court denied relief in an order dated September 16, 1997 and denied petitioner's application for a certificate of probable cause, or in the alternative, a certificate of appealability in an order dated December 30, 1997.

A certificate of appealability will issue upon a substantial showing of the denial of a constitutional right.<sup>1</sup> Petitioner claims that six issues meet this standard:

1. Ineffective assistance of counsel involving failure to properly develop and present evidence showing that third parties were responsible for the murder;
2. Ineffective assistance of counsel claim involving the failure to effectively impeach witness John Hertlien;
3. Ineffective assistance of counsel claim involving the failure to call twelve witnesses to rebut the prosecution theory suggesting that petitioner had destroyed all the physical evidence;
4. Ineffective assistance of counsel claim regarding the failure to object to the prosecution's questioning of petitioner on cross-examination;
5. Due Process violation resulting from the exclusion of credible exculpatory evidence that third parties could have committed the murder;
6. Cumulative prejudice;
7. Ineffective assistance of appellate counsel.

The district court found against petitioner on each of these issues in denying habeas relief under 28 U.S.C. § 2254. The district court also found that petitioner

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<sup>1</sup>Congress recently amended 28 U.S.C. § 2253 to substitute a "certificate of appealability" for a certificate of probable cause. A petitioner seeking a certificate of appealability from the denial of § 2254 relief must make a "substantial showing of the denial of a constitutional right."

failed to make a substantial showing of denial of a constitutional right so as to support the issuance of a certificate of appealability. We disagree.

Petitioner's ineffective assistance claims, with the exception of the third, all revolve around the issue of whether diligent production and presentation of evidence would have permitted Mansfield to preserve for review the trial court's exclusion under State v. Umfrees, 433 S.W.2d 284 (Mo. banc 1968), of potentially exculpatory evidence tending to show that third persons were responsible for the murder and that Mansfield was not. In a recent Missouri Supreme Court decision in State v. Butler, 951 S.W.2d 600 (Mo. banc 1997), a murder defendant was found to have received ineffective assistance where defense counsel failed to undertake a reasonably diligent investigation that would have unearthed facts implicating third parties in the murder. Had Mansfield's counsel undertaken such an investigation, he would have found evidence implicating Clayton Howerton, Jr., the owners of Papa Leone's, and the state's key witness, John Hertlien. Easily discoverable facts indicate that Howerton assaulted Trader within hours of the murder, that Trader owed money to Howerton and to Papa Leone's and its owner, and that Howerton and Dave Couzens, the owner of Papa Leone's had threatened Trader on multiple occasions. Such evidence, coupled with the available testimony of a cabdriver that a man fitting the description of Howerton was waiting by Trader's apartment door when he was dropped off immediately prior to the murder, suggest that the investigation performed by Mansfield's attorney was not minimally adequate. Had this information been discovered, Mansfield could have made an offer of proof under Umfrees and would have been free to mount a defense. It is not certain that the jury would have reached a different result if counsel had presented a full factual picture, but there "is a reasonable probability that [they] would have had a reasonable doubt" as to whether Mansfield committed the murder. Strickland, 466 U.S. at 694. Without the evidence presented in petitioner's application, "the jury that convicted [Mansfield] had no reason to question the inferences the state drew from its circumstantial case." Butler, 951 S.W.2d at 610 (citing Henderson v. Sargent, 926 F.2d 706, 712 (8th Cir. 1991)).

Based on Missouri case law and the facts presented in the petition, a certificate of appealability should issue with respect to claims 1, 2, and 4 above.

We have carefully reviewed petitioner's remaining claims and find them to be without merit.

We find that petitioner has made a substantial showing of denial of a constitutional right. Accordingly, this court grants petitioner's motion for a certificate of appealability on the grounds stated above.

November 30, 1998

Order Entered at the Direction of the Court:

*Michael E. Gland*  
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

JAMES ERIC MANSFIELD,

Petitioner,

v.

DAVID DORMIRE,

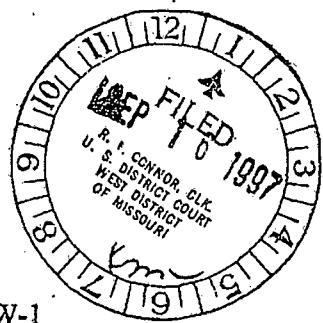
Respondent.

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SEP 18 '97

MISSOURI  
ATTORNEY GENERAL

No. 96-0443-CV-W-1



**ORDER**

Pending before the Court is James Mansfield's petition for habeas corpus relief under 28 U.S.C. § 2254. For the reasons set forth below, Mansfield's petition is DENIED.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Mansfield seeks relief from his conviction in the Circuit Court of Jackson County, Missouri for the murder of Mark Trader. Mansfield alleges the following factual basis to support his petition. In the fall of 1991, Mark Trader was cheated out of \$4,000 in a botched drug deal. Out of fear of those to whom he owed a debt from the drug deal, he went into hiding. In January 1992, Trader emerged from hiding. Later that month, he was at Papa Leone's, a deli and bar in Independence, Missouri owned by Dave Couzens. Dave Couzens, whom Trader owed money--including money from the botched drug deal--called Trader into a back office to discuss Trader's debts. At some point, Couzens called Clayton Howerton, Jr., whom Trader also owed money, to the back office because

"the numbers didn't jive." Trader emerged from the meeting in a nervous state and told two people that "it might get dirty around here."

On April 27, 1992, Trader persuaded his brother, John Trader, to pay off the drug debt and other debts that Trader owed Couzens. John Trader wrote a check for \$5,000 and gave it to Dave Couzens. Two days were required for the check to clear.

On the night of April 28, 1992, Mark Trader and others gathered at Papa Leone's. Among those present were John Hertlien, Howerton, Dave Couzens, Jon Couzens, and Mansfield. That night, both Jon Couzens and Howerton assaulted Trader. A cab picked up Trader from the deli at about 1:40 a.m. Mansfield and Hertlien drove off in Mansfield's car in the opposite direction. The cab dropped Trader off at his apartment. Scott Blanz, the cab driver, saw Trader with another man at the front door of the apartment before he drove off. Blanz described the man as being white with long curly hair and a mustache, wearing a white, long-sleeved, collared shirt. According to Mansfield, this description depicts Howerton.

At around 2:10 a.m., Hertlien and Mansfield returned to Papa Leone's, then stopped for gas, and then returned to Papa Leone's where Mansfield dropped off Hertlien. Mansfield returned home at around 2:20 a.m. and was seen there by his mother. Trader was stabbed to death at approximately 2:34 a.m. After Mansfield had dropped off Hertlien, Hertlien left the deli and arrived at the residence of Angela Cascone, Hertlien's cousin, at around 3:30 a.m. Hertlien and another person entered Cascone's home, used her bathroom, borrowed a t-shirt, and left. Cascone never saw who was with Hertlien.

Hertlien related a different version of the story at trial. Essentially, he testified that he left the deli with Mansfield in Mansfield's car at a high rate of speed and beat the taxi cab to Trader's

apartment. Hertlien testified that Mansfield had a Gerber Gator knife with him, confronted Trader when he arrived, and returned to the car covered with blood. Hertlien further testified that the two drove back to Papa Leone's, briefly stopped at a gas station, and searched for a place where Mansfield could clean up. He testified that he and Mansfield went to Angela Cascone's home, and Mansfield used her bathroom.

Later in the morning of April 29, police Sergeant John Passiglia contacted Hertlien by telephone, inquired about the murder, picked up Hertlien, and drove him to the Independence Police Department to speak with a homicide detective, Marty Cavanah. While at the police department, Hertlien implicated Mansfield in the murder. Mansfield was arrested later that morning. Cavanah arranged for Hertlien--equipped with a tape recorder--to be placed in a cell next to Mansfield for the purpose of eliciting incriminating statements from Mansfield. Hertlien's statements were also recorded before Mansfield was placed in the adjacent cell. Mansfield characterizes Hertlien's statements as bragging about his involvement with Trader's murder and an admission that Hertlien stabbed Trader with two people helping him. After Mansfield was placed in the adjacent cell, Mansfield and Hertlien conversed. Mansfield made no incriminating statements, although Hertlien did, according to Mansfield. Additionally, Hertlien requested that other inmates assault Mansfield and said he would get Mansfield "through the bars" if he had the opportunity.

In the Circuit Court of Jackson County, Missouri, a jury returned a verdict against James Mansfield for murder in the first degree and for armed criminal action for the stabbing death of Mark Trader. He was sentenced to concurrent terms of life imprisonment. Mansfield is presently incarcerated at the Potosi Correctional Center located at Mineral Point, Missouri.

Mansfield sought postconviction relief under Missouri Rule of Criminal Procedure 29.15 with

the motion court.<sup>1</sup> In that proceeding, Mansfield asserted that his trial counsel was ineffective on numerous grounds; his trial counsel had a conflict of interest; and the prosecuting attorney made false statements and failed to investigate possible alibi witnesses. See Order Overruling Movant's Motion to Vacate, Set Aside or Correct Judgment of Convictions, CV93-18366. After an evidentiary hearing, the court denied Mansfield's petition. Mansfield appealed both the judgment of conviction (the "direct appeal") and the denial of Rule 29.15 postconviction relief. On appeal, Mansfield complained that the trial court did not permit him to present evidence that other persons had a motive to kill the victim. He also complained that the motion court should have granted his Rule 29.15 motion for postconviction relief because he demonstrated that his trial counsel was ineffective and had a conflict of interest. The Missouri Court of Appeals consolidated the appeals and affirmed the lower court on both the judgment of conviction and the denial of postconviction relief, stating that Mansfield had not properly preserved any of his points for review. State v. Mansfield, 891 S.W.2d 854, 855 (Mo. Ct. App. 1995). Subsequently, Mansfield filed a petition with the Missouri Court of Appeals, requesting that it recall its mandate that affirmed the trial court's rulings. The court summarily denied the petition without opinion. On April 22, 1994, Mansfield filed a petition for habeas corpus relief in federal court pursuant to 28 U.S.C. § 2254.<sup>2</sup>

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<sup>1</sup> Rule 29.15 permits a convicted felon to challenge his conviction or sentence if either violates state law or the United States constitution. See Mo. R. Crim. P. 29.15(a).

<sup>2</sup> On April 24, 1996--two days after Mansfield filed his petition--President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). Neither party argued that any portion of the AEDPA should apply to Mansfield's petition.

## II. HABEAS CORPUS RELIEF UNDER 28 U.S.C. § 2254

Section 2254 authorizes a court to review a state-court judgment only on the ground that petitioner is in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254. If state criminal defendants procedurally default on their federal claims in state court, however, habeas review is precluded in federal court. The concept of procedural default arises out of the adequate and independent state grounds doctrine. The independent and adequate state ground doctrine applies to bar federal habeas corpus relief when a state court declined to address a defendant's federal claims because the defendant had failed to meet a state procedural requirement. Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 2554, 115 L. Ed. 2d 640 (1991). Procedural default may occur in one of two ways. First, the petitioner may fail to raise his federal claims in state court by failing to raise fairly and properly a federal issue on direct appeal or postconviction review. Alternatively, the state court may rely on a state procedural bar as an independent basis for its disposition of the case.

If the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those federal claims, or to be interwoven with those claims, a federal court may address the petition. Id. Conversely, a federal claimant's procedural default will preclude federal habeas review if the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Id.; Harris v. Reed, 489 U.S. 255, 262, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989).

Even if a federal court finds an adequate and independent ground for procedural default, however, federal habeas review of federal claims will not be barred if the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," or demonstrate that failure to consider

the federal claim will result in a "fundamental miscarriage of justice," Harris, 489 U.S. at 262, 109 S. Ct. at 1043, or if petitioner can make a showing of actual innocence under the standard established in Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397(1986) and Schlup v. Delo, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Mansfield challenges his conviction on four constitutional grounds: (1) his trial attorney's ineffective assistance violated the Sixth Amendment; (2) his trial attorney represented him despite a conflict of interest, which violated the Sixth Amendment; (3) he was not properly indicted by a grand jury, in violation of the Fifth Amendment; and (4) the evidence used to convict him was so deficient that it violated his right to due process. Each is discussed below.

### **III. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL**

Mansfield first alleges that his attorneys' performance during trial fell below the constitutional standard set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Mansfield specifies nine instances of error by his trial counsel to support the Strickland claim.

#### **A. Procedural Default**

The government argues that Mansfield has procedurally defaulted on his Strickland ineffectiveness claim, which precludes this Court from reviewing the claim in a habeas corpus proceeding. Mansfield defaulted, the government argues, because the Missouri Court of Appeals found that the claim was not preserved for appeal because Mansfield's appellate attorney failed to comply with Missouri Rule of Criminal Procedure 30.06(d), which governs the contents of appellate briefs.

Rule 30.06(d) requires three things: (1) a statement of the action or ruling complained of; (2) why the ruling was erroneous; and (3) wherein the evidence, the lack of it, or other matters support the position that the appellant asserts the trial court should have taken. Mo. R. Crim. P. 30.06(d); State v. Nenninger, 872 S.W.2d 589, 589 (Mo. Ct. App. 1994), cert. denied, 513 U.S. 1022, 115 S. Ct. 589, 130 L. Ed. 2d 503 (1994). Failure to substantially comply with Rule 30.06 forfeits appellate review of non-complying issues. Nenninger, 872 S.W.2d at 589. The Missouri Court of Appeals found that Mansfield's appellate brief failed to comply with Rule 30.06(d) because it inadequately phrased and argued the points relied on:

Rule 30.06(d) says, "The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed[.]" Although in arguing his point Mansfield makes clear that he is complaining of the motion court's denial of his Rule 29.15 motion for postconviction relief, his point relied on does not mention the motion court at all and leaves us to assume that this is the case ... Mansfield does not allege, as he must, that the motion court's rulings were clearly erroneous.

State v. Mansfield, 891 S.W.2d at 856.

Mansfield seeks to overcome the State's assertion of procedural bar to his ineffectiveness claim by arguing the following: (1) Missouri Rule of Criminal Procedure 30.06(d) is not an independent and adequate state bar; (2) his appellate counsel's ineffective assistance constitutes "cause" and "prejudice" for the procedural default; (3) the last state court rendering judgment did not rely on a state procedural bar but, instead, ruled on the merits; (4) he is actually innocent under the standard set forth in Murray v. Carrier. Because the Court finds that Mansfield's first argument successfully overcomes the procedural bar, the Court will not address the remaining three theories.

A claim that is procedurally defaulted under state law is barred from federal review only if the

state procedural rule is both (1) firmly established and (2) regularly followed. Oxford v. Delo, 59 F.3d 741, 744 (8th Cir. 1995), cert. denied, 116 S. Ct. 1361, 134 L. Ed. 2d 528 (1996). Federal review is not barred where a state procedural rule is inconsistently enforced or the state court undertakes a novel application of the rule. Id. Mansfield argues that Missouri Rule of Criminal Procedure 30.06(d) is not an adequate and independent state ground for barring federal habeas review because Missouri courts have not regularly followed Rule 30.06(d). Consequently, he argues that the Missouri Court of Appeal's judgment of procedural default under this Rule does not bar consideration of the merits of his claim of ineffective assistance of trial counsel in federal court..

A review of Missouri law demonstrates that Rule 30.06 is not consistently applied to bar review of criminal defendants' claims. Some courts strictly apply the Rule. See, e.g., Nenninger, 872 S.W.2d at 589; State v. Jenson, 914 S.W.2d 864, 865 (Mo. Ct. App. 1996); State v. Berry, 916 S.W.2d 389, 397 (Mo. Ct. App. 1996); State v. Coomer, 888 S.W.2d 356, 361 (Mo. Ct. App. 1994). Others recognize their authority to strictly apply the Rule but, nonetheless, decline to enforce it in a particular case. See, e.g., State v. Rehberg, 919 S.W.2d 543, 548 (Mo. Ct. App. 1995) (reaching the merits of appellant's claim after stating the following: "It is true that the court may deny appellate review for failure to comply with 30.06(d). However, in criminal cases, when appellant's arguments make clear the grounds for alleged error, it is preferable to decide cases on the merits to avoid punishing appellant for the shortcomings of appellate counsel."); State v. Sloan, 756 S.W.2d 503, 505 n.2 (Mo. 1988) (en banc) ("While it is apparent that the point does not state 'wherein and why' the trial court erred, appellant's arguments make clear the grounds for alleged error. Since it is this Court's policy to decide cases on the merits whenever possible and to avoid punishing innocent parties for the shortcomings of counsel on appeal, particularly in criminal cases, we treat appellant's

point of error as if properly raised." (internal quotations omitted)), cert. denied, 489 U.S. 1040, 109 S. Ct. 1174, 103 L. Ed. 2d 236 (1989); State v. Tivis, 884 S.W.2d 28, 29 n.2 (Mo. Ct. App. 1994) (same); City of Springfield v. Waddell, 904 S.W.2d 499, 502 (Mo. Ct. App. 1995) (same). Arguably, these cases indicate only that Missouri courts consistently apply an exception to Rule 30.06(d), an exception which permits a Missouri court to review the merits of a criminal appellant's claim despite the procedural default when the appellant's arguments make clear the grounds for alleged error. A state court's consistent application of an exception to a procedural rule is not a basis for concluding that the state court inconsistently applies its procedural rule. See, e.g., Prikoda v. McCaughtry, 910 F.2d 1379, 1384 (7th Cir. 1990) (stating that a state court's consistent application of an exception to a procedural rule does not defeat the courts' right to stand on its procedural rules on collateral attack); Rogers-Bey v. Lane, 896 F.2d 279, 284 (7th Cir. 1990) (Manion, J., concurring); Phillips v. Lane, 787 F.2d 208, 211-15 (7th Cir. 1986).

Even assuming that Missouri courts, in fact, consistently apply such an exception in most cases, the Missouri Court of Appeals applied the exception in a novel way in this case. The Missouri Court of Appeals expressly acknowledged that the argument section of Mansfield's brief made it clear that he was complaining of the motion court's denial of his Rule 29.15 motion for postconviction relief. See Mansfield, 891 S.W.2d at 856 (stating that "in arguing his point[,] Mansfield makes clear that he is complaining of the motion court's denial of his Rule 29.15 motion for postconviction relief"). The court refused to review the merits of his claim solely because his point relied on "does not mention the motion court at all and leaves [the court] to assume that this is the case." Id. This refusal inconsistently applied the exception to the Rule 30.06 bar, assuming such an exception is solidly established. The Court concludes, therefore, that Rule 30.06 is not an adequate state ground

for procedurally barring Mansfield's federal claims in federal court because Missouri courts do not consistently apply the Rule nor its arguable exception. Consequently, the Missouri Court of Appeals' judgment of procedural default under this Rule does not bar federal habeas review of the merits of Mansfield's claim of ineffective assistance of trial counsel.

#### B. Merits of the Claim

Mansfield contends that his attorney's performance at trial violated the standards enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1985). In Strickland, the Supreme Court established a two-part test for ineffective assistance of counsel claims. First, a habeas petitioner must show that his or her counsel's performance was deficient; second, the habeas petitioner must show that the deficient performance prejudiced his or her defense. Johnson v. Lockhart, 921 F.2d 796, 799 (8th Cir. 1990) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). The first part of the test requires a court to review counsel's performance, considering all of the surrounding circumstances. Id. Judicial scrutiny of counsel's performance is highly deferential because of the risks attending the deceptive clarity of hindsight. Id. (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). If a court determines that counsel's performance fell below an objective threshold, then the court proceeds with the second part of the Strickland test. To satisfy this part, a habeas petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). In this case, Mansfield alleges nine errors to support his claim for ineffective assistance of counsel. Each is discussed below.

1. Failure to properly develop and present evidence to show that third parties were responsible for Trader's murder and consequent failure to make requisite offer of proof at trial.

At trial, Mansfield sought to show that he was at home at the time of Trader's murder and that, consequently, he could not have murdered Trader. In anticipation of such a defense, the State brought a motion in limine based on State v. Umfrees, 433 S.W.2d 284 (Mo. 1968) to exclude any evidence that third parties had a motive and opportunity to murder Trader. Umfrees precludes defendants from introducing such evidence unless the defendant can offer proof that directly connects the other person to the crime and tends clearly to exonerate the defendant. Id. at 287. Umfrees adopted the standard set forth in 22A C.J.S. Criminal Law § 622b for admitting such evidence: "The evidence, to be admissible, must be such proof as directly connects the other person with the *corpus delicti*, and tends clearly to point out someone besides accused as the guilty person. Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." Id. 287-88 (quoting 22A C.J.S. Criminal Law § 622b). The court granted the State's motion in limine because Mansfield's counsel did not make a sufficient offer of proof under the Umfrees rule. Further, under Missouri law, a motion in limine preserves nothing for review. Mansfield, 891 S.W.2d at 855. A trial court's ruling in limine is interlocutory and is subject to change during a trial. Id. The proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the proponent must make an offer of proof. Id. During trial, the State objected to the introduction of evidence designed to show that third-parties had a motive to kill Trader. Mansfield, however, failed to follow through with the requisite offer of proof as to how the witness would

answer his questions. He failed to preserve the issue for review. Id.

Here, Mansfield argues that his counsel was ineffective for failing to support his alibi defense by failing to make a sufficient offer of proof under Umfrees and thereby failing to develop and present evidence to the jury that Howerton, Hertlien, and Jon Couzens were the actual murderers. Mansfield contends that, if his counsel would have developed and presented evidence about the relationship among Trader, Howerton, Hertlien, and Jon Couzens, he would have had a sufficient basis for overcoming the State's motion in limine to exclude any evidence that third parties, and not Mansfield, murdered Trader. The evidence that Mansfield proffers to connect the others to the murder, however, either does not directly link the other individuals to the crime or does not tend to clearly exonerate Mansfield.

Mansfield first asserts that his counsel should have argued that Hertlien could be directly linked to the crime with evidence that Hertlien bragged about his involvement in Trader's murder and admitted that he stabbed Trader and should have argued that Howerton could be directly linked to the crime by arguing that Blanz's description of the man he saw at Trader's apartment fit the physical description of Howerton. Linking those men to the murder, however, does not negate Mansfield's link to the murder. The evidence suggested that Howerton, Hertlien, and Mansfield were involved in the murder. See, e.g., Pet. Ex. F. Because the evidence did not tend clearly to exonerate Mansfield, Mansfield's counsel could not have satisfied Umfrees. Consequently, his failure to do so was not constitutionally deficient. Furthermore, the evidence that Hertlien was bragging about his involvement with the murder consists of the audio tape recorded while Hertlien was in the cell with Mansfield attempting to provoke Mansfield to say something incriminating. Thus, the statements in the tape are extremely unreliable.

Mansfield also argues that his counsel unreasonably failed to make a sufficient offer of proof and present and develop evidence that Trader owed some of these individuals money as the result of a botched drug deal and that Jon Couzens and Howerton assaulted Trader earlier in the night. This evidence, however, does not directly connect Howerton and Couzens to the murder and did not tend to clearly exonerate Mansfield. See State v. Williams, 575 S.W.2d 838, 840 (Mo. Ct. App. 1978) ("Evidence which merely demonstrates that a person at the scene of the crime has previously been involved in fights with the defendant does not constitute evidence of an act directly connected with the crime itself."). Mansfield's counsel could not have satisfied Umfrees. Consequently, his failure to do so was not constitutionally deficient.

## 2. Failure to object to playing audio portion of a videotape

Mansfield next contends that his counsel was ineffective for failing to argue for the exclusion of the audio portion of State's exhibit 54. Exhibit 54 was a videotape of Hertlien "re-creating" the alleged events that occurred on the night of Trader's murder. Mansfield's counsel initially argued that the jury should not be permitted to hear the audio portion of the tape because it improperly bolstered Hertlien's live testimony. After Hertlien's testimony on direct examination, however, Mansfield's counsel withdrew his objection and acquiesced to the playing of the audio. At the hearing on Mansfield's motion for postconviction relief before the state motion court, Mansfield's counsel testified that he believed that playing the audio portion of the videotape would assist the defense for several reasons. See Resp. Ex. D at 126 (delineating counsel's reasons).

Under the Strickland standard discussed above, decisions related to trial strategy are virtually unchallengeable. Bowman v. Gammon, 85 F.3d 1339, 1345 (8th Cir. 1996) (citing Strickland, 466

U.S. at 690, 104 S. Ct. at 2066). Here, the record establishes that counsel for Mansfield recognized the pitfalls of the audio portion of the videotape and made tactical trial decisions in the interests of his client. Because counsel's trial strategy decisions were objectively reasonable, Mansfield's ineffective assistance claim is without merit. See James v. State of Iowa, 100 F.3d 586, 590 (8th Cir. 1996) ("Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful.").

**3. Erroneously stipulating that the playing of the audio portion of the videotape would not open the door to evidence that third-parties committed the murder**

The videotape contained information about the events that occurred at Papa Leone's before the murder. Mansfield's counsel made a tactical judgment that giving the jury an opportunity to hear this evidence would allow it to consider the possibility that someone else may have committed the murder. As noted above, the record establishes that counsel for Mansfield recognized the pitfalls of the audio portion of the videotape and made tactical trial decisions in the interests of his client. However, the trial court had previously granted the State's motion in limine to exclude evidence that third parties may have committed the crime. Consequently, if Mansfield's counsel wished the jury to hear the videotape, he had no alternative but to stipulate that the tape would not open the door to the third-party-evidence. The stipulation was reasonable in light of his strategy to smuggle in some of the excluded evidence relating to the events at Papa Leone's through the audio portion of the videotape. Accordingly, the Court concludes that counsel's trial strategy decisions were objectively reasonable.

#### 4. Failure to properly impeach John Hertlien testimony and credibility

Mansfield next argues that his counsel improperly failed to impeach Hertlien's testimony and improperly failed to introduce evidence to impeach Hertlien's credibility by failing to use the tape recorded conversation between Mansfield and Hertlien during cross-examination. As mentioned above, Hertlien secretly tape recorded a conversation with Mansfield when Hertlien was placed in a jail cell next to Mansfield in hopes of eliciting an incriminating statement from Mansfield. Mansfield states that Hertlien admitted to stabbing Trader on the tape and that such an admission could have cast doubt on the veracity of Hertlien's testimony implicating Mansfield. For at least two reasons, Mansfield's counsel was not ineffective for declining to use the tape on cross-examination of Hertlien.

The Court construes Mansfield's first argument as asserting that his counsel should have asked Hertlien whether he had ever told anyone that he had stabbed Trader. If Hertlien denied making such a statement, the question would have laid the proper foundation for impeaching Hertlien's testimony through his prior inconsistent statement on the tape recording. Such a question would have been inappropriate, however, because the trial court had ruled that Mansfield could not introduce evidence that third parties were responsible for Trader's murder. Further, even if Hertlien were permitted to answer the question, the tape recording would have been inadmissible to contradict him. Contradiction through extrinsic evidence is not allowed on collateral matters. Cline v. William H. Friedman & Associates, Inc., 882 S.W.2d 754, 760 (Mo. Ct. App. 1994); State v. Foster, 854 S.W.2d 1, 8 (Mo. Ct. App. 1993). When the fact in dispute is of no material significance in the case or is not pertinent to the issues as developed, the matter is collateral. Cline, 882 S.W.2d at 8. The test for determining whether a matter is collateral hinges on whether the party seeking to introduce it for purposes of contradiction would be entitled to prove it as a part of his case. Id. The general rule is

that an opposing party is bound by a witness' answers elicited on cross-examination with respect to collateral matters and will not be permitted to introduce extrinsic evidence to refute the answers. Id. Here, the tape recording of Hertlien stating that he was involved in the murder was collateral to the issues at trial because the trial court precluded Mansfield from proffering evidence that a third party committed the murder. As a result, the court would have excluded the tape recording because it was extrinsic evidence that would not have served any purpose independent of mere contradiction of Hertlien.

Mansfield next argues that his counsel should have used the tape recording to impeach Hertlien's credibility by showing hostility toward Mansfield. During the postconviction proceeding in state court, the State argued that the tape or its transcript would have been inadmissible if offered by Mansfield during the cross-examination of Hertlien because it was hearsay. Under Missouri law, a hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and which depends upon the veracity of the statement for its value. State v. Skillicorn, 944 S.W.2d 877, 884 (Mo. 1997) (en banc). Such statements are generally inadmissible unless they fall within a recognized exception to the hearsay rule. Id. Here, the tape recording contained out-of-court statements by Hertlien. However, Mansfield argues that the statements should have been admitted, not for the truth of the matters asserted, but to impeach Hertlien's credibility by showing that he was biased against or hostile to Mansfield and thus had a motive to lie. See State v. McGee, S.W.2d 321, 327 (Mo. Ct. App. 1988) (indicating that evidence that is substantively inadmissible may be admitted for impeachment purposes if relevant to show bias or interest). However, Hertlien's statements on the tape are exceptionally unreliable to show hostility or bias because Hertlien knew he was being taped and was trying to provoke Mansfield to say something incriminating. The trial court would have

likely excluded it if offered and Mansfield's counsel was not unreasonable for declining an attempt to offer it. Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. Barnes v. United States, 859 F.2d 607, 608 (8th Cir. 1988). A review of the thirty-six pages of the transcript of Hertlien's cross-examination convinces the Court that counsel's performance was not constitutionally infirm.

##### **5. Failure to call twelve alibi witnesses**

Mansfield next argues that his counsel was ineffective for failing to call twelve witnesses who could have supported his alibi. After reviewing Mansfield's allegations as to what these individuals would testify, the Court agrees with the findings and conclusions of the state court in the postconviction proceeding and concludes that Mansfield's counsel engaged in reasonable trial strategy in declining to call them and that Mansfield was not prejudiced by the absence of their testimony.

##### **6. Failure to introduce police photos in rebuttal to the State's theory that Mansfield destroyed all of the evidence**

At trial, the State argued that it could present no physical evidence linking Mansfield to the murder because he had sufficient time to destroy the bloody clothes, discard the knife, and wash his car which may have been stained by blood. The State asked the jury to consider the fact that Mansfield's car mats were found in his trunk and were damp. Mansfield argues that his counsel was ineffective for failing to introduce and highlight photographs of his car that showed mud on his tires. He argues that the photographs proved that he did not wash his car after the murder because dried mud could be seen on the tires and in the interior of the car. If the car had been washed after the

murder, he argues, the car would have been spotless or the mud would have been wet. First, photos of the car were admitted into evidence and were available to the jury. Furthermore, Mansfield testified that he washed his car on the day before the murder, not the day after the murder. Thus, the jury was apprised of Mansfield's explanation for the wet floor mats. Finally, the argument based on the photographs is not robust and would have supported Mansfield's case in only a minor way. Therefore, his counsel's strategic decision to decline to highlight the mud on the tires and in the interior of the car was objectively reasonable and not prejudicial.

7. **Failure to object to the State's improper questioning of Mansfield on cross-examination**

Mansfield next argues that his counsel was unreasonable for failing to object to the State's improper questioning of him on cross-examination. On cross-examination, the prosecutor questioned Mansfield regarding the testimony of the State's witnesses. On approximately thirty occasions, the prosecutor asked Mansfield whether the discrepancies between his testimony and the testimony of the State's witnesses meant that the State's witnesses were lying. Mansfield claims that this repeated question forced him to impliedly call the other witnesses "liars" to defend his innocence, and that this in turn implied that the prosecutor was calling him a liar. He argues that placing him in that situation was improper and that his counsel should have objected to the prosecutor's method of cross-examination. See U.S. v. Williams, 897 F.2d 1430, 1432 (8th Cir. 1990) (citing U.S. v. Peyro, 786 F.2d 826 (8th Cir. 1986)). After careful review of the questioning, the Court concludes that the references were directed to contradictions in the witness' testimony and that the prosecutor did not opine that any witness was lying. See Peyro, 786 F.2d at 831 ("Statements by the prosecutor such

as, 'The man is an obvious liar,' have no place in a criminal trial."'). Consequently, even if Mansfield's counsel was unreasonable in failing to object, no prejudice occurred. See, e.g., Jenner v. Class, 79 F.3d 736, 741 (8th Cir. 1996).

**8. Failure to object to improper questioning of Bertha Vollmer and closing argument relating to Vollmer's testimony**

Mansfield argues that his counsel was ineffective for failing to preserve his objection to the State's examination of his mother, Bertha Vollmer, and the related closing argument which precluded him from arguing the issue in the motion for new trial. On direct examination, Vollmer testified that Mansfield could not have murdered Trader because she saw him at home at the time the murder took place. On cross, the prosecutor began to elicit testimony from Vollmer that she never told the police that Mansfield was at home at the time of the murder. Mansfield's counsel objected. He claimed that the prosecutor's question was asked in bad faith because the prosecutor knew that Mansfield was appointed counsel shortly after his arrest and that his counsel became the spokesman for the family. The trial court permitted the prosecutor to re-phrase the question. Vollmer testified that she did not go to the police and that "I had hired a lawyer and I assumed a lawyer would take care of that for me. The police never contacted me or I would have told them." TR. at 1297, ln. 21-23. The prosecutor also noted this in the closing argument. The prosecutor's question and his statements in closing argument were not improper. The prosecutor had a good faith basis for asking the question because there was no record of Vollmer informing the police that Mansfield was at home with her at the time of the murder. Mansfield's counsel was not ineffective for failing to preserve an objection to a proper question posed by the prosecutor. Furthermore, if Vollmer's testimony needed to be put in context, that

could have been accomplished on re-direct. Instead, Vollmer herself offered the context by stating why she did not go to the police, thus dispensing with the need for re-direct. Accordingly, Mansfield's counsel's conduct was objectively reasonable.

#### **9. Failure to cross examine and impeach Joshua Trader**

Joshua Trader, the twelve-year-old son of the victim, testified on direct examination that he saw Mansfield at Papa Leone's on the night of April 28, 1992 and testified to what Mansfield had been wearing. Mansfield's counsel did not cross-examine Joshua Trader. At the hearing during the postconviction proceeding in state court, Mansfield's counsel testified that he chose not to cross-examine Joshua Trader, whom he found to be a frail child, because he feared that it would generate sympathy for Joshua and alienate himself and Mansfield from the jury. He testified that he believed that this danger outweighed any benefits from cross-examining Joshua Trader. The defense counsel's choice to not cross-examine Joshua Trader was reasonable trial strategy and not a basis for a finding of ineffectiveness.

#### **C. Conclusion**

Based on the forgoing, the Court concludes that the performance of Mansfield's trial counsel was not constitutionally ineffective. In each instance discussed above, Mansfield failed to establish either that his counsel's performance was deficient or that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different, or both. Accordingly, Mansfield's claim of ineffective assistance of counsel does not provide a basis for relief under 28 U.S.C. § 2254.

#### **IV. CONFLICT OF INTEREST IN VIOLATION OF THE SIXTH AMENDMENT**

Mansfield argues that his trial counsel's representation of him violated the Sixth Amendment because he represented Mansfield despite a conflict of interest. The alleged conflict arises because a partner in Mansfield's counsel's law firm formerly practiced law with John Trader and remained his good friend. John Trader is the victim's brother who wrote a check and gave it to Dave Couzens to pay off the victim's drug debt.

##### **A. Procedural Default**

The government argues that Mansfield has procedurally defaulted on his conflict of interest claim, which precludes this Court from reviewing the claim in a habeas corpus proceeding. Mansfield defaulted, the government argues, because the Missouri Court of Appeals found that the claim was not preserved for appeal because Mansfield's appellate attorney failed to comply with Missouri Rule of Criminal Procedure 30.06(d). The State advocated this same position against Mansfield's ineffective assistance of counsel claim and, accordingly, is rejected on the same ground: Rule 30.06 is not an adequate state ground to procedurally bar federal habeas review in the circumstances of this case.

##### **B. Merits of the Claim**

The Sixth Amendment right to counsel embraces the right to representation that is free from conflicts of interest or divided loyalties. U.S. v. Acty, 77 F.3d 1054, 1056 (8th Cir. 1996). Counsel breaches the duty of loyalty to a client when burdened with an actual conflict of interest. U.S. v. Flynn, 87 F.3d 996, 1001 (8th Cir. 1996). The mere potential for a conflict, however, is insufficient

to demonstrate a violation of a defendant's Sixth Amendment rights. Acty, 77 F.3d at 1056 n.3.<sup>3</sup> In determining whether a conflict of interest exists, substantial weight is given to defense counsel's representations. Flynn, 87 F.3d at 1001.

At the hearing in the post-conviction proceeding, Mansfield's counsel testified that he told Mansfield that his law partner was friends with the victim's brother and that this might have the appearance of a conflict. He also testified that he had a passing acquaintance with John Trader but that the acquaintance never interfered with his preparation or trial strategy. Moreover, the record shows that the defense counsel rigorously advanced Mansfield's case, conducted numerous depositions and interviews, and effectively cross-examined a number of the State's witnesses. Consequently, the Court finds that Mansfield has failed to demonstrate an actual conflict of interest.

## **V. FAILURE TO PROPERLY INDICT BY A GRAND JURY**

Mansfield argues that he was denied his Fifth Amendment right to indictment by a grand jury. Mansfield was indicted in state court under Mo. Rev. Stat. § 565.020.1, which states the following: "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." The indictment charges Mansfield under section

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<sup>3</sup> Although a mere potential for a conflict is insufficient to demonstrate a violation of a defendant's Sixth Amendment rights, a potential conflict of interest may form the basis of an ineffective assistance of counsel claim under the two-pronged test of Strickland. Acty, 77 F.3d at 1056 n.3 (citing Pool v. Armontrout, 852 F.2d 372, 375 (8th Cir. 1988) ("Absent an actual conflict of interest, Pool must establish that his counsel was ineffective under the two-pronged Strickland test."), cert. denied, 489 U.S. 1023, 109 S. Ct. 1149, 103 L. Ed. 2d 208 (1989)). A defendant asserting a Strickland claim of ineffective assistance due to a potential conflict would receive relief only by showing both that (1) her attorney had a potential conflict of interest and (2) the potential conflict prejudiced her defense. Id. Here, the Court already considered and rejected Mansfield's Strickland claim and must now only determine whether an actual conflict of interest existed.

indictment by a grand jury and no basis for habeas relief.<sup>4</sup>

## VI. INSUFFICIENT EVIDENCE TO CONVICT IN VIOLATION OF DUE PROCESS

Finally, Mansfield argues that the evidence at his trial was constitutionally insufficient to support his conviction. He argues that the grand jury in the state proceeding returned an indictment that charged Mansfield with murder by shooting. He further argues that the indictment was improperly amended to charge him with murder by stabbing. Because the amendment was improper, he could not properly be convicted based on evidence that he committed murder by stabbing. Accordingly, he argues that the State's evidence, which was introduced to prove that Mansfield murdered Trader by stabbing him, was constitutionally insufficient to convict him of murder by shooting.

### A. Procedural Default

The government argues that Mansfield has procedurally defaulted on his insufficient evidence claim, which precludes this Court from reviewing it in a habeas corpus proceeding. Mansfield defaulted because his appellate counsel failed to raise the issue on direct review in the Missouri Court of Appeals. See Farrell v. Lane, 939 F.2d 409, 411 (7th Cir. 1991) (stating that a habeas petitioner

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<sup>4</sup> Mansfield's argument is better understood as a claim that the State violated his Sixth Amendment right to reasonable notice of the charge against him, which is applicable to the states through the Fourteenth Amendment. See Franklin v. White, 803 F.2d 416, 417 (8th Cir. 1986). Under this theory, however, if a state defendant is actually notified of the charge, the due process notice requirements may be met, even if the indictment is deficient. Id. In this case, even if Mansfield would have better-tailored his argument, it would have been unsuccessful because the record demonstrated that he had ample notice of the charge against him.

“forfeits the right to raise an issue he failed to raise in direct or post-conviction review”). Mansfield advances several theories to overcome the procedural default: (1) his incarceration is fundamentally unjust; (2) he is actually innocent under the standard established in Murray v. Carrier; (3) the ineffective assistance of his trial or appellate counsel constitutes “cause” and “prejudice” for the default.

### **1. Fundamental unfairness**

Federal habeas review of federal claims will not be barred if the habeas petitioner can demonstrate that failure to consider the federal claim will result in a “fundamental miscarriage of justice.” Harris, 489 U.S. at 262, 109 S. Ct. at 1043. Here, Mansfield argues that the State’s custody of him is fundamentally unfair because the state trial court improperly amended the indictment, changing the method of the murder from shooting to stabbing. The record demonstrates, however, that Mansfield had ample notice of the charge against him and his attorney vigorously defended him against the charge of murder by stabbing. See Franklin v. White, 803 F.2d 416, 417 (8th Cir. 1986) (stating that, if a state defendant is actually notified of the charge against him, the due process notice requirements may be met, even if the indictment is deficient). Consequently, the Court concludes that the trial court’s decision to permit the State to amend the indictment does not render the State’s custody of Mansfield fundamentally unjust.

### **2. Actual innocence**

Mansfield argues that, even though he failed to raise the insufficiency of the evidence claim in the Missouri Court of Appeals, federal habeas review is not barred because he can make a showing

of actual innocence under the standards set forth in Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) and Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Mansfield's claim of innocence is procedural rather than substantive. Mansfield may obtain habeas review of his constitutional claim only if he falls within the "narrow class of cases implicating a fundamental miscarriage of justice." See Schlup, 115 S. Ct. at 860-61 (internal quotations and citations omitted). Mansfield's claim of innocence is offered only to bring him within this "narrow class of cases" but does not by itself provide a basis for relief. Id. at 861. Instead, his claim for relief depends on the validity of his insufficiency of the evidence claim. Id. Mansfield's claim of innocence is thus not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. Id.

If a petitioner such as Mansfield presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims. Id. To meet the gateway standard, the habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id. at 867 (quoting Carrier, 477 U.S. at 496, 106 S. Ct. at 2649-50). To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. Id. In assessing the adequacy of petitioner's showing, district courts are not bound by the rules of admissibility that would govern at trial. Id. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Id. To be credible, a claim of actual innocence requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence,

trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial. *Id.* at 865.

After carefully evaluating Mansfield's allegations and evidence, the Court concludes that Mansfield has failed to meet his burden of showing that it is more likely than not that no reasonable juror would have convicted him in light of the evidence that specific third-parties arguably had a motive to kill Trader. Except for his assertion that Blanz's description of the man at Trader's apartment fit Howerton and Hertlien's unreliable "admission" that he was involved in the murder, his allegations and evidence fail to directly link Hertlien, Jon Couzens, Howerton, and Dave Couzens to the murder. Further, linking those men to the murder does not negate Mansfield's link to the murder. Mansfield offers nothing analogous to reliable exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was excluded from trial. The Court concludes that Mansfield has not met his burden of showing actual innocence to excuse his procedural default.

### **3. Ineffective assistance of counsel establishes "cause"**

Mansfield argues that the ineffective assistance of his appellate counsel constitutes cause for his failure to raise his insufficiency of the evidence claim on direct appeal. Alternatively, he argues that his trial counsel's ineffective assistance of counsel establishes cause. He argues that if his trial counsel had objected to the State's motion to amend the indictment, his appellate counsel would have had no need to raise the insufficiency of the evidence claim on direct appeal. Thus, he argues that, because the grand jury returned an indictment for murder by shooting (not stabbing), his trial counsel was ineffective for failing to object to the amendment; his appellate counsel was ineffective, Mansfield argues, for failing to argue that the evidence was constitutionally insufficient to convict him of murder.

by shooting.

As stated above, Mansfield has no constitutional right to a grand jury indictment. Thus, his trial counsel's failure to object to the amendment of the indictment could not be constitutionally prejudicial unless the failure to object resulted in an unfair trial under the amended indictment. As discussed above, Mansfield was not only given ample notice of the elements required to prove the offense of murder by stabbing, he, in fact, presented a defense to murder by stabbing. He was not denied the constitutionally required notification of the elements to be proved. Inasmuch as no error occurred at trial, appellate counsel did not err by failing to recognize and raise the issue on appeal under the guise of a sufficiency of the evidence argument. Therefore, Mansfield has not established cause or prejudice for his failure to raise the insufficiency of the evidence claim because he has failed to show that he was denied the effective assistance of trial or appellate counsel.

#### **B. Merits of the Claim**

Because Mansfield has not offered a sufficient reason for overcoming his procedural default, the Court is precluded from reaching the merits of his claim of insufficiency of the evidence. Accordingly, habeas relief is inappropriate.

#### **VII. DUE PROCESS, EQUAL PROTECTION, AND SIXTH AMENDMENT**

Mansfield next challenges the trial court's exclusion of evidence, under State v. Umfrees, 433 S.W.2d 284 (Mo. 1968) (en banc), intended to show that others had a motive and opportunity to kill Trader. In a federal habeas petition, this Court may only review state evidentiary issues when the asserted error infringed a specific constitutional protection or was so prejudicial as to deny due

process. McDonald v. Bowersox, 101 F.3d 588, 596-97 (8th Cir. 1996). Mansfield argues that exclusion of the evidence violated his Fourteenth Amendment rights to Due Process and Equal Protection and his Sixth Amendment right to confront and cross examine his accusers. Specifically, he argues that, even if the Missouri Court of Appeals properly applied Umfrees to exclude the third-party evidence, the use of the Umfrees rule in his case violated his due process rights. His rights to equal protection were also violated, he argues, because “had petitioner been involved in a botched drug deal with the victim or assaulted the victim the night of the murder, the prosecution would have been allowed to present this evidence because it would be logically and legally relevant to the issue of whether he had a motive to kill the victim.” Pet. Second Am. Pet. at 3. Finally, he argues that the trial court’s ruling violated his right under the Sixth Amendment to confront and cross examine his accusers. Exclusion of the third-party evidence, he argues, prevented him from effectively impeaching the credibility of Howerton, Hertlien, and Jon Couzens and from persuading the jury that others perpetrated the murder. Respondent argues that Mansfield has procedurally defaulted on these claims because he failed to preserve them for direct appeal.

In the Eighth Circuit, a state appellate court’s review of a constitutional claim for plain error constitutes a ruling on the merits and thus, no procedural bar to federal habeas review of that claim exists. See Driscoll v. Delo, 71 F.3d 701, 712 (8th Cir. 1995). In this case, the Missouri Court of Appeals appears to have reviewed for plain error Mansfield’s claim that the trial court improperly applied Umfrees to exclude the third-party evidence. The Missouri Court of Appeals stated that the trial court made no “evident, obvious, and clear error” in its application of Umfrees. Mansfield, 891 S.W.2d at 855. However, Mansfield did not argue that the Umfrees rule, even when applied correctly, violated his right to due process, equal protection, and to confront his accusers. Therefore,

the Missouri Court of Appeals did not review this question for plain error. Instead, it reviewed for plain error only whether the trial court properly applied the Umfrees rule. Consequently, Mansfield procedurally defaulted on this claim. Mansfield has not stated sufficient reasons to overcome the procedural bar and, therefore, the Court does not reach the merits of this claim.

### **VIII. CUMULATIVE EFFECT OF ERRORS RENDERED MANSFIELD'S CONVICTION FUNDAMENTALLY UNFAIR**

In the Eighth Circuit, errors that are not unconstitutional individually cannot be added together to create a constitutional violation. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (citing Girtman v. Lockhart, 942 F.2d 468, 474-75 (8th Cir. 1981), cert. denied, 117 S. Ct. 395, 136 L. Ed. 2d 310 (1996)). Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief. Id.; Pryor v. Norris, 103 F.3d 710, 714 n.6 (8th Cir. 1997). Notwithstanding the Eighth Circuit's rule, relying on Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), Mansfield argues that the cumulative effect of the trial court's errors coupled with the substandard performance of his trial counsel rendered his conviction fundamentally unfair in violation of the Sixth and Fourteenth Amendment.

In Kyles, the Supreme Court found that the prosecution had wrongfully withheld exculpatory evidence from the defense. Such misconduct may violate an accused's right to due process. See Kyles, 514 U.S. at 432, 115 S. Ct. at 1565. In evaluating such a due process claim, a court must determine whether there exists a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Kyles, 514 U.S. at 434, 115 S. Ct. at 1565. The Supreme Court stated that whether the prosecutor's failure to disclose favorable

evidence rises to the level of a due process violation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item-by-item. Kyle, 514 U.S. 436-37, 115 S. Ct. at 1567. In this case, there has been no allegation that the prosecutor wrongfully withheld favorable evidence from the defense. Further, as discussed above, the evidence was not excluded based on trial court error or on constitutionally ineffective assistance of trial counsel. Consequently, the Court finds that Mansfield's situation is not sufficiently analogous to that presented in Kyle. Therefore, the Court will follow the rule established by the Eighth Circuit Court of Appeals: Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief.

## IX. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Mansfield next argues that his appellate counsel was constitutionally ineffective. On direct appeal, Mansfield--through his attorney--submitted four points for review: (1) the trial court erroneously excluded evidence that Mansfield was not the only person with a motive to kill Trader; (2) the court erroneously denied his Missouri Rule of Criminal Procedure 29.15 motion for postconviction relief because he demonstrated that his trial counsel had a conflict of interest and (3) was ineffective; and (4) the cumulative effect of the errors committed by the trial court and the defense counsel rendered his conviction fundamentally unfair and violative of due process. See Mansfield, 891 S.W.2d at 855, 856. The Missouri Court of Appeals upheld the conviction and the denial of post-conviction relief. The court found that point one was not properly preserved because Mansfield's trial counsel had not made a proper offer of proof during trial to admit the third-party evidence. Points two and three were procedurally barred because Mansfield's appellate counsel failed

to comply with Missouri Rule of Criminal Procedure 30.06.<sup>5</sup> The court of appeals denied the fourth point on the following ground: "When an appellant fails to preserve contentions of error for review or to assert them in a manner consistent with the rules of appellate review, he has truly left us nothing to review--whether as a matter of direct review or as so-called cumulative error. The point is without merit." Id. at 856.

Here, Mansfield argues that his appellate counsel's performance was constitutionally deficient because he failed to comply with Rule 30.06; failed to incorporate the appropriate standard of review in presenting his ineffective assistance of trial counsel arguments;<sup>6</sup> failed to present all of Mansfield's viable factual and legal arguments for relief; and failed to make the pre-trial depositions of the state's witnesses part of the record on appeal under Rule 30.04(b).

In Zinzer v. State of Iowa, 60 F.3d 1296, 1299 (8th Cir. 1995), the Eighth Circuit Court of Appeals articulated the standard for evaluating the performance of an appellate attorney. To show ineffective assistance of direct appeal counsel, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance renders the result of the direct appeal unreliable or fundamentally unfair. Id. In evaluating counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of

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<sup>5</sup> As discussed above, Rule 30.06(d) requires three things: (1) a statement of the action or ruling complained of; (2) why the ruling was erroneous; and (3) wherein the evidence, the lack of it, or other matters support the position that the appellant asserts the trial court should have taken.

<sup>6</sup> Rule 29.15(k) states the standard of appellate review for postconviction proceedings under Rule 29.15. Subsection k states that appellate review of the trial court's action on a Rule 29.15 motion shall be limited to determining whether the findings and conclusions are clearly erroneous. See Mo. R. Crim. P. 29.15(k). Here, Mansfield argues that his appellate attorney did not phrase his ineffective assistance of counsel claims appropriately because he did not argue that the motion court's findings and conclusions were clearly erroneous.

reasonable professional assistance." Pollard v. Delo, 28 F.3d 887, 889 (8th Cir. 1994).

**A. Failure to Comply with Rule 30.06(d) and to Seek Review Under Rule 29.15(k)**

Mansfield first asserts that his appellate attorney's failure to comply with Missouri Rule of Criminal Procedure 30.06(d) and failure to argue that the lower court's findings on his ineffective assistance of counsel claims were clearly erroneous under Rule 29.15(k) constituted a denial of his constitutional right to effective assistance of appellate counsel. Although criminal defendants have a constitutional right to effective assistance of counsel on direct appeal, see Zinzer, 60 F.3d at 1299, there is no constitutional right to an attorney in state post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752-53, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991) (citing Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. Id. (citing Wainwright v. Torna, 455 U.S. 586, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982)). Accordingly, the pivotal issue here is whether Mansfield has a constitutional right to effective assistance of direct appeal counsel on any of his claims that were barred by Rule 30.06(d) or on the ineffective assistance claim for which Mansfield's appellate counsel did not seek review under Rule 29.15(k). Only points two, three, and four were barred by Rule 30.06(d). Only the ineffective assistance of trial counsel claim is challenged for failure to seek review under 29.15(k).

The resolution of this issue requires an examination of Missouri's hybrid procedural scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of post-conviction relief. Missouri Rule of Criminal Procedure 30.01(d) requires that a criminal defendant file his notice of appeal no later than ten days after the judgment or order appealed from

becomes final. A criminal defendant is permitted to challenge the constitutionality of his conviction in a state post-conviction relief proceeding pursuant to Missouri Rule of Criminal Procedure 29.15. The defendant litigates his Rule 29.15 claims in the sentencing court while the direct appeal is held in abeyance. If the sentencing court denies the Rule 29.15 relief, the defendant must file a separate notice of appeal.

At that time, the Missouri Court of Appeals enters an order consolidating the direct criminal appeal and the appeal from the Rule 29.15 relief. The direct appeal and the Rule 29.15 appeal, however, retain their independent identity. Lowe-Bey v. Groose, 28 F.3d 816, 819 (8th Cir. 1994). The issues in the consolidated appeal are separated into those raised on direct appeal and those raised in the appeal from the denial of Rule 29.15 relief. The appellate court employs separate standards of review in its examination of the issues because of the civil nature of the Rule 29.15 appeal and the criminal nature of the direct appeal of the conviction. Id. Furthermore, even if a single attorney handles a hybrid appeal, the criminal defendant is entitled to effective assistance of counsel only on the portion of the hybrid appeal that was devoted to direct-appeal issues because he has no right to effective assistance of counsel on that portion of the hybrid appeal devoted to the appeal of his Rule 29.15 claims Id. at 820. Consequently, the task here is to discern which issues were on direct appeal and which were on appeal from the sentencing court's denial of Rule 29.15 relief.

#### **1. Ineffective assistance of trial counsel and conflict of interest**

In Missouri, ineffective assistance of trial counsel and conflict of interest claims cannot be raised on direct appeal--they can be raised only in a Rule 29.15 proceeding. Lowe-Bey, 28 F.3d at 819 (ineffective assistance of counsel) (citing State v. Wheat, 775 S.W.2d 155, 157-58 (Mo. 1989)

(en banc), cert. denied, 493 U.S. 1030, 110 S. Ct. 744, 107 L. Ed. 2d 762 (1990); State v. George, 921 S.W.2d 638, 642 (Mo. Ct. App. 1996) (conflict of interest). Obviously, then, in the hybrid appeal, Mansfield's ineffective assistance of trial counsel claim and conflict of interest claim (points two and three) were not on direct appeal but were on appeal from the sentencing court's denial of Rule 29.15 relief. Mansfield has no right to effective assistance of counsel in any post-conviction proceeding. Consequently, his post-conviction appellate counsel's alleged incompetence in failing to comply with Rule 29.15 and in failing to argue for review under 29.15(k) when briefing these claims on appeal cannot be the basis of habeas relief.

## 2. Due process

On the other hand, Mansfield's claim that the-cumulative effect of the errors committed by the trial court and the defense counsel rendered his conviction fundamentally unfair and violative of due process apparently was on direct appeal to the Missouri Court of Appeals. Mansfield argues that his counsel on direct appeal was ineffective for failing to comply with Rule 30.06 in presenting the due process claim. Under the Zinzer standard, however, a petitioner must show that the alleged deficient performance rendered the result of the direct appeal unreliable or fundamentally unfair. Mansfield has not made such a showing. As articulated above, errors that are not unconstitutional individually cannot be added together to create a constitutional violation. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (citing Girtman v. Lockhart, 942 F.2d 468, 474-75 (8th Cir. 1981), cert. denied, 117 S. Ct. 395, 136 L. Ed. 2d 310 (1996)). Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief. Thus, this claim is meritless. The Missouri Court of Appeals' failure to reach the merits of the claim did not render the

result of the direct appeal unreliable.

**B. Failure to Present all of Mansfield's Viable Factual and Legal Arguments for Relief**

Mansfield next challenges his appellate counsel's performance because he failed to present all of his viable factual and legal arguments for relief to the Missouri Court of Appeals. Mansfield does not specify what additional factual and legal arguments should have been raised. Failure to brief every conceivable allegation on appeal does not render appellate counsel ineffective. Whitmill v. Armontrout, 42 F.3d 1154, 1156 (8th Cir. 1994).

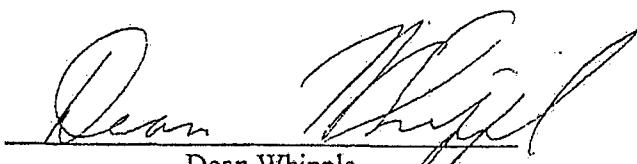
**C. Failure to Make the State's Witnesses' Pre-Trial Depositions Part of the Record**

Finally, Mansfield argues that his appellate counsel's performance was ineffective because he failed to make the state's witnesses' depositions part of the record on appeal. Mansfield argues that, had appellate counsel included the depositions, the court of appeals would have had before it all the relevant facts necessary to fully review Mansfield's third-party perpetrator claims.

Rule 30.04(b) specifies items that shall not be included in the record on appeal. It states that depositions should not be included "unless specifically requested and necessary to determination of issues on appeal." Mansfield does not indicate that the court of appeals requested the state's witnesses' depositions or that the depositions were necessary to determine any issue on appeal. He indicates only that these depositions may have been helpful. Further, the record sufficiently disclosed the material content of the depositions to aid the court of appeals in its review. Consequently, the Court finds that counsel's performance was not deficient and the outcome was not rendered unreliable by omitting the depositions from the record on appeal.

**ORDER**

Based on the foregoing, it is hereby ORDERED that James Mansfield's petition for relief under 28 U.S.C. § 2254 is DENIED.

  
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Dean Whipple  
United States District Judge

Date Sept 16, 1997

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No. 98-1486WMKC

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2000 U.S. App. LEXIS 6746

April 12, 2000, Decided

**NOTICE: [\*1] DECISION WITHOUT PUBLISHED OPINION****PRIOR HISTORY:** 96-0443-CV-W-1-P.Original Opinion of February 4, 2000, Reported at: [2000 U.S. App. LEXIS 1412](#).**OPINION****Order Denying Petition for Rehearing and for Rehearing En Banc**

The petition for rehearing en banc is denied. Chief Judge Wollman, Judge McMillian, and Judge Richard S. Arnold would grant the petition. The petition for rehearing by the panel is also denied.

April 12, 2000

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In the Supreme Court of Missouri

## January Session 2008

State ex rel. James Eric Mansfield,

Petitioner,

No. SC89090      **HABEAS CORPUS**

Dave Dormire, Superintendent,

**Respondent.**

Now at this day, on consideration of the petition for writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 2008, and on the 18th day of March, 2008, in the above-entitled cause.

WITNESS my hand and the Seal  
of the Supreme Court of Missouri,  
at my office in the City of Jefferson  
this 18th day of March, 2008.

Thomas P. Clark Clerk

D.C.

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Shepardize® | TOA**A** State v. Mansfield, 891 S.W.2d 854 (Copy w/ Cite)

891 S.W.2d 854, \*; 1995 Mo. App. LEXIS 60, \*\*

STATE OF MISSOURI, Respondent, v. JAMES ERIC MANSFIELD, Appellant. JAMES ERIC MANSFIELD, Appellant, v. STATE OF MISSOURI, Respondent.

WD 47692 (Consolidated with WD 49179)

COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

891 S.W.2d 854; 1995 Mo. App. LEXIS 60

January 17, 1995, Filed

**SUBSEQUENT HISTORY:** [\*\*1] Appellant's Motion for Rehearing Only Denied February 28, 1995.Writ of habeas corpus denied Mansfield v. Dormire, 202 F.3d 1018, 2000 U.S. App. LEXIS 1412 (8th Cir. Mo., 2000)Later proceeding at, Dismissed by Mansfield v. State, 2006 Mo. App. LEXIS 14 (Mo. Ct. App., Jan. 3, 2006)**PRIOR HISTORY: APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY.** The Honorable Edith L. Messina, Judge.**CASE SUMMARY****PROCEDURAL POSTURE:** Defendant appealed a judgment of the Circuit Court of Jackson County (Missouri), which convicted him of first degree murder and denied his Mo. R. Crim. P. 29.15 motion for postconviction relief.**OVERVIEW:** The victim was killed after fights involving several individuals arose in a bar. On appeal of his conviction, defendant claimed that the trial court erroneously granted the State's motion in limine to exclude evidence establishing that others had reason to kill the victim too, that he was denied effective assistance of counsel, that he was convicted in violation of his Sixth Amendment right to counsel, and that his convictions were fundamentally unfair and violative of due process. The court, in affirming defendant's conviction and the trial court's denial of his Rule 29.15 motion, held that defendant failed to preserve his contentions of error for review and to assert them in a manner consistent with the rules of appellate review. The court found that the trial court's motion in limine ruling was not plain error given defendant's failure to assert that any of the other individuals threatened by the victim committed some act directly connecting them with the crime. In addition, defendant did not allege, as he should have, that the trial court's rulings were clearly erroneous.**OUTCOME:** The court affirmed the trial court's judgment and denial of defendant's motion for postconviction relief.**CORE TERMS:** limine, objecting, plain error, postconviction, presenting evidence, cross-

examination, ineffective, belligerent, complains, tape, offer of proof, defense counsel, admissible, connecting, preserved, convicted, proponent, motive, judgment of conviction, cross-examining, belligerence, erroneously, cumulative, murder, kill

## LEXISNEXIS® HEADNOTES

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[Criminal Law & Procedure > Pretrial Motions > Motions in Limine](#)

[Evidence > Procedural Considerations > Objections & Offers of Proof > Objections](#)

**HN1** A trial court's ruling in limine is interlocutory and is subject to change during a trial. A motion in limine preserves nothing for appeal. The proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the proponent must make an offer of proof. [More Like This Headnote](#) | [Shepardize](#): Restrict By Headnote

[Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review](#)

[Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions](#)

**HN2** Plain error is defined as "evident, obvious and clear error." [More Like This Headnote](#)

[Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor](#)

**HN3** Evidence that another person had a motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime. Evidence which has no other effect than to cast bare suspicion on another is not admissible. [More Like This Headnote](#)

[Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Judicial Discretion](#)

**HN4** Mo. R. Crim. P. 30.20 states: Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest justice or miscarriage of justice has resulted therefrom. [More Like This Headnote](#)

[Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview](#)

**HN5** Mo. R. Crim. P. 30.06(d) states: The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed. [More Like This Headnote](#)

**COUNSEL:** Burton H. Shostak, 8015 Forsyth Boulevard, St. Louis, MO 63105, Susan Lynn Hogan, Assistant Public Defender, 505 E. 13th Street, Suite 420, KCMO 64106, for appellant.

John Munson Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102, for respondent.

**JUDGES:** BEFORE SPINDEN, P.J., LOWENSTEIN and ELLIS, JJ. All concur.

**OPINION BY:** PAUL M. SPINDEN

## OPINION

**[\*855]** In this appeal of his first degree murder conviction, James Eric Mansfield complains that the trial court did not permit him to present evidence that he was not the only person

with a motive to kill the victim. He also complains that the court erroneously denied his Rule 29.15 motion for postconviction relief because he demonstrated that his trial counsel had a conflict of interest and was ineffective. We affirm the trial court's judgment of conviction and the denial of his Rule 29.15 motion because Mansfield has preserved none of these points for our review.

Mansfield was convicted of killing Mark Trader during the early morning hours of April [\*\*2] 29, 1992, in Independence. Mansfield had been drinking at a bar with Trader and others earlier.

Mansfield complains in the first of his four points on appeal that the trial court erroneously granted the state's motion in limine to block his presenting evidence establishing that others had a reason to kill Trader, too. In arguing the motion, Mansfield's attorney said:

The victim spent his last hours in a bar in Independence called Papa Leone's. Several people in the bar. And it is my contention that what transpired between the victim and those people in the bar, specifically assaults, fights, drunken behavior, bad language, invitations to step outside and settle the matter and ultimately a cab being called to put the victim into it to send home, are relevant to the whole issue of who did it. Mansfield did not preserve the point for our review. <sup>HN1</sup>~~¶~~A trial court's ruling in limine is interlocutory and is subject to change during a trial. State v. Purlee, 839 S.W.2d 584, 592 (Mo. banc 1992). A motion in limine preserves nothing for appeal. The proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the [\*\*3] proponent must make an offer of proof. *Id.*; State v. Wald, 861 S.W.2d 791, 794 (Mo. App. 1993).

Just before Mansfield's cross-examination of the state's key witness, he requested the trial court's permission "to ask [the witness] with whom Mr. Trader became belligerent, in what fashion he became belligerent, why the bar had to close down early because of his belligerence and the way he displayed it, what reaction he got with folks with whom he became belligerent." The trial court denied the request and announced that its order in limine was "no longer a preliminary ruling" and that it ruled "in favor of the State."

Mansfield, however, failed to follow through with the requisite offer of proof as to how the witness would answer his questions. He failed to preserve the issue for our review. Purlee, 839 S.W.2d at 592.

Although Rule 30.20 grants this court some leeway to consider unpreserved issues,<sup>1</sup> we do not discern <sup>HN2</sup>~~¶~~plain error, which we previously have defined as "evident, obvious and clear error." State v. Bailey, 839 S.W.2d 657, 661 (Mo. App. 1992). The Supreme Court of Missouri has ruled, <sup>HN3</sup>~~¶~~"Evidence that another person had . . . a motive for committing the crime for which [\*\*4] the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." State v. Umfrees, 433 S.W.2d 284, 287 (Mo. banc 1968). "Evidence which has no other effect than to cast bare suspicion on another is not admissible." State v. Schaal, 806 S.W.2d 659, 669 (Mo. banc 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S. Ct. 976 (1992). Given this law and Mansfield's failure [\*856] even to assert to the trial court that any of the other individuals threatened by Trader in the bar committed some act directly connecting them with the crime, the trial court's ruling was not plain error.

#### FOOTNOTES

<sup>1</sup> <sup>HN4</sup>~~¶~~The rule says, "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest justice or miscarriage of justice has resulted therefrom."

In his second point on appeal, Mansfield accuses his trial attorney of making enough blunders to render his assistance ineffective. He charges [\*\*5] that his attorney was ineffective for (1) not objecting to the state's presenting the video-taped interview of its primary witness, John Hertlein, III; (2) stipulating that the tape did not "open the door" to Mansfield's presenting evidence of Trader's belligerence in the bar; (3) not objecting to purportedly improper cross-examination questions of Mansfield; (4) not cross-examining Joshua Trader, the victim's son; (5) not offering a tape of Mansfield's jail cell conversation with Hertlein in which Mansfield denied awareness of Trader's death; (6) not cross-examining Hertlein about the tape; (7) not objecting to the state's improper cross-examination of Mansfield's mother; (8) not objecting to improper argument by the state; (9) not calling witnesses who had exculpatory evidence; (10) and not presenting evidence of mud on Mansfield's car in rebuttal of evidence that he washed it after the murder.

The state first responds that Mansfield did not preserve this point, either, because of the manner in which he phrased his point relied on. We agree. <sup>HNS</sup> Rule 30.06(d) says, "The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed[.]" [\*\*6] Although in arguing his point Mansfield makes clear that he is complaining of the motion court's denial of his Rule 29.15 motion for postconviction relief, his point relied on does not mention the motion court at all and leaves us to assume that this is the case. Even if we were to make this assumption, the motion court considered Mansfield's points and ruled against him. The motion court made 38 pages of extensive findings of fact and conclusions of law addressing each of the points raised on appeal after an evidentiary hearing filling 142 transcript pages. We presume that the motion court's rulings were correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991). Mansfield does not allege, as he must, that the motion court's rulings were clearly erroneous.

Mansfield makes the same error in his third point: "Mansfield was convicted in violation of his Sixth Amendment right to counsel without divided loyalties because defense counsel was a friend and associate of the deceased's brother." <sup>2</sup> Again, Mansfield does not mention either the trial court or motion court or action by either. The claimed error was not preserved for review.

#### FOOTNOTES

<sup>2</sup> The purported conflict was that Mansfield's attorney, Jay DeHardt, was a partner with Robert McQuain who attended law school with John Trader, the victim's brother, and that McQuain and Trader were once members of the same firm. Moreover, DeHardt acknowledged that he was acquainted with John Trader.

[\*\*7] Mansfield's final point is a "catch-all:" "The cumulative effect of the errors committed by the trial court and defense counsel renders Mansfield's convictions fundamentally unfair and violative of due process." When an appellant fails to preserve contentions of error for review or to assert them in a manner consistent with the rules of appellate review, he has truly left us nothing to review--whether as a matter of direct review or as so-called cumulative error. The point is without merit.

We affirm the judgment of conviction and the court's denial of his Rule 29.15 motion for postconviction relief.

Paul M. Spinden, Presiding Judge

All concur.

IN THE  
SUPREME COURT OF MISSOURI

FILED

FEB 8 2008

IN RE JAMES ERIC MANSFIELD,

Petitioner,

v.

DAVE DORMIRE, SUPERINTENDENT,  
Jefferson City Correctional  
Center,

Respondent.

Thomas F. Simon  
CLERK, SUPREME COURT

No. 089090

**PETITION FOR A WRIT OF HABEAS CORPUS**

COMES NOW petitioner, James Eric Mansfield, a Missouri prisoner in the custody of respondent, and petitions this Court, pursuant to Rule 91, for a writ of habeas corpus vacating his convictions for first degree murder and armed criminal action and his concurrent sentences of life imprisonment without eligibility for parole and life imprisonment.

**SUGGESTIONS IN SUPPORT**

**I. INTRODUCTION**

This case presents the court with a rare and ideal opportunity to correct a fundamentally unfair conviction and, in doing so, revisit and clarify, or overrule, a forty year old rule of evidence in criminal cases regarding the admissibility of defense evidence pointing to a different perpetrator of the crime than the defendant. *See State*

Under the facts and law, counsel's failure to present this evidence in an offer of proof meets both prongs of the *Strickland* test. The Eighth Circuit's decision to the contrary was based upon an erroneous interpretation of Missouri evidentiary law. Habeas relief is warranted.

## **CLAIM 2**

### **THE FEDERAL COURTS LACKED JURISDICTION UNDER THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO REWRITE AND HEIGHTEN THE EVIDENTIARY LAW OF THE STATE OF MISSOURI REGARDING THE ADMISSIBILITY OF EVIDENCE OF A THIRD PARTY'S GUILT.**

The Tenth Amendment of the United States Constitution mandates that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," and was enacted to "allay lingering concerns about the extent of the national power." *Alden v. Maine*, 527 U.S. 706, 714-715 (1999). *See Printz v. United States*, 521 U.S. 898, 924 n.13 (1997) (Tenth Amendment speaks explicitly to dual sovereignty system). The power of a state to enact rules of evidence for trials conducted in its courts is neither delegated by the Constitution to the federal government, nor prohibited by the

Constitution to the states. Simply put, a state is "free to construct such evidentiary rules as it deems proper." *Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999).

Further, a state supreme court's interpretation of state evidentiary law, where such law does not violate federal constitutional protections, binds the federal court during federal habeas corpus proceedings. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) (state supreme court's interpretation of transferred intent doctrine applied to crime at issue), *habeas relief granted sub. nom. Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007); *Barrett, supra*, 169 F.3d at 1162; *Clark v. Groose*, 16 F.3d 960, 963-964 (8th Cir. 1994); *Glaze v. Redman*, 986 F.2d 1192, 1195 (8th Cir. 1993); *Williams v. Armontrout*, 877 F.2d 1376, 1383 (8th Cir. 1989).

Forty years ago this Court held, in clear and express language, that "[e]vidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *Umfrees*, 433 S.W.2d at 287. *Umfrees* did not hold, as the Eighth Circuit erroneously stated during federal habeas review of petitioner's case, that a third party's commission of "some act directly connecting him with the crime" was the legal equivalent of "evidence that clearly exonerates" the defendant. *Mansfield, supra*, 202 F.3d at 1022.

In *Umfrees*, this Court held the defendants' proffered testimony inadmissible because it lacked "proof that [another] person committed some act *directly connecting* him with the crime." *Umfrees, supra*, 433 S.W.2d at 287 (emphasis added). It failed to *both* "directly connect[] the other person with the corpus delicti, *and* tend[] clearly to point out someone besides [the defendant] as the guilty person." *Id.* at 288 (emphasis added). Judge Seiler dissented, viewing the issue as one of credibility. *Id.* Clairvoyantly echoing Justice Alito in *Holmes*, Judge Seiler strongly advocated the position that this evidence should have been heard and evaluated by the jury. *Id.* at 289-290.

In *State v. Barriner*, 111 S.W.3d 396 (Mo. banc 2003), this Court ruled that the trial court erroneously denied defense counsel's request to cross-examine the state's criminalist about the hairs from crime scene that matched neither the defendant nor the victims. *Id.* at 399-400. Although not citing *Umfrees*, this Court held that:

The evidence Barriner sought to present was more than the mere motive or opportunity of another person. It was not disconnected or remote. The hairs are physical evidence that could indicate another person's interaction with the victims at the crime scene. Barriner was entitled to present to the jury this evidence of another person's direct connection to the murders. [Footnote omitted].

*Id.* at 400. This court ordered a new trial, despite the fact that Barriner confessed to the crime. *Id.* at 399.

In the case at hand, John Hertlein committed an act *directly connecting* him with the killing of Mark Trader when he admitted, multiple times, that *he himself* had killed Trader. Hertlein told his fellow inmates that he stabbed Trader, he was "gonna cop a plea," he was "going to jail," he was going to confess, and he was going to plead guilty (Tr. 520-522); *Exhibit E attached hereto* at 3, 7, 9, 11 (Transcript of Nagra Tape Recording, Independence City Jail, 4/19/1992); *Exhibit F attached hereto* at 1-2 (Supplemental investigation report by Det. Cavanah, 5/11/1992). This evidence *met* the *Umfrees* standard, because it directly connected him to the crime and clearly pointed to someone besides the petitioner as the guilty person.

The Eighth Circuit, however, interpreted *Umfrees* as requiring petitioner's evidence to point to another as the guilty person(s) "to the *exclusion* of [him]." *Mansfield, supra*, 202 F.3d at 1022 n.5 (emphasis added); *see id.* at 1023. That court held that petitioner's evidence showing that Hertlein had "told his cell mates that he had been arrested for the murder of Mark Trader and ... that he had assisted in the murder," and that "Trader had been drunk and obnoxious at the bar earlier on the night of the murder and had been involved in a physical fight with Couzens and Howerton," had been involved in a botched drug deal with Couzens, and owed

Couzens and Howerton money, "[did] not point to others as the guilty persons *to the exclusion of Mansfield.*" *Id.* at 1023 (emphasis added); *see id.* at 1020, 1021 n.3. It was only in the panel's dissenting opinion that Missouri's evidentiary law was properly stated:

...under Missouri law at the time of Mansfield's trial, he was prohibited from presenting evidence of another's motive and opportunity to commit the crime unless he could provide the trial court with some direct link connecting the alleged perpetrators to the crime. *See State v. Umfrees*, 433 S.W.2d 284, 287-88 (Mo.1968) (en banc).

*Mansfield, supra*, 202 F.3d at 1024 (Heaney, J., dissenting). Judge Heaney noted that, in fact, there was an "abundance of evidence which tended to prove that Hertlein, Couzens, and Howerton had both a motive to commit the murder and the opportunity to do so," as well as "evidence directly linking them to the crime," all of which petitioner's counsel had failed to present. *Id.*

The *Umfrees* rule does not require third-party-evidence to completely "exonerate" a defendant. *See State v. Barriner*, 210 S.W.3d 285 (Mo. App. W.D. 2006) (affirming Barriner's conviction after his new trial); Black's Law Dictionary (8th ed. 2004) (to exonerate is "to free from responsibility"). The Eighth Circuit lacked jurisdiction and violated the Tenth Amendment by imposing its own erroneous

interpretation of Missouri's evidentiary law to petitioner's case. Had the Eighth Circuit applied the proper *Umfrees* standard, it would have granted petitioner a new trial. Habeas relief is warranted.

### **CLAIM 3**

#### **PETITIONER IS ACTUALLY INNOCENT OF THE CRIMES FOR WHICH HE WAS CONVICTED.**

Petitioner sets forth a clear and convincing showing of his actual innocence that undermines confidence in the correctness of the judgment against him. *Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). In the past five years, this Court has twice granted a writ of habeas corpus pursuant to Rule 91 on the basis that the petitioner presented a claim of actual innocence apart from, and independent of, any constitutional violation. *See State ex rel. Verweire v. Moore*, 211 S.W.3d 89 (Mo. banc 2006) (finding petitioner actually innocent of crime for which he was convicted); *Amrine, supra*, 102 S.W.3d at 543-544, 546-549 (finding clear and convincing evidence of petitioner's actual innocence).

This court in *Amrine* stated:

A freestanding claim of actual innocence is evaluated on the assumption that the trial was constitutionally adequate. Accordingly, the evidence of actual innocence must be strong enough to undermine the basis for

IN THE MISSOURI SUPREME COURT

STATE EX REL. )  
JAMES ERIC MANSFIELD, )  
 )  
Petitioner, )  
 )  
v. ) Case no. SC89090  
 )  
DAVE DORMIRE, Warden, )  
 )  
Respondent. )

FILED  
FEB 29 2008

Thomas F. Simon  
Suggestions In Opposition CLERK, SUPREME COURT

**To Petition For Writ Of Habeas Corpus**

This Court should deny the petition because Mansfield's claims are procedurally defaulted and meritless.

**I. Factual Background**

John Hertlein, James Mansfield, Mark Trader (the victim), and several other people had been drinking at Papa Leone's Italian Deli and Bar in Independence, Missouri. *Mansfield v. Dormire*, 202 F.3d 1018, 1020 (8th Cir. 2000). Trader was too inebriated to drive when the bar closed. *Id.* Mansfield helped Trader into a cab and gave the cabdriver Trader's address. *Id.*

Mansfield then drove Hertlein to Trader's apartment. 202 F.3d at 1020. On the way, Mansfield told Hertlein that he was going to "Gerber"

*Dormire*, 202 F.3d 1018, 1020 (8th Cir. 2000), *cert. denied* 531 U.S. 1154 (2001).

### **III. Analysis**

Mansfield challenges his 1993 Jackson County convictions and sentences for first-degree murder and armed criminal action. He alleges in that the trial court erred in excluding evidence implicating John Hertlien as the murderer, Pet. at 20-34, and that Mansfield is actually innocent, Pet. at 39-41.<sup>1</sup>

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<sup>1</sup> Mansfield also contends that the Eighth Circuit erred in denying his federal habeas petition and that the Eighth Circuit lacked authority to "expand" Missouri evidentiary law. Pet. at 34-39. This Court has no supervisory jurisdiction over the Eighth Circuit; only the Supreme Court of the United States does. Mansfield can only bring his claim in that Court. His claim is not cognizable here as this Court cannot grant him effective relief. To the extent that Mansfield challenges Missouri's third-party evidence rule in this claim, respondent addresses those contentions in sections III.A.3.a and III.A.3.b of these suggestions.

## INDEPENDENCE, MISSOURI POLICE DEPARTMENT

## Supplemental Investigation Report

Date: May 11, 1992

Report # 92-3996

Page 1 of 2

Offense: Homicide

Victim: Last Name (or firm), First Name

Telephone #

Trader Mark

## Interview: (4)

- #1 Joseph B. Snodgrass w/m 11-30-79  
211 W. 20th Oak Grove, Mo.
- #2 Leonard. D. Berryman w/m 2-29-66  
4408 S. Bellfontain KCMO
- #3 Nick J. Nichols w/m 3-14-74  
3031 Chelsea KCMO
- #4 Jessie K. Kessler w/m 5-3-63  
1211 S. Scott Apt. C

On April 30, 1992 Sgt. Hagaman advised me that Assistant Jackson County Brian Round had contacted him in regards to a conversation he had with Jay DeHart who is the attorney representing Eric Mansfield. Mr. DeHart advise Brian Round that his client Eric Mansfield told him that other prisoners had stated that John Hertlien was bragging about killing Mark Trader. Mr. DeHart stated that Jessie, Nick, Joe, and an unknown black male were in jail with him. These subjects all told Mansfield that John Hertlien was admitting to them that he killed Trader. Mr. DeHart felt that this information should be investigated.

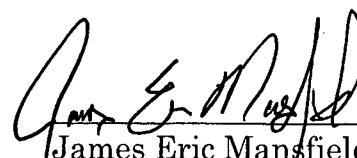
I then contacted the above 4 subjects in detention and interviewed each separately. All four were in jail during the time that both Mansfield and Hertlien were in jail.

Snodgrass stated that Eric Mansfield was in jail and he acted as though he did not know what was going on. He did not make any incriminating statements concerning this homicide. He did not talk much with anyone during his stay in jail. Snodgrass stated that the other person who was talking believed to Hertlien made many statements about the homicide as if he knew about it. He made the statement that the suspect had been stabbed 21 times. It was obvious to him that Hertlien knew about the murder as if he were there.

Berryman stated something about putting the dude in a cab and three of them followed him to his house. Hertlien stated that all 3 of them got out and each one stabbed him. He stated that Eric played dumb as if he did not know what was going on. He stated that he told Eric that John was involved by the way he was talking.

Reporting Officer      Serial #      Radio #      Approved by:  
Kenneth M. Cavanah      521      511

Respectfully submitted.



James Eric Mansfield  
Jefferson City Correctional Center  
8200 No More Victims Road, 2D206  
Jefferson City, MO 65101

**Petitioner, pro se**