

**IN THE SUPREME COURT OF MISSOURI**

<b>CHRISTOPHER DUNN,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>No. _____</b>
	)	
<b>MICHELE BUCKNER, Superintendent,</b>	)	
<b>South Central Correctional Center,</b>	)	
	)	
<b>Respondent.</b>	)	

**PETITION FOR A WRIT OF HABEAS CORPUS**

COMES NOW petitioner, Christopher Dunn, a Missouri prisoner in respondent's custody and submits to this Court, pursuant to Rule 91, his petition for a writ of habeas corpus challenging his convictions for first degree murder, two counts of assault in the first degree, and three counts of armed criminal action and his sentence of life without parole plus ninety years. In support of this petition, Mr. Dunn states as follows:

**SUGGESTIONS IN SUPPORT**

**I.**

**INTRODUCTION**

This habeas corpus case presents an unprecedented situation where the Circuit Court below made the necessary factual findings, after holding an evidentiary hearing, to establish that Christopher Dunn is innocent of the 1990 murder of Ricco Rogers that occurred in the City of St. Louis. This credible

evidence established that petitioner was entitled to a new trial under *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). However, Circuit Judge William Hickle felt compelled to deny habeas relief to petitioner on his freestanding claim of innocence in light of the Western District Court of Appeal's decision in *State ex rel. Lincoln v. Cassady*, 517 S.W.3d 11 (Mo. App. W.D. 2016), because petitioner is not on death row. (*See* Exh. 21, pp. 10-17).

Although Judge Hickle found that petitioner could meet the gateway innocence test, he ruled that petitioner's two defaulted due process claims lacked merit. (Exh. 21, pp. 17-24). As a result, petitioner will languish in prison serving a sentence of life without parole for first degree murder and other crimes he clearly did not commit, without any judicial recourse, unless this Court intervenes to address whether *Lincoln* should be abrogated. *See State v. Johnson*, 617 S.W.3d 439, 445 n.8 (Mo. banc 2021); *see also* Tony Messenger, *Innocence isn't enough, judge says, to free a man convicted of 30-year old murder*, St. Louis Post-Dispatch (Apr. 30, 2021).

No physical evidence has ever implicated petitioner in any of the crimes for which he was convicted. Petitioner was convicted solely on the eyewitness testimony of two boys, fifteen-year-old DeMorris Stepp and twelve-year-old Michael Davis. Both of these witnesses testified at trial that they observed petitioner shoot the victim on the porch of a residence at 5607 Labadie in St. Louis.

(Tr. 135-148; 173-178). Mr. Stepp's testimony was inherently unreliable because, in exchange for his testimony, he pleaded guilty on a pending first degree robbery charge and subsequently received probation in exchange for his testimony for the prosecution. (*See* Exh.'s 5, 19).

Both Mr. Davis and Mr. Stepp have now recanted their testimony under oath and admitted they committed perjury at trial when they identified Christopher Dunn as the man they saw shooting at them and Mr. Rogers. (*See* Exh.'s 1, 2). These recantations are corroborated by the sworn affidavit and testimony of an independent eyewitness, Eugene Wilson, and other evidence. (*See* Exh.'s 3, 4). As a result, there is no remaining evidence of petitioner's guilt and he is entitled to habeas relief under *State ex rel. Amrine v. Roper*, 102 S.W.2d 541 (Mo. banc 2003).

In light of Judge Hickie's findings of fact, this case provides this Court with a perfect vessel to decide whether its decision in *Amrine* applies to innocent prisoners who are not under a sentence of death. In the highly publicized innocence cases involving Missouri prisoners Lamar Johnson and Kevin Strickland, neither of these men has ever received an evidentiary hearing on their claims on innocence. As a result, neither of those cases presents this Court with the opportunity to address this important issue expeditiously without the need of appointing a special

master. Both Mr. Johnson and Mr. Strickland also have another path to freedom, not available to petitioner, if S.B. 53 is signed into law.

After Mr. Dunn's habeas petition was filed in the Circuit Court of Texas County, Judge William Hickle ordered an evidentiary hearing, which was conducted on May 30, 2018.<sup>1</sup> At this hearing, Mr. Stepp testified that he had a plea bargain with the prosecution guaranteeing that he would get probation on his pending charges if he testified for the prosecution at Mr. Dunn's trial. (Exh. 23, p. 22). Mr. Stepp also admitted he lied to petitioner's jury regarding, not only his identification of petitioner as the shooter, but also his understanding that he would be guaranteed probation if he testified for the state. (*Id.* pp. 14-15, 22-24).

Based upon the foregoing facts, Mr. Dunn is raising three claims for relief in this petition: (1) a freestanding claim of actual innocence under *Amrine* and the Due Process and Cruel and Unusual Punishment clauses of the Missouri and United States Constitutions; (2) a due process claim based upon the undeniable fact that his convictions were based entirely upon the perjured testimony of Mr. Stepp and Mr. Davis, and (3) a due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963) involving the undisclosed plea agreement for probation between the state

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<sup>1</sup> Undersigned counsel ordered a transcript of this hearing from Central Transcribing Service shortly after the Circuit Court entered judgment. Because petitioner's health is failing and his life is at risk if he contracts COVID-19, counsel elected to submit this petition to the Court of Appeals before this transcript was completed. This transcript was completed shortly after the Court of Appeals denied the petition and is attached to this petition as Exhibit 23.

and Mr. Stepp. As a result, petitioner respectfully requests that this Court direct the State of Missouri to respond to this petition and thereafter, grant the petition for a writ of habeas corpus, order petitioner's immediate release from state custody, and order the state to declare within fifteen days whether it intends to re-prosecute petitioner for these crimes.

## **II.**

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Petitioner, Christopher Dunn was convicted by a jury on July 18, 1991, for the May 18, 1990 murder of Ricco Rogers. Petitioner was also convicted of two counts of assault in the first degree and three counts of armed criminal action arising out of the same occurrence. Petitioner was subsequently sentenced to life without parole by St. Louis City Circuit Judge Michael Calvin.

The state's entire case rested upon the eyewitness testimony of Stepp and Davis. Both of these young men testified that on May 18, 1990, these two men and Rogers were sitting on a porch at a house at 5607 Labadie in the City of St. Louis. Just before midnight, both Stepp and Davis testified that they saw petitioner near the porch. A few minutes later, they heard shots and all three men tried to run away. Both Stepp and Davis testified that petitioner was the person who fired the fatal shot that ultimately caused the death of Mr. Rogers.

At the time he testified, Mr. Stepp had pending charges for armed robbery, armed criminal action, unlawful use of a weapon, and tampering in the first degree. (Exh. 5). In exchange for his testimony against petitioner, the prosecution agreed to drop the armed criminal action charges so that Stepp would be eligible for probation and agreed to recommend a fifteen year sentence for the remaining charges. The same day he testified against petitioner, Mr. Stepp pleaded guilty and later received probation on these charges. (*See* Exh.'s 5, 19).

After petitioner was convicted and sentenced, petitioner filed a timely notice of appeal and a timely Rule 29.15 motion pursuant to Missouri's then existing consolidated post-conviction review system in criminal cases. After holding an evidentiary hearing, the trial court denied petitioner's Rule 29.15 motion. On consolidated appeal, the Missouri Court of Appeals, Eastern District affirmed petitioner's convictions and the denial of his post-conviction motion in *State v. Dunn*, 889 S.W.2d 65 (Mo. App. E.D. 1994). Petitioner, thereafter, unsuccessfully sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

Petitioner filed the present petition for a writ of habeas corpus in the Circuit Court of Texas County on February 15, 2017. *Dunn v. Bowersox*, No. 17TE-CC00059. The case was assigned to Judge William E. Hickie. After the case was fully briefed, Judge Hickie ordered an evidentiary hearing that was conducted on May 30, 2018. (*See* Exh. 23). At this hearing, petitioner presented the testimony of

DeMorris Stepp, who recanted his trial testimony and stated he falsely identified petitioner at trial as the person who committed these crimes. (*Id.* pp. 14-15, 47). Petitioner also presented the testimony of Curtis Stewart, Nicole Bailey, and an independent eyewitness to the shooting, Eugene Wilson. (*Id.* pp. 48-96). After attempts to locate and depose Michael Davis proved unsuccessful, the Circuit Court also considered the prior affidavit and statements of Michael Davis recanting his trial testimony. (*See* Exh. 21). A transcript of Mr. Stepp's 1991 guilty plea and sentencing hearing was also submitted to the court following the hearing. (Exh. 19).

Despite finding that petitioner could meet the gateway innocence standard and strongly suggesting that petitioner could meet the freestanding innocence test under *Amrine*, Judge Hickle, on September 23, 2020, denied habeas relief to petitioner in a twenty-five page order and judgment. (*See* Exh. 21). Despite Judge Hickle's finding that petitioner's claim of innocence was strong and based upon credible evidence, he believed he was legally constrained from granting relief on petitioner's free-standing innocence claim by the Western District Court of Appeals' decision in *State ex rel. Lincoln v. Cassady*, 517 S.W.3d 11 (Mo. App. W.D. 2016). (Exh. 21, pp. 16-17). On November 13, 2020, the present habeas corpus petition was filed in the Missouri Court of Appeals, Southern District, SD36893, and was summarily denied on November 24, 2020. (Exh. 22).

### III.

#### NEWLY DISCOVERED EVIDENCE OF INNOCENCE

DeMorris Stepp was the first of the state's two eyewitnesses to recant his trial testimony. In 2005, Mr. Stepp signed a sworn affidavit admitting he committed perjury when he identified Christopher Dunn as the man he saw shoot Ricco Rogers. (*See* Exh. 1). Mr. Stepp indicated he was pressured by police and prosecutors to falsely identify Mr. Dunn as the shooter because they wanted him off the streets. (*Id.*). These agents of the state also utilized Mr. Stepp's serious pending felony charges as leverage to coerce him to falsely testify in court that Christopher Dunn was the shooter and promised him he would avoid jail time if he did so. (*Id.*). Mr. Stepp's affidavit states that because it was so dark that night, he could not identify who the person was who fired the fatal shot. (*Id.*)

As noted earlier, at the 2018 evidentiary hearing in the Circuit Court below, Mr. Stepp reiterated under oath in open court that he committed perjury when he identified petitioner as the shooter. (Exh. 23, pp.14-15, 47). In addition, he also testified that he lied under oath regarding the plea bargain he reached with the prosecution about his pending charges. (*Id.* pp. 22-24). Mr. Stepp testified that he had an understanding with the prosecution that if he testified against petitioner he would be guaranteed probation and there was no danger, in his mind, that he would receive fifteen years in prison. (*Id.*). As a result, Mr. Stepp, in complicity with the

prosecutor, deliberately misled the jury regarding the substance of the deal that he would receive in exchange for his testimony.

The other eyewitness, Michael Davis, was more difficult to locate because he moved to California shortly after he testified at petitioner's trial. (Exh. 2). However, Mr. Davis was located in 2015 at the Solano County Jail in Fairfield, California where he was incarcerated on pending criminal charges. (Exh. 2). After being interviewed, Mr. Davis also recanted under oath in a sworn affidavit. (*Id.*). This affidavit, like the affidavit of Mr. Stepp, indicates that Mr. Davis committed perjury when he identified Mr. Dunn as the killer at his 1991 trial. (*Id.*). Like Mr. Stepp, Mr. Davis indicated that he could not see the shooter from his location. (*Id.*). Mr. Davis indicated that he and Mr. Stepp decided to implicate Mr. Dunn as the shooter because they believed he was a member of the Crips gang in their neighborhood. (*Id.*). Because Stepp and Davis were members of the rival Bloods gang, they wanted Dunn out of the neighborhood and believed implicating him in the murder was an easy way to get that done. (*Id.*).

A couple of weeks after the shooting, Mr. Davis moved to California with his mother. (*Id.*). He was brought back to Missouri by the prosecutors in 1991 to testify at petitioner's trial. When interviewed by the police prior to testifying, he hesitated as to whether he could identify who shot Ricco Rogers. (*Id.*). At that time, he was pressured by the police to identify Christopher Dunn as the killer.

(*Id.*). The police showed Davis gruesome photos of Rogers' corpse. The police also arranged to have Ricco Rogers' mother call him and pressure him to testify. (*Id.*). As a result of this pressure, Mr. Davis appeared in court and committed perjury at trial by identifying Mr. Dunn as the shooter. (*Id.*).

On November 17, 2015, Mr. Davis gave a more detailed tape recorded statement to petitioner's investigator, Craig Speck, at the Solano County Jail. A copy of this tape recorded statement was transcribed by a court reporter and is attached to this petition as Exhibit 7.

At the time the evidentiary hearing was conducted by Judge Hickle in 2018, Mr. Davis was in California custody and had been released from jail to an in-patient drug treatment program. Counsel for petitioner intended to take Mr. Davis' deposition on or before August 1, 2018, and submit it to the Circuit Court. (Exh. 23, pp. 97-98). However, Mr. Davis absconded from the halfway house and a warrant was issued for his arrest. As a result, petitioner submitted Mr. Davis' testimony through his sworn affidavit and through his transcribed taped statement that were previously submitted as exhibits before the Circuit Court. (*See* Exh's 2, 7).

These two recantations are corroborated by the testimony of an independent eyewitness, Eugene Wilson, who was at the scene and witnessed the shooting death of Ricco Rogers. Mr. Wilson is referred to as "Geno" in the police reports

and during the trial testimony of Stepp and Davis. Mr. Wilson has signed a sworn affidavit and later testified at the 2018 hearing that he was present with Rogers, DeMorris Stepp, and Michael Davis on Marvin Tolliver's porch at 5607 Labadie on the night of May 19, 1990. (Exh. 3, 23, pp. 59-97). While they were all outside the front of the house, several shots rang out that came from the front of the house to the west. (Exh. 3). Because it was dark outside, none of these young men could see who was shooting at them. (*Id.*). Everybody started to run except for Ricco Rogers and, after the gunshots stopped, Mr. Wilson realized that Ricco had been shot. (*Id.*).

Shortly after the shots were fired, one of the men on the porch mentioned Christopher Dunn's name and indicated he might have been the shooter. (*Id.*). Mr. Wilson stated that many of the younger kids in that neighborhood did not like Chris Dunn. Mr. Wilson also testified that because he and Marvin Tolliver were friends with Mr. Dunn, he does not believe that petitioner would have shot at them because of that friendship. (*Id.*, Exh. 23, p. 82). Mr. Wilson is also certain that because of where he, Mr. Stepp, and Mr. Davis were positioned when Ricco Rogers was shot, none of them could have possibly seen the shooter or positively identified Mr. Dunn. (Exh. 3; *see also* Exh. 23, pp. 78-79). When he was told about some of the prior statements that Stepp and Davis had given regarding the

description of the shooter, Mr. Wilson stated that these statements were false because none of them could have seen the shooter. (Exh. 3).

Mr. Wilson testified that he was very close with the victim and the victim's mother. (Exh. 23, p. 82). Mr. Wilson lived with the Rogers family after his mother passed away when he was fourteen and he considered Ricco Rogers' mother as his step mother. (*Id.*). When the police arrived, Mr. Wilson did not talk to them or give them a statement because he was concerned with consoling the victim's mother. (*Id.* at 84). He did not believe he needed to speak to the police because he did not see the shooter. (*Id.* at 84-85).

Finally, Mr. Wilson testified that Christopher Dunn did not have any motive to shoot at any of these young men and did not know Mr. Stepp, Mr. Rogers, or Mr. Davis. (*Id.* at 80-81). However, Mr. Wilson testified that Mr. Rogers' mother's ex-boyfriend had been abusing Ricco Rogers' mother. As a result, this group of young boys beat up the boyfriend a few days earlier. Since the boys got the better of the fight, this incident established that the ex-boyfriend, and not petitioner, had a motive to retaliate and was a more likely suspect than petitioner. (*Id.* at 81). This bad blood between Ricco Rogers and Mrs. Rogers' ex-boyfriend provided a motive pointing to a different killer. This was also brought up by Michael Davis in his tape recorded statement (*See* Exh. 7, p. 8).

Petitioner's claim of innocence is also corroborated by other independent evidence. Catherine Jackson signed a sworn affidavit indicating that she was friends with Mr. Dunn at the time of the shooting in 1990 and that they often spoke on the phone. (Exh. 4). She indicated that at approximately 11:00 p.m. on the night of the shooting, she was engaged in a lengthy phone conversation with Mr. Dunn that lasted between thirty and sixty minutes that could have been ongoing at the time that Mr. Rogers was shot. (*Id.*). During that conversation, she remembered that Mr. Dunn was happy and acting normal and did not seem upset or indicate that he had been involved in any altercation or dispute with anyone. When she was contacted about being a trial witness for Mr. Dunn, Jackson's mother did not want her to get involved and refused to answer the door when the public defender's office came calling. (*Id.*).

Another friend of petitioner, Nicole Bailey, has also provided an affidavit and later testified at the 2018 hearing that she, like Ms. Jackson, called petitioner's home and spoke to him between 11:00 p.m. and 12:00 a.m. on the night that Mr. Rogers was shot. (Exh. 6; Exh. 23, pp. 55-69). Ms. Bailey also remembered that, during this conversation, she was watching a T.V. program that a T.V. Guide indicated was on channel 11 between 11:00 p.m. and midnight. (*Id.* pp. 60-61). Ms. Bailey remembers this phone conversation because it occurred while she was in the hospital, after having given birth to her first child the night before. (*Id.*).

Ms. Bailey also is certain that this phone conversation occurred on the night that Mr. Rogers was killed because she attempted to call petitioner again that same night and was informed by petitioner's sister that the police had just come to petitioner's house and taken him to jail. (*Id.* p. 62).

Finally, petitioner's claim of innocence was corroborated by several alibi witnesses whose testimony was presented at petitioner's Rule 29.15 hearing. Petitioner's claim of innocence was also bolstered by evidence adduced during the 29.15 action that the victim's brother, Dwayne Rogers, had made statements that petitioner was not the man who had killed his brother and that he knew the identity of the actual shooter.

Following the completion of the 2018 evidentiary hearing, the record was reopened to allow the presentation of a transcript from Mr. Stepp's 1991 guilty plea. This transcript was submitted both in the courts below and before this Court as petitioner's Exhibit 19. This transcript corroborates Mr. Stepp's testimony at the evidentiary hearing that he had an understanding with the prosecution that he would receive probation if he testified against Christopher Dunn.

Before the transcript of Stepp's guilty plea was obtained, counsel for petitioner believed that Stepp's guilty plea arose from a home invasion where an infant was shot in the eye. (See Exh. 16; Exh. 23, pp. 19-21). It turns out that Mr.

Stepp pleaded guilty in a different case involving the robbery of a cab driver. (Exh. 19, p. 5).

After the evidentiary hearing in this case, petitioner, through a new Sunshine Request, obtained an additional police report regarding Stepp's involvement in the home invasion case where an infant was shot in the eye. This report indicates that Mr. Stepp, after being arrested, confessed to the crimes in the presence of his mother (*See* Exh. 16). Thereafter, several felony charges were filed against him in juvenile court. (*Id.*). No public record exists regarding the disposition of those charges, which suggests that the case remained in juvenile court or, if Stepp was certified as an adult, these charges were later dismissed. It seems unlikely, in light of Stepp's confession, that the prosecutors would have dropped the home invasion charges, which strongly suggests that the case went away after Stepp testified at petitioner's trial.

Stepp's guilty plea transcript reveals that on July 17, 1991, the same day that he testified against Mr. Dunn, he pleaded guilty before Judge Michael Calvin, who was also the judge presiding over petitioner's trial. (Exh. 19, pp. 1-2). In cause number 911-640, Mr. Stepp was charged with robbery in the first degree, armed criminal action, tampering in the first degree, and unlawful use of a weapon. (*Id.* p. 2). At the commencement of the plea hearing, the prosecution announced that there was a plea agreement whereby the State would recommend concurrent

sentences of fifteen years on the robbery charge, one year on the tampering charge, and one year on the weapons charge. (*Id.*). The armed criminal action charge would be dismissed pursuant to this plea bargain. (*Id.* p. 3). During the plea colloquy, the trial court noted that this plea bargain was offered in consideration for Mr. Stepp's testimony in the case that he was presently trying. (*Id.*). After the court accepted the plea, a presentence investigation was ordered and sentencing was set for August 30, 1991. (*Id.* p. 8).

At his sentencing hearing, Mr. Stepp's counsel argued to the court that Mr. Stepp should receive probation rather than fifteen years imprisonment, despite the fact that the presentence report recommended against probation. (*Id.* pp. 8-10). Specifically, Mr. Stepp's counsel argued that his client deserved leniency because he was only fifteen years old and because of his testimony against Mr. Dunn which counsel noted was "instrumental" in obtaining a conviction. (*Id.*, p. 9).

Remarkably, the prosecution did not oppose or offer any counter argument to defense counsel's request for probation and did not ask the court to follow the original plea bargain agreement. (*Id.*, pp. 8-14). Judge Calvin suspended the imposition of the sentences on all three charges and placed Mr. Stepp on probation for three years. (*Id.*, p. 14). Before doing so, the court did not ask for the State's recommendation and the assistant prosecutor at the sentencing hearing did not say a word until after this sentence of probation was imposed. (*Id.*, pp. 10-14).

In light of these facts surrounding Mr. Stepp's 1991 guilty plea and sentencing, Mr. Stepp's testimony at the 2018 hearing that he had a guarantee of probation if he testified against Mr. Dunn is credible. The key factor that establishes that there was a clear understanding that Mr. Stepp would receive probation is the fact that the State stood silent and the judge did not request a sentencing recommendation from the State after Mr. Stepp's defense counsel urged the court not to follow the fifteen year plea bargain, but instead give him probation. If there was not a mutual understanding between the State and defense counsel and perhaps the trial court<sup>2</sup> that Mr. Stepp would receive probation, the prosecutor would have undoubtedly urged the court not to give Mr. Stepp probation, but instead to follow the fifteen year plea bargain that was recommended at the guilty plea hearing.

After he received probation, Mr. Stepp repeatedly violated his probation and ultimately served his fifteen year sentence. (Exh. 5). After he was released, Mr. Stepp was subsequently convicted of first degree murder involving the killing of his girlfriend and is currently serving a sentence of life without parole. (Exh. 23, p. 24).

Based on the foregoing facts, petitioner's convictions cannot stand because there is now clear and convincing evidence that petitioner is actually innocent of

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<sup>2</sup> It is unclear whether or not any off the record proceedings occurred before Mr. Stepp's sentencing hearing.

the murder of Ricco Rogers under the test articulated by this Court in *Amrine*. These facts also establish that petitioner's convictions are unconstitutional because they were secured through the knowing use of perjured testimony elicited from Mr. Stepp and Mr. Davis. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 269 (1959). Mr. Stepp's 2018 testimony regarding his undisclosed plea agreement also establishes a *Brady* violation.

There is also no procedural bar to merits review of petitioner's *Napue* and *Brady* claims for two reasons. First, there is cause and prejudice to overcome any procedural default because the facts supporting these claims did not first come to light until 2005, well after petitioner's direct appeal and 29.15 actions had been litigated to completion. *See State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011). There is also no procedural bar to merits review of petitioner's *Napue* and *Brady* claims because, as Judge Hickle found, petitioner can clearly meet the gateway innocence test of *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

Because there is no procedural impediment to review of the merits of the constitutional claims raised in this petition and petitioner is clearly innocent, petitioner is confident that this Court, after a full and fair review of the facts and applicable law, will find that habeas relief is warranted. Pursuant to Rule 91.04(a)(4), petitioner also states that no habeas petition raising these issues has been filed in a higher court.

#### IV.

#### JUDGE HICKLE'S ORDER AND JUDGMENT

Although Judge Hickle ultimately denied habeas relief to petitioner, he made several favorable findings of fact regarding the credibility of witnesses and evidence that was presented at the 2018 evidentiary hearing to which this Court should defer. Based upon these findings, it is evident that, but for the *Lincoln* decision, Judge Hickle would have granted habeas relief to petitioner on his freestanding claim of actual innocence. (*See* Exh. 21, pp. 10-17).

Most importantly, Judge Hickle found the testimony of Eugene Wilson, an independent eyewitness, to be credible. (*Id.* at 11-12). Judge Hickle also noted that Mr. Wilson's testimony enhanced the credibility of Mr. Stepp's and Mr. Davis' recantations. (*Id.* at 10). Although Judge Hickle did not make any explicit findings regarding whether the Stepp and Davis recantations were more credible than their trial testimony, he noted, citing Judge Wolff's concurring opinion in *Amrine*, that the only witnesses who implicated petitioner in this shooting were "proven liars." (*Id.* at 8).

In his findings of fact, Judge Hickle also noted that petitioner's claim of innocence was corroborated by other independent evidence. This evidence, as recited earlier, included the affidavit of Catherine Jackson and affidavit and hearing testimony of Nicole Bailey that they both spoke on the phone with

petitioner during the time the shooting occurred. Judge Hickle also credited the testimony of Curtis Stewart, who overheard Mr. Stepp tell someone on a phone call, while they were incarcerated together in the St. Louis City workhouse, that he did not know who shot Ricco Rogers. Finally, Judge Hickle found that petitioner's claim of innocence was corroborated by several alibi witnesses and the testimony of the victim's brother in the 29.15 hearing. (*Id.* 12-13).

Although Judge Hickle declined to grant habeas relief on petitioner's free-standing innocence claim because he felt legally constrained by the *Lincoln* decision, he found that petitioner could meet the gateway innocence test under *Schlup v. Delo*, 513 U.S. 298, 327 (1995). (*Id.* at 17-19). Judge Hickle also found that petitioner could establish cause and prejudice to overcome the procedural bar to his due process claims. (*Id.* at 19).

## V.

### REASONS FOR GRANTING THE WRIT

#### CLAIM 1

**PETITIONER'S CONTINUED INCARCERATION ON A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IMPOSED FOR THE OFFENSES OF FIRST DEGREE MURDER, TWO COUNTS OF FIRST DEGREE ASSAULT, AND THREE COUNTS OF ARMED CRIMINAL ACTION VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 21 OF THE MISSOURI CONSTITUTION BECAUSE HE IS UNQUESTIONABLY INNOCENT OF THESE CRIMES.**

The aforementioned evidence in this case conclusively establishes that petitioner did not commit the murder of Ricco Rogers in the City of St. Louis on May 18, 1990. There is simply no remaining credible evidence to establish that petitioner was the murderer. In light of the sworn recantations of DeMorris Stepp and Michael Davis, coupled with the lack of any physical evidence implicating him in the crime, there is no remaining evidence to support his guilt as presented in his original criminal trial.

In addition, the recantations of the state's two star witnesses are corroborated by other credible evidence, including disinterested eyewitness Eugene Wilson. (Exh. 3). Petitioner's claim of innocence is also bolstered by the affidavits of Catherine Jackson and Nicole Bailey, which indicate there is a strong possibility that petitioner was talking to one of them on the phone at the time that Ricco Rogers was shot. Coupled with the other exculpatory evidence presented in prior proceedings, all of the evidence, both old and new, clearly and convincingly undermines any confidence in the correctness of the jury's original verdicts, which were rendered without the benefit of this previously unavailable evidence.

For most of the last three decades, it appeared to be well-settled under Missouri law that free-standing claims of innocence are cognizable in a Rule 91 petition for a writ of habeas corpus. *See Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991). In 2003, this Court held that a habeas petitioner may assert a free-

standing claim of actual innocence, independent of any constitutional violation, as a means to obtain release from prison. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). Although *Amrine* involved a prisoner under a sentence of death, it is also a “manifest injustice” for the same reason to allow a prisoner to remain incarcerated for life if he is unquestionably innocent. *Id.* at 547-548. In fact, this Court in *Amrine* framed the issue as follows: whether Amrine’s “continued incarceration and eventual execution for a murder he did not commit constitutes a manifest injustice entitling him to habeas relief.” *Id.* at 546.

Petitioner’s free-standing claim of actual innocence is virtually indistinguishable from the facts that this Court confronted in *Amrine*. As in *Amrine*, no physical evidence linked petitioner to the murder and he was convicted solely on the basis of eyewitness testimony. *Id.* at 544. As in *Amrine*, all of the eyewitnesses the prosecution utilized to secure petitioner’s convictions have recanted under oath. Petitioner’s new evidence of innocence is also arguably stronger than Mr. Amrine’s case because there was an independent eyewitness to the murder, Eugene Wilson, whom the Circuit Court found to be credible, who provided strong corroborating evidence enhancing the credibility of Stepp’s and Davis’ recantations.

In 2018, this Court granted relief in a non-capital habeas corpus case involving a claim of freestanding innocence in *State ex rel. Robinson v. Cassady*,

SC95892. This Court granted a preliminary writ in *Robinson* and appointed a special master. On February 2, 2018, the master issued a report recommending that Robinson's conviction be vacated on his claim of innocence. *In re Robinson v. Cassady*, No. SC65892 (Report of Circuit Judge Darrell Missey) 2/2/18, pp. 79-86. The master in *Robinson* held that the *Lincoln* decision, which held that freestanding claims of actual innocence are not cognizable in non-capital Rule 91 actions, cannot be reconciled with *Amrine*. The special master also held that *Lincoln* is inconsistent with other prior decisions from this Court that recognize that freestanding claims of innocence are cognizable in non-capital Rule 91 actions. *See Wilson v. State*, 813 S.W.2d 833, 834-835 (Mo. banc 1991); *State ex rel. Verweire v. Moore*, 211 S.W.3d 89, 93 (Mo. banc 2006).

On May 1, 2018, this Court issued a one-page unpublished order in *Robinson*. The Court granted habeas relief to Robinson on his constitutional claims and further held that Robinson could meet the "gateway innocence" test and declined to address his freestanding innocence claim. Since the *Lincoln* decision appears to be an aberration that cannot be reconciled with *Amrine* and other previous Supreme Court decisions, it should not be followed by this Court. Like Judge Missey in *Robinson*, this Court should grant petitioner habeas relief on his claim of innocence because, as in *Amrine* and *Robinson*, both of the eyewitnesses to the crime in this case have recanted.

This Court, last year, sidestepped yet another opportunity to overrule *Lincoln* in granting habeas relief to Donald Nash, another Missouri prisoner who was wrongfully convicted. *State ex rel. Nash v. Payne*, SC97903 (Mo. 2020). In that case, as in *Robinson*, the Court declined to address whether *Lincoln* should be overruled by granting relief under gateway innocence notwithstanding the fact that a special master had recommended that Mr. Nash be granted relief on his free-standing innocence claim under *Amrine*.

In December of 2020, this Court appointed Judge Hickle as a special master to hear evidence in a habeas corpus case challenging the Jackson County murder conviction of Keith Carnes. *Carnes v. Buckner*, SC98736 (Order of 12/22/20). As in this case, Mr. Carnes raised a free-standing claim of innocence based upon the fact that the two eyewitnesses implicating him in the murder had recanted. However, it appears unlikely that this Court will utilize Mr. Carnes' case to reexamine or overrule the *Lincoln* decision because this Court's order appointing the special master directed Judge Hickle to only address the issue of gateway innocence and Mr. Carnes' other two claims for relief. (*Id.*).

Just last week, this Court denied the habeas petition of Kevin Strickland, who advanced a free-standing claim of actual innocence under *Amrine* that was supported by the elected prosecutor of Jackson County. *State ex rel. Strickland v. Brewer*, Case No. SC99096. This Court's decision in *Strickland* likely reflects this

Court's realization, as petitioner noted earlier, that Mr. Strickland's innocence claim was not ripe for expeditious review because he has never had a hearing to establish that he could meet the *Amrine* test.

Mr. Strickland refiled his habeas corpus petition in the Circuit Court of Dekalb County last week. *State ex rel. Strickland v. Brewer*, Case No. 21DK-CC00019. Based upon the substance of the circuit court's show cause order, it appears that the earliest that Mr. Strickland could receive an evidentiary hearing on his claim of innocence would be late this year. (*Id.* order of June 4, 2021). This case, however, provides this Court with the opportunity to expeditiously determine whether its 2003 decision in *Amrine* applies to innocent prisoners who are not under a sentence of death.

In the circuit court proceeding, respondent argued that free standing claims of innocence are not cognizable in Rule 91 actions unless the petitioner is under a sentence of death, citing *Lincoln*. Judge Hickle, in his order and judgment, found that he could not grant relief on petitioner's free-standing claim of innocence "[u]nless *Lincoln* is overruled or another division of our appellate court decides differently..." (Exh. 21, at 17). Judge Hickle's findings of fact provide this Court with a pristine vehicle to grant discretionary review and find that *Lincoln* was wrongly decided. Until *Lincoln* is overruled, innocent Missouri prisoners have no available judicial remedies to litigate and prove their innocence, which puts

Missouri at odds with virtually every other state. *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(g-1)?*, 76 Albany L. Rev. 1453, 1471–81, 1488–1515 (2013) (Noting that, at the time of publication, approximately forty states and the District of Columbia provided a judicial remedy by statute, caselaw, or court rule for state prisoners to litigate claims of innocence.)

In addition to being entitled to relief under the *Amrine* decision, petitioner's continued incarceration where there is clear and convincing evidence that unquestionably establishes his innocence, without affording him a new trial, is an arbitrary deprivation of life and liberty in violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Petitioner's continued incarceration without a new trial in the face of this evidence also constitutes an arbitrary and disproportionate punishment in violation of the cruel and unusual punishment clauses of the Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution.

In similar circumstances, courts of other states have granted new trials to state prisoners who have presented compelling and convincing evidence that they are innocent of the crime for which they are incarcerated. *See, e.g., Ex parte*

*Elizondo*, 947 S.W.2d 202 (Tex. App. 1996); *Montoya v. Ulibarvi*, 163 P.3d 476 (N.M. 2007); *People v. Washington*, 665 N.E.2d 1330 (Ill. 1996). In *Washington*, the Illinois Supreme Court declined to grant a prisoner a new trial based on an innocence claim on federal due process grounds in light of the decision in *Herrera v. Collins*, 506 U.S. 390 (1993). Instead, the court granted the defendant a new trial based upon the Illinois Constitution. 665 N.E.2d at 1335. Since that time, the United States Supreme Court has clarified that the fragmented *Herrera* decision, in which the petitioner had only made an extremely weak showing of innocence, did not actually resolve whether the Fourteenth Amendment would preclude habeas relief for a prisoner who presents a compelling claim of innocence. See *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *House v. Bell*, 547 U.S. 518, 554-555 (2006).

The Supreme Court of Iowa recently addressed a similar claim of innocence advanced by a prisoner based upon a recantation of a key prosecution witness in *Schmidt v. State*, 909 N.W.2d 778 (Ia. 2018). In that case, the court held that the due process clause of the Iowa Constitution required that the state courts provide a forum to hear an innocent prisoner's claim for relief from his conviction. In reaching this conclusion, the court noted: "An innocent person has a constitutional liberty interest in remaining free from undeserved punishment...[Therefore,] [h]olding a person who has committed no crime in prison strikes the very essence

of the constitutional guarantee of substantive due process.” *Id.* at 793. The *Lincoln* decision, if it stands, deprives Missouri prisoners of any judicial forum to advance a claim of innocence, which denies innocent prisoners their due process right to meaningful access to the courts. *See Halbert v. Michigan*, 545 U.S. 605, 623-624 (2005).

As in *Amrine*, all of the evidence the prosecution presented to convict petitioner at trial has been utterly discredited. When viewed in conjunction with the independent eyewitness testimony of Eugene Wilson and the lack of physical evidence, as in *Amrine*, there is clear and convincing evidence, in light of all the evidence, that petitioner is completely innocent. Therefore, this Court should issue a writ of habeas corpus vacating petitioner’s murder, assault, and armed criminal action convictions and his sentences of life imprisonment without parole and ninety years.

## **CLAIM 2**

**PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS BECAUSE PETITIONER’S CONVICTIONS WERE SECURED IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DUE TO THE GOVERNMENT’S KNOWING USE OF THE PERJURED TESTIMONY OF DEMORRIS STEPP AND MICHAEL DAVIS TO SECURE PETITIONER’S CONVICTIONS.**

The aforementioned recantations of Mr. Stepp and Mr. Davis unquestionably establish that petitioner’s convictions were secured through perjured testimony.

Apart from admitting that they lied at petitioner's trial, both of these witnesses indicated that, when they waived in their identifications, that they were coerced by the police and prosecutors to falsely implicate petitioner as the murderer of Ricco Rogers.

As noted earlier, Mr. Stepp admitted that he committed perjury at trial in his recent testimony at the May 30, 2018, evidentiary hearing. During his testimony, he also admitted that he had an understanding with the prosecution that, if he testified at petitioner's trial as a prosecution witness, he would be guaranteed to receive probation on his pending charges. This recent testimony indicates that Mr. Stepp, with the knowledge of the prosecution, deceived the jury regarding the substance of his plea agreement in order to unfairly enhance his credibility as a witness. Mr. Davis has also admitted, under oath, that he lied at petitioner's trial.

One of the most cherished principles of our criminal justice system, "implicit in any concept of ordered liberty," is that the state may not use false evidence to obtain a criminal conviction. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Deliberate deception of a judge and a jury is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Therefore, "a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269. Where it can be shown that the government knowingly

permitted the introduction of false testimony, reversal is “virtually automatic.” *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975).

The government also violates a criminal defendant’s right to due process of law, guaranteed by the Fourteenth Amendment, when it allows false evidence to go uncorrected when it is presented. *Giglio v. United States*, 405 U.S. 150, 155 (1972); *Pyle v. Kansas*, 317 U.S. 213 (1942). Based on the foregoing facts, there can be little doubt that petitioner’s conviction was secured through the use of perjured testimony, known by agents of the government to be false when it was presented.

To prevail on the due process violation involving perjured testimony under *Napue* and *Giglio*, a petitioner must also establish that he was prejudiced. *Jackson v. Brown*, 513 F.3d 1057, 1071-1072 (9th Cir. 2008). The test for prejudice resulting from the use of perjured testimony is more lenient than the *Brady* materiality test and a new trial is required where there is “any reasonable likelihood” that the perjured testimony could have “affected the judgment of the jury.” *United States v. Bagley*, 473 U.S. 667, 678 (1985).

Under Missouri law, a trial prosecutor does not have to have personal, subjective knowledge of the falsity of testimony before a due process violation can be established. *See State v. McClain*, 498 S.W.2d 798, 800 (Mo. banc 1973). Based upon these two recanting witnesses’ sworn statements and testimony, it is

evident that, at the bare minimum, agents of the state solicited false testimony and allowed that testimony to go uncorrected after it was given. *Giglio*, 405 U.S. at 153. Regarding the false testimony of Mr. Stepp involving his plea bargain, the prosecution also knowingly permitted Mr. Stepp to mislead the jury.

In *Giglio*, the court also found a *Napue* violation when the prosecutor lacked personal knowledge of the perjury. In that case, the court held that one prosecutor's unknowing failure to correct false testimony that disavowed promises made by another prosecutor violated due process. *Giglio*, 405 U.S. at 155. In reaching this conclusion, the court in *Giglio* stated: "The prosecutor's office is an entity and as such it is the spokesman for the government. A promise made by one attorney must be attributed for these purposes, to the government." *Id.* at 154. Thus, *Napue* and *Giglio* stand for the proposition that the element of the "knowing use" of perjured testimony is established when any of the state's representatives, including the police, would know that the testimony presented at trial was false. *See, e.g., Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008).

In addressing this claim, Judge Hickle denied relief because, in his view, petitioner presented no direct evidence that the police or the prosecution had actual knowledge that Mr. Stepp or Mr. Davis lied during their trial testimony. (Exh. 21, p. 20). However, the court below failed to recognize that it is an open question in Missouri as to whether a defendant's right to due process is violated by the state's

use of material perjured testimony to secure a conviction whether or not the prosecution or other government actors had actual knowledge that a witness was lying at the time he testified. In the last fifty years, this Court has not addressed whether the *Napue* requirement of governmental knowledge of the perjury was abrogated by the Supreme Court's *Brady* decisions, except in dicta in *Taylor v. State*, 382 S.W.3d 78, 83 (Mo. banc 2012).

This issue has created a split across fourteen federal courts of appeals and state supreme courts. Six courts recognize that a due process violation occurs when a defendant is convicted on the basis of material, perjured testimony, regardless of whether the government knew of the perjury at the time of trial. *See Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003); *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002); *Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009); *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1990); *Riley v. State*, 567 P.2d 475, 476 (Nev. 1977); *Case v. Hatch*, 183 P.3d 905, 910 (N.M. 2008). Eight other federal appellate and state supreme courts require contemporaneous government knowledge to find a due process violation when a conviction is based on perjured testimony. *See Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002); *Blalock v. Wilson*, 320 F. App'x 396, 413-414 (6th Cir. 2009); *Shore v. Warden*, 942 F.2d 1117, 1122 (7th Cir. 1991); *Farrar v. Williams*, 924 F.3d 1126 (10th Cir. 2019); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994); *People v.*

*Brown*, 660 N.E.2d 964, 970 (Ill. 1995); *In re Personal Restraint Petition of Rice*, 828 P.2d 1086, 1093 & n.2 (Wash. 1992); *State v. Lotter*, 771 N.W.2d 551, 562 (Neb. 2009).

Since this Court has not definitively addressed this issue, this case presents this Court with an ideal opportunity to decide this important question. A conviction that rests on material perjured testimony violates fundamental fairness and due process whether or not the government was aware of that perjury at the time of trial. Constitutional protections against the government's use of perjury rest upon the need to avoid an unfair trial, not the desire to "punish society for the misdeeds of the prosecutor." *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The United States Supreme Court's twentieth century caselaw addressing the use of perjured testimony initially addressed the state's deliberate use of perjury. *See Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942). Subsequent cases steadily clarified that the paramount concern of the due process clause is to ensure that the defendant receives a fair trial regardless of the subjective knowledge of the prosecutor during the trial. The Supreme Court later recognized that the due process principles announced in *Mooney* and *Pyle* extend beyond the limited universe of deliberate malfeasance by the prosecution in *Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

In *Alcorta*, the Court held that a due process violation occurs even when the state allows false evidence to go uncorrected after it is presented. *Id.* See also *Napue v. Illinois*, 360 U.S. 264, 269 (1959). *Napue* expanded upon this fairness principle by holding that a due process violation occurs even when the false testimony goes only to the credibility of a prosecution witness, reasoning that a “lie is a lie.” *Id.* at 269-270. In doing so, the Court in *Napue* explained that the prosecution’s subjective motivations are immaterial. *Id.* at 270. In other words, the “concept of ordered liberty” is offended not by the prosecution’s malevolence but by perjury’s insidious effect upon the fairness of the trial itself. *Id.* at 269.

The Supreme Court’s later decision in the seminal case of *Brady v. Maryland*, 373 U.S. 81 (1963), then took the next step. In that case, the Court held that the suppression of material exculpatory evidence violates due process “irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87.

Based upon these Supreme Court precedents, the proper test for finding a due process violation is that a constitutional violation occurs when a witness perjures himself and there is a reasonable likelihood that the perjured testimony affected the jury’s decision. See *Napue*, 360 U.S. at 272. It offends any reasonable sense of justice to allow a conviction to stand where a defendant can establish beyond any doubt that his conviction was tainted by perjured testimony.

Perjury is “the leading cause of wrongful conviction.” *See Perjury*, Innocence Project of New Orleans.<sup>3</sup> Nearly six in ten wrongful convictions can be traced back to perjury. *See % Exonerations by Contributing Factor*, National Registry of Exonerations.<sup>4</sup> Of the five factors contributing to wrongful convictions - mistaken witness identification, perjury or false accusation, false confession, false or misleading forensic evidence, and official misconduct - only official misconduct (contributing to 54% of wrongful convictions) even comes close to rivaling perjury’s clout. *See Id.*

In our system of justice, the truth should matter. *James v. Illinois*, 493 U.S. 307, 311 (1990). Perjury corrupts the truth-seeking function of the trial process and sullies the reputation of the judiciary itself. In order to vindicate this bedrock principle of the American judicial system, this Court should grant discretionary review to address this important unresolved question.

On the issue of prejudice, there can be no doubt that the perjured testimony here affected the judgment of the jury. As noted above, this perjured testimony was the only evidence the prosecution could muster to secure petitioner’s convictions. Without this testimony, the state simply had no case.

In light of the foregoing facts, it is beyond dispute the perjured testimony here affected the judgment of the jury. Habeas relief is warranted.

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<sup>3</sup> Available at <https://bit.ly/2SYyIgs> (last visited 1/27/20).

<sup>4</sup> Available at <https://bit.ly/2QLQIYU> (last visited 1/27/20).

### **CLAIM 3**

**PETITIONER IS ENTITLED TO HABEAS RELIEF FROM HIS CONVICTIONS AND SENTENCES BECAUSE THE PROSECUTION FAILED TO DISCLOSE MATERIAL, EXCULPATORY, AND IMPEACHMENT EVIDENCE THAT UNDERMINES CONFIDENCE IN THE OUTCOME OF PETITIONER’S TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI, AND MISSOURI SUPREME COURT RULE 25.03.**

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. Later, in *Strickler v. Greene*, 527 U.S. 263 (1999), the court more precisely articulated the three essential elements for establishing a *Brady* claim: “[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 281-282. It is also well settled that the *Brady* rule encompasses evidence “known only to police investigators and not the prosecutor...In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.’” *Id.* at 280-281 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

Like the due process requirements of the *Brady* line of cases, Missouri Rule 25.03 requires the prosecution, upon written request of defendant's counsel, to disclose exculpatory evidence to the accused prior to trial. This rule "imposes an affirmative requirement of diligence and good faith on the state to locate records not only in its own possession or control but in the control of other government personnel." *Merriweather v. State*, 294 S.W.3d 52, 56 (Mo. banc 2009). Although discovery violations under Rule 25.03 are trial errors that normally must be raised on direct appeal, this Court held in *Merriweather* that such claims may be raised in a subsequent post-conviction action in the interest of fundamental fairness. *Id.* at 55.

The facts that give rise to the *Brady* claim in this case involve the state's failure to disclose to the defense that its star witness, DeMorris Stepp, had an understanding that he would receive probation on his pending charges if he testified at petitioner's trial. At the time of petitioner's trial, as noted earlier, Mr. Stepp had a pending felony case arising from offenses that occurred before petitioner's trial. (Exh. 5).

At petitioner's trial, Mr. Stepp testified that he had entered into a plea agreement under which the state would request that he be sentenced to fifteen years in the Department of Corrections in exchange for his testimony in petitioner's case. (Tr. 146). In contrast to his trial testimony, Mr. Stepp testified at the 2018 hearing

that he had an understanding that he would definitely receive probation on his pending charges if he testified at petitioner's trial. (Exh. 23, pp.14-15, 47). This was corroborated by the fact that, at his subsequent sentencing hearing, he received a suspended imposition of sentence and three years' probation (Exh. 19, pp. 8-14).

The foregoing facts provide a textbook violation of the due process principles of *Brady* and further constitute a discovery violation under *Merriweather*. Under *Brady*, it is clear that the state failed to disclose the impeaching information that Mr. Stepp expected to, and did, in fact, receive probation in exchange for his testimony in petitioner's case. *See State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. banc 2010). There is no dispute under the first part of the *Brady* test that this evidence was exculpatory. *Id.* To establish *Brady* materiality, petitioner must show "a reasonable probability of a different result" or in other words, that the excluded evidence "undermines confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 434-435 (1995).

In considering the issues of prejudice and *Brady* materiality, this Court's recent decision in *Merriweather* is instructive. As in *Merriweather*, the prosecution's case here depended almost entirely on the credibility of Mr. Stepp. Thus, the case hinged on whether the jury chose to believe Mr. Stepp. In *Merriweather*, this Court had little difficulty in concluding that the additional impeaching information in that case, involving an undisclosed prior conviction of

the key prosecution witness, was prejudicial. The same conclusion can be reached here “because [Mr. Stepp’s] credibility was pivotal and the [undisclosed impeachment evidence] would have affected the jury’s assessment of [Mr. Stepp’s] credibility.” *Merriweather*, 294 S.W.3d at 57.

The United States Supreme Court has also addressed the impact that undisclosed exculpatory evidence has when the defendant’s conviction is based on weak trial evidence presented by the state. *See Wearry v Cain*, 577 U.S. 385 (2016). “If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.” *Id.* at 393 (quoting *United States v. Agurs*, 427 U.S. 97, 113 (1976)). Here, the only evidence linking petitioner to the crime was the testimony of Mr. Stepp and Mr. Davis.

In considering *Brady* materiality, this Court should also take into account the evidence of innocence presented in this case, under Claim 1, including the recantations of Mr. Stepp and Mr. Davis, in determining whether the jury’s guilty verdict is worthy of confidence. This Court has held that similar newly discovered evidence, such as a recantation of a key witness, must be considered in conjunction with the *Brady* evidence in determining whether a new trial is warranted. *See State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011); *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 345 (Mo. banc 2013).

Judge Hickle, in denying relief on this claim, concluded that no agreement for probation existed because he believed that such an arrangement would have made the trial judge complicit in a “scheme” to deceive petitioner’s jury. (Exh. 21, p. 23). Judge Hickle’s analysis fails to recognize that *Brady* claims of this nature must necessarily focus on whether an understanding or arrangement between the witness and the prosecution existed. The fact that the prosecution did not urge the trial court to follow the plea bargain and impose the fifteen year sentence at Mr. Stepp’s sentencing hearing strongly corroborates Mr. Stepp’s testimony in 2018, that both the prosecutor and Mr. Stepp knew at the time he testified at trial that he would not be going to prison.

It is also clear that a formal plea agreement or contract with a witness is not required to establish a *Brady* violation. *See Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989) (finding a *Brady* violation despite the lack of either “an express or implied agreement” between the witness and the state). As the Supreme Court has noted, the key question is not whether there is an effective agreement, but whether the witness “might have believed that [the state] was in a position to implement...any promise of consideration.” *LaCaze v. Warden*, 645 F.3d 728, 735 (5th Cir. 2011) (quoting *Napue v. Illinois*, 360 U.S. 264, 270 (1959)).

Here, there was clearly an understanding between this witness and the state as to the outcome of a future prosecution that would have adversely affected Mr.

Stepp's credibility, had it been disclosed to the defense. *See Giglio*, 405 U.S. at 155. As the record clearly indicates, the state unfairly enhanced Mr. Stepp's credibility during petitioner's trial by hiding the fact that Mr. Stepp knew he would get probation for his testimony against petitioner. *See Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).

Petitioner's due process rights were violated by the prosecution's suppression of material exculpatory evidence under *Brady*. While Mr. Stepp testified at petitioner's trial that he was being offered a fifteen year sentence in exchange for his testimony against petitioner, it is clear that he actually believed that he would be receiving probation. Since Mr. Stepp was the star witness for the state, his testimony was critical and the excluded impeachment evidence undermines confidence in the jury's verdict. Habeas relief is warranted.

### **CONCLUSION**

WHEREFORE, for all the foregoing reasons, petitioner respectfully requests that this Court require the State of Missouri to show cause as to why habeas relief should not be granted and thereafter, after a thorough review of the facts and law, enter an order granting a Writ of Habeas Corpus vacating petitioner's convictions, and grant such other and further relief that the Court deems fair and just under the circumstances.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of June, 2021, the foregoing was filed via case.net and a true and correct copy was sent to the office of the Missouri Attorney General via email: andrew.crane@ago.mo.gov.

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