

IN THE CIRCUIT COURT OF ST. FRANCOIS COUNTY
STATE OF MISSOURI

In re:

RODNEY CARR,

PETITIONER,

v.

RICHARD ADAMS,

*Warden, Eastern Reception Diagnostic
and Correctional Center,*

RESPONDENT.

Cause No:

**PETITION FOR HABEAS CORPUS AND INCORPORATED SUGGESTIONS IN
SUPPORT**

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--Trial Prosecutor Timothy Finnical (Ex 4)

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A: As he was actually stabbing Tom Jackson.

Q: Who? As who? Who is he?

A: Driscoll.

Q: Is Mr. Driscoll present here in the courtroom today?

A: That's him over there.

--[REDACTED], State v. Driscoll II, T. 867 (Ex 10)

"it seems to me that you're doing an admirable job of cross-examination using his prior testimony. I think you've impeached him."

--The Hon. John D. Wiggins, Judge, Driscoll II (*Id.* T. 876)

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IV. CONCLUSION

Comes now, Petitioner Rodney Carr, by counsel, and petitions this Court for a Writ of Habeas Corpus pursuant to the Missouri Constitution, Art. 1 § 12, § 532.430 R.S.Mo and Missouri Rule 91 and states the following in support:

INTRODUCTION

Rodney Carr was wrongly convicted of capital murder in 1985 for the stabbing death of Missouri Corrections Officer Tom Jackson. On July 3, 1983 the overcrowded and short staffed¹ Moberly Correctional Center was the location of what law enforcement would come to call a “riot.” Numerous officers and inmates were involved. Some were injured. Corrections Officer Thomas Jackson was fatally stabbed. Inmates Robert Driscoll, Roy Roberts and Petitioner Rodney Carr were each tried in separate trials and convicted of acting in concert to cause Jackson’s death. Mr. Carr petitions this Court for habeas corpus relief because substantial new evidence, much of it concealed by the State, proves his innocence in Officer Jackson's stabbing.

PROCEDURAL HISTORY

The three co-defendants in the death of Officer Thomas Jackson—Rodney Carr, Robert Driscoll (nickname: Rabbit), and Roy Roberts (nickname: Hog)—severed their cases following a joint preliminary hearing in 1984.

Driscoll was the first to be tried in November of 1984 in Phelps County. He was convicted and sentenced to death for the stabbing of Officer Jackson.

Driscoll was granted habeas corpus relief in federal court based on ineffective assistance of counsel² and re-tried in Phelps County in 1999. He was again sentenced to death. This sentence

¹ Superintendent [REDACTED] Testified at Carr’s Trial, “It is pretty obvious that was over capacity of 1643 prisoners with a designed capacity of 1034 that we were pretty heavily over populated.” (Ex 6: Carr trial transcript, T. 158)

² *Driscoll I* reversed: *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995), cert. denied, 519 U.S. 910 (1996).

was also reversed, with the Missouri Supreme Court holding in 2001 that evidence of Driscoll's membership in the Aryan Brotherhood had been improperly admitted.³ Driscoll's final trial took place in 2004, and he was found guilty of manslaughter and sentenced to time served.⁴ He died a free man, a husband, and private investigator in or around 2010.⁵

Roberts was the second to be tried. In January of 1985 in Marion County, he was convicted and sentenced to death on the allegation he was restraining Officer Jackson as Jackson was stabbed. Roberts' appeals were ultimately unsuccessful. He was executed by the State of Missouri on March 10, 1999.⁶

Carr's trial took place in February 1985 in Dent County. Carr was convicted for stabbing Officer Jackson. However, the jury deadlocked on whether or not to impose death as the sentence. Judge Frank Conley sentenced Carr to life in prison, noting that the evidence against Petitioner was "thin." (Ex 4: Letter by Prosecutor Tim Finnical). Carr has exhausted all of his appeals.⁷ The instant petition follows.

THE TOTALITY OF THE EVIDENCE

There is substantial newly discovered evidence. The totality of this new evidence, including numerous *Brady* Violations and rampant prosecutorial misconduct, show an overwhelming and manifest injustice; one that has resulted in an innocent man sitting in a Missouri prison since 1983. The evidence of prosecutorial misconduct corroborates a recent admission by

³ *Driscoll II* reversed: *State v. Driscoll* 55 S.W.3d 350 (Mo. 2001)

⁴ See Ex 1: transcript of Driscoll III trial, no appeal.

⁵ See: Ex 2: Affidavit of [REDACTED], formerly Driscoll, Ex 3: Email from Attorney Bradford Kessler

⁶ *State v. Roberts*, 709 S.W.2d 857 (Mo.banc 1986)

⁷ *State v. Carr*, 708 S.W.2d 313 (Mo.App. 1986), *Carr v. State*, 819 S.W.2d 84 (Mo. Ct. App. 1991), *Carr v. State*, 829 S.W.2d 101 (Mo. Ct. App. 1992)

the State's prosecutor that he knows Carr did not stab the victim, even though this same prosecutor presented evidence at trial that Carr was, in fact, the stabber.

March 18, 2019

Tim Finnical
143 Lakeside Dr
Forsyth, MO 65653

To whom it May Concern:

I have been contacted by the attorney for Rodney Carr. He informed me that he will be filing a petition for clemency with the office of the Missouri Governor in the near future.

I was the special prosecutor from the Missouri Attorney General's Office assigned to prosecute Mr. Carr and two other defendants.

Mr. Carr was not the person who actually stabbed the victim. The evidence supporting Mr. Carr's guilt was thin, the trial Judge, Hon. Frank Conley, remarking to me that the case of Carr's guilt was a "close one".

I have no opposition to the Governor's granting of clemency to Rodney Carr.

Sincerely,

Tim Finnical

Ben #30766

(Ex 4)

In March 2019, former Assistant Attorney General Tim Finnical admitted that he knew Carr did not stab Corrections Officer Tom Jackson. But in 1985, that knowledge didn't stop him from trying Carr for Capital Murder for the stabbing of Officer Jackson and presenting false evidence that Carr was stabber. This exemplifies the prosecutor's use of contradictory evidence to present each defendant in the Moberly prosecutions in the most culpable light possible.

Finnical signed the above letter (Ex 4) in the presence of, and made confirming statements to, private investigator and former Christian County Sheriff [REDACTED] (Ex 5: Affidavit of Private Investigator [REDACTED]).

Justice requires that a Court consider all available evidence uncovered following an Appellant's trial that may impact his entitlement to habeas relief. (See: *State ex el Amrine v. Roper* 102 S.W. 3d 541, 545 (Mo Banc 2003), *Kyles v. Whitley* at 436, 473 and *Woodworth v. Denney* 396 S.W. 3d 330, 345 (Mo. 2013),

"In deciding whether the prejudice shown by Brady violation is sufficient to determine that the prior verdict is 'not worthy of confidence,' the Courts should consider the effect of all suppressed evidence along with the totality of the other evidence uncovered following the prior trial." *Woodworth, supra*.

Finnical's 2019 admission is corroborated by a growing body of newly discovered evidence supporting Mr. Carr's innocence. Together, they demonstrate prosecutorial misconduct so severe as to violate Carr's due process rights under the United States Constitution.

Finnical did not and does not believe Carr stabbed Officer Jackson, and through investigation, we now know why. In 1985, the following was known to the government, but not disclosed to the defense:

- a. Evidence that Carr's cut-off jean shorts, which later tested negative for blood, were in the possession of the State. This evidence would have contradicted the testimony of prosecution witnesses that the stabber wore gray prison-issued trousers. This contradiction was known by the prosecution;
- b. Evidence destroying the link between Mr. Carr and the knife alleged to have been used by him, and establishing that the only white knife with a proper chain of custody was found in/under the cell of alternative suspect [REDACTED] [REDACTED], a likely perpetrator of Jackson's stabbing. Finnical knew of this evidence, but it was successfully concealed from Carr's defense;
- c. Transcripts of co-defendant trials establish irreconcilable inconsistencies (both elicited by the prosecution, and in other cases left uncorrected) in testimony of key

witnesses, guards as well as inmates, including the testimony of Officer [REDACTED],

who said in Carr's trial that Carr was Jackson's stabber, but in Driscoll's trial

identified Driscoll as the prisoner who stabbed Jackson;

c2. Evidence establishing undisclosed deals and leniency extended to State's

Witnesses, "Finnical's Lucky Three," in exchange for false testimony; and

undisclosed retaliation against an inmate who tried to expose the deals;

d. Testimony and statements that inmate witness [REDACTED] was threatened with

prosecution and death row when he told investigators Carr could not have stabbed

Officer Jackson;

d. Evidence that a prisoner questioned by the Emergency Squad identified the

perpetrators of the uprising who were later found hiding in a cell together, and that

Carr was never identified by this prisoner and was not found in the cell;

e. Evidence that Department of Corrections Employees did not write their own

reports, but signed reports ghost-written by prison investigators. They were told

how to testify by supervisors and state officials, and were directed not to disclose

certain facts;

All of the above support the following claims:

I. The State suppressed exculpatory evidence in violation of *Brady v. Maryland*;

II. Severe prosecutorial misconduct violated Carr's due process rights when the State:

(a) introduced testimony in Mr. Carr's trial that conflicted with testimony supporting incompatible facts and theories presented in the trials of Mr. Carr's co-defendants, Driscoll and Roberts, in violation of *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), *Giglio v. United*

States, 405 U.S. 150 (1972), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Berger v. United States*, 295 U.S. 78 (1935), and

(b) intimidated and threatened witnesses in violation of Carr's due process rights under *Webb v. Texas*, 409 U.S. 95 (1972), *State v. Brown*, 543 S.W.2d 56 (Mo. Ct. App. 1976) and *State v. Allen*, 800 S.W.2d 82 (Mo. Ct. App. 1991);

III. The State's concealment of exculpatory evidence and Mr. Carr's Actual Innocence support a procedural gateway to the merits of Mr. Carr's claims pursuant to *Engel v. Dormire*, 304 S.W. 3d 120, 126 (Mo. banc 2010), and support a freestanding claim of innocence.

A VERDICT NOT WORTHY OF CONFIDENCE

As set forth below, the cumulative effect of the prosecutorial misconduct, shocking contradictions in state's witness' testimony and *Brady* violations was to render the verdict against Carr "not worthy of confidence." Newly discovered evidence corroborates the prosecutor's recent admission and establishes that, had Carr known the facts and information newly discovered herein, he would have been able to substantially weaken the state's evidence against him in an already thin case. In particular, had Carr been able to present the knowing use of false evidence and different theories at the different trials by the prosecutor, he would have been able to successfully attack the integrity and credibility of the entire investigation and prosecution.

The evidence is clear and convincing that Carr is innocent of the murder of Officer Thomas Jackson. The newly-discovered evidence and the totality of the circumstances demonstrate that:

(1) the State did not disclose exculpatory and impeachment evidence that was material to the outcome of the case, and the State further engaged in misconduct that violated Mr. Carr's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution;

(2) Mr. Carr can show cause-and-prejudice for not having discovered his *Brady v. Maryland* claims earlier;

(3) Mr. Carr has established a gateway claim of innocence that overcomes any alleged procedural default and a freestanding claim of actual innocence; and,

Therefore, Mr. Carr is entitled to the writ of habeas corpus.

ARGUMENT

I. VIOLATIONS OF *BRADY V. MARYLAND*

LEGAL STANDARDS FOR *BRADY* RELIEF

To prevail in his *Brady* claims, Petitioner must satisfy three components: (1) The evidence at issue must be favorable to him, either because it is exculpatory or because it is impeaching of an adverse witness; (2) that evidence must have been suppressed by the State, whether willfully or inadvertently; and (3) he must have been prejudiced. *Woodworth*, 396 S.W.3d 330 at 338. *State ex rel. Hawley v. Beger*, 549 S.W.3d 507, 512 (Mo. Ct. App. 2018)

“*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation.” *Miller*, 14 A.3d at 1107 (quoting *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995)). It does not require the production of specific documents. It requires the production of information. *Id.*

“The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)

A showing of “cause and prejudice” is necessary to overcome any procedural bar to *Brady* relief. Cause is established where there is a factor at issue external to the defense or beyond its responsibilities. *Engel v. Dormire* Supra at 125. If a Petitioner establishes the prejudice necessary to support his *Brady* claims, he also establishes the required prejudice to overcome the procedural bar for habeas relief. *Id.* at 126.

“The deception from a negligent nondisclosure causes no less injury to the administration of criminal justice than a suppression made by design or guile. The duty to disclose, whether under *Brady* or Rule 25.32, rests on the prosecutor, and the material and information are within his possession or control, the cause of his failure cannot soften the sanction.” *Giglio v. United States*, 405 U.S. 150, 154 (1972)

Petitioner can overcome any procedural bars to his habeas claims by showing “cause and prejudice.” To demonstrate cause, the petitioner must show that an effort to comply with the State’s procedural rules was hindered by some objective factor external to the defense. *Id.* at 126. In other words, “a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable.” *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (citation omitted).

The State’s failure to disclose exculpatory evidence, if shown, constitutes adequate cause for failure to earlier raise the error. See *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011) (State’s failure to disclose evidence that an inmate other than the defendant possessed a weapon at the time of victim’s murder in jail yard constituted “cause” to overcome objection that defendant did not raise the issue at trial).

To establish “prejudice,” Petitioner must prove that the state’s failure to disclose exculpatory information known to it, whether inadvertent or deliberate, undermined confidence in

the verdict. The determination whether a constitutional violation is prejudicial under the cause and prejudice standard is identical to this Court's assessment of prejudice undertaken in assessing Petitioner's *Brady* claims. *Engel*, 304 S.W.3d at 126.

In determining prejudice, the United States Supreme Court has stated: "A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, to be entitled to a new trial under the *Brady* standard, a defendant must show "a 'reasonable probability' of a different result," *Id.*, which means a verdict not worthy of confidence. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *Griffin*, 347 S.W.3d at 77.

"Courts must consider the cumulative effect of excluded evidence in determining if a *Brady* violation occurred." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. 2010) (See also: *Kyles supra* at 436, 437.)

A. Evidence that Petitioner's cut-off jean shorts were in the possession of the State, and tested negative for blood, contrary to the testimony of prosecution witnesses that the stabber wore gray prison-issued trousers

At Petitioner's trial, every witness who described the clothing of Jackson's attacker, described the clothing of Driscoll: Grey pants, blue shirt. (Ex 6: [REDACTED]: T.215, [REDACTED]: T.261, [REDACTED]: T.233).

Prosecutor Finnical went as far as to elicit the following testimony from Officer [REDACTED],

knowing that Petitioner's cut offs were in the State's possession:

Q: Do the inmates that you are familiar with own any street pants?

A: Not to my knowledge. (*Id* at T. 320)

At his trial, Petitioner testified he was wearing cut-off blue jean shorts the night of July 3, 1983. (T. 397). Petitioner was not aware at the time that his cut-off jeans were in the possession of the State.

1. **The Cut Off Jean Shorts**

Due to his immediate transfer away from MCC Moberly, Carr had no way of knowing at the time of trial that his shorts had been **collected by the state as evidence**. Carr's swift transfer from Moberly meant that Carr did not receive all of his property until he was released from administrative segregation in or around 1986. (He was always missing property when moved).

The first mention of the denim shorts came from a 1999 evidence report following Driscoll's Second Trial, where the report listed "Rodney Carr's Shorts" as evidence. (Ex 43: 1999 Evidence Report).

Carr did not receive a copy of this report and he had no knowledge of the whereabouts of his shorts, or that they had been collected by the state as evidence, until at least 2005. (Ex 44: 2021 Photo of Shorts, below).

2. The Testing of the Cut Off Jean Shorts



In 2021, Carr discovered through investigation that not only were his cut-off denim shorts in the possession of the State (Ex 44, above), they had been tested for blood shortly before *Driscoll III*. That test was negative—an exculpatory result. (Ex 45: Testing Results, below).



**GENETIC
TECHNOLOGIES, INC.**
DNA / FORENSIC / PATERNITY TESTING

FORENSIC BIOLOGY WORKSHEET

CASE#: FD1301 DATE RECEIVED: 11-25-03 REAGENT QC (+) and (-):
ANALYST: SK/LGH SHIPPING METHOD: In Person AP Spot: ☐ ☐
DATE: 2-20-04 RECEIVED BY: SKH PTH: ☒ ☒
PASSWORD: TAK: ☒ ☒
Urea: ☐ ☐

ITEM	DESCRIPTION	AP SPOT	AP CUT	P30	SPERM	BLOOD PRESUMPTIVE (PTH)	BLOOD CONFIRM (TAK)	UREA	AMYLASE	DNA
Q1	Metal Shank wrapped w/black electrical tape									
Q1-1	Red/brown colored spot on handle below tape.					(-)	(-)			
Q2	Metal Shank wrapped w/white & clear tape for handle. - Section of white tape w/ red/brown colored stains.					(-)	(-)			
Q4-1	Red/brown stain taken from front of lt. leg (closer to inseam)					(-)	(-)			
Q4-2	Red/brown stain taken from front of right leg of cut-off jean shorts					(-)	(-)			✓
Q3-1	Red/brown colored stain taken from an area adjacent to cuttings in right shoulder of guard shirt									
Q3-3	Red/brown stain on left pocket of guard shirt									✓

3. Cause and Prejudice- Carr's Shorts

There is no evidence that the State honored its ongoing, continuing *Brady* obligation.

"The duty to disclose evidence within the scope of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), is ongoing and extends to all stages of the judicial process." *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997), citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

Carr has been unable to locate any documents regarding petitioner's shorts that pre-date a 1999 Mo State Hwy Patrol evidence inventory log. This, suppressed from Carr, evidence log appears to have been generated for *Driscoll II*. (Ex 43).

This evidence would have been significant to Carr, as key identifications for the State testified the attacker was wearing gray pants. The cut-off jean shorts could have been used as impeachment material and to support a defense that he was misidentified for Robert Driscoll, the

admitted stabber who was wearing gray pants and blue shirt. Driscoll confessed to the stabbing and to the clothing he was wearing and that clothing was recovered from his cell by state officials:

“This investigator and the others involved then proceeded to housing unit #2B, cell #410, which had been assigned to Driscoll and [REDACTED] on July 3, 1983...upon entering the cell, investigators observed and recovered a blue tank top shirt and pair of gray pants and a pair of Nike tennis shoes. *All of the items had stains appearing to be blood on them...*Driscoll was shown the items which had been recovered. Without hesitation, Driscoll identified the items as being his and the ones which he had worn on July 3, 1983.” (Ex 7- DOC Report P.14, emphasis added)

The exculpatory testing on the shorts was never disclosed to Carr and only discovered in 2021 through Missouri Chapter 610 Request by Carr’s counsel. There is no evidence that the State disclosed the results of this test to Carr. However, there is documented evidence that the State was aware of this testing and its results.

In fact, Carr filed his own motion for DNA testing on Driscoll’s clothing in January 2005, and while finally acknowledging that they had Carr’s shorts in their possession, the State still failed to disclose the exculpatory testing to Petitioner. (Ex 46: Carr DNA Motion Documents).

In spite of Carr’s diligent pursuit of this evidence, the State successfully blocked his access to it. Therefore, Carr can show cause and prejudice to overcome any alleged default for not having raised these *Brady* claims while prior proceedings were available.

The existence of the shorts and their testing is exculpatory, and undermines the case against Carr. This shows that The State’s nondisclosure was in violation of *Brady v. Maryland*. Therefore, Carr is entitled to habeas corpus relief on this claim.

B. Evidence destroying the link between Mr. Carr and the knife alleged to have been used by him, and that the only knife with a proper chain of custody was found in the cell of alternative suspect [REDACTED]

The state's case against Petitioner depended on connecting Rodney Carr to a white tape handled knife. But, as explained in the next section, material evidence connecting a white tape handled knife to an alternative suspect [REDACTED] was suppressed.

In his highway patrol interview in September 1983, Officer [REDACTED] *claimed* to have recovered the knife allegedly used by Carr on the night of Jackson's death,

"[REDACTED] saw inmate Rodney Carr with a knife and was cut on the hand by Carr. He then saw Carr get on the back of Officer [REDACTED]. This is when it is thought that [REDACTED] was stabbed in the back. While Carr was on [REDACTED] back, he was struck on the head by Officer [REDACTED] causing him to drop his knife which Officer [REDACTED] recovered." (Ex 38)

The Knives At Carr's Trial

However, at Carr's trial in 1985, [REDACTED] story changed significantly from the account above. (Ex 6).

[REDACTED] testified at trial that a shank fell down beside him and he picked it up and gave it to Officer [REDACTED]. He said the knife he picked up was Carr's during his direct examination, but [REDACTED] identified that knife as Ex. 22. Ex. 22 was the black tape knife Robert Driscoll confessed to using. (Ex 6: T. 254-259). So, [REDACTED] identified a knife connected to Driscoll, not Carr.

Then, during his cross examination, Officer [REDACTED] back-tracked, saying he cannot say he saw Ex.22 in Carr's hand on July 3, 1983, but, "can't say it wasn't that knife either." He testified it was the knife he picked up, but he cannot say it was the one Carr had. (T. 260).

On redirect examination, Prosecutor Finnical elicited testimony from [REDACTED] eliminating Carr's connection to this knife:

Q: Are you contending that that's Rodney Carr's knife or just a knife you found on the floor?

A: No, sir. That's a knife I found on the floor. (P. 262)

Still at Carr's trial, Officer [REDACTED] identified Carr as having stabbed Officer Jackson with a knife 7-10 inches long, with white tape around the handle. (P. 226-227). **This is important because such a white tape handled knife was found in alternative perpetrator [REDACTED] cell—a fact not disclosed to Carr.**

When State's Ex. 27, a white tape handled knife, was introduced, Officer [REDACTED] testified that he couldn't say Ex. 27 was the exact knife supposedly used by Carr, but Carr at least used one that "appeared that way." (P. 228). [REDACTED] also stated he did not pick that knife up off the floor, and had never seen Ex. 22 (Driscoll's black taped knife) before.

Prosecutor Finnical also elicited testimony about Ex. 27, the white tape handled knife, from MODOC Investigator [REDACTED] at Carr's trial. [REDACTED] stated that the white tape handled knife was found in the rotunda after the inmates were pushed back into the wing. (T. 271).

Finnical attempted to admit Ex. 27 into evidence at the conclusion of [REDACTED] testimony, but when Defense Attorney Ossman objected that a proper foundation hadn't been laid, Finnical responded, "I won't offer at this time, your honor." (T. 278).

The knife was later admitted into evidence, against the same objection, during the testimony of pathologist and medical examiner [REDACTED] that Driscoll's black taped knife "could have caused all wounds if it is an inch wide or close to an inch wide," and that Ex. 27, (the white handled knife alleged to have been used by Petitioner) was, "possible to have caused one of the wounds, but not all of them." No further foundation had been laid. (T. 379).

[REDACTED] went on to explain that because he did not record in his notes or report which of the four wounds on Officer Jackson had an "indeterminable edge," he couldn't determine if that wound

came from a single or double-edged knife. All others came from a double-edged knife with certainty. (TTR 337, 380-382). Driscoll's black knife was double-edged. The white-knife alleged to have been used by Petitioner, was not. (Id.). This is all confirmed in the following exchange between Prosecutor Finnical and pathologist [REDACTED]:

Q: But you cannot say that this knife (Ex 17-black tape) caused all of them, and you couldn't say this knife (Ex 27-white tape) caused one of them?

A: That's correct.

Q: The best you could do is an educated guess that one of the wounds appeared to have a flat edge and three of wounds appeared to have two sharp edges?

A: One of the wounds appeared that- I could not really tell whether flat or sharp one one edge, and the other(s) looked like they were all sharp. (TTR 382).

Despite eliciting this testimony concerning the knives, **Prosecutor Finnical adopted a contradictory argument at Driscoll's first trial.** (Ex 8).

At that trial, unlike at Petitioner's trial *only a few months prior*, Finnical highlighted for the jury that, "[REDACTED] said the knife Driscoll had- was consistent with the stab wounds to the victim."

He went on to say that [REDACTED] said the wounds were done by a double-edged knife, not one with a blunt side. (Ex 8: Driscoll I, P. 1926). This trial testimony and argument from the Driscoll trial, only a few months earlier, was not disclosed to Petitioner in violation of *Brady v. Maryland*, supra.

[REDACTED] would expand on this years later in his undisclosed *Driscoll II* deposition and trial testimony to say that the similar angle of the stab wounds suggests one object was used for all of them. (Ex 39: [REDACTED] 1999 Depo, P. 13, Driscoll II: P. 846). This testimony could have been used by petitioner at his trial to show, in addition to the white tape handled knife's tenuous connection to him, it was definitely NOT the murder weapon.

At Carr's trial, Finnical continued presenting testimony about the white tape handled knife through the testimony of "Lucky Three" inmate [REDACTED] testified that Petitioner had a knife, 8 to 12 inches long with white tape on the handle. (*Carr*, Ex 6, T. 302).

Carr testified in his own defense at his trial, and when presented with Ex. 27 by his attorney, Mr. Carr stated that he had seen it before, in the possession of [REDACTED] the night of July 3, 1983. (T. 404). Following his direct examination, Prosecutor Finnical and Carr had the following exchange on cross:

Q: Where did you keep your knife, Rodney?

A: I never had a knife. T. 412

Q: You are pretty little guy, aren't you?

A: Yes, sir.

Q: How do you protect yourself from all those big boys?

A: Fight if I had to.

Q: Ever had a knife, Rodney?

A: If I had to defend myself, I was brought up to defend myself with my fists. T. 413

Finnical then offered the testimony of [REDACTED] as "rebuttal" to Mr. Carr's testimony. When [REDACTED] took the stand he said only, "I would like to take the fifth on anything. I have nothing to say whatsoever, my name or anything else."

Finnical then offered, and read, [REDACTED] deposition taken in Driscoll's case. (T. 440-448). In that deposition, [REDACTED] denied having a knife or a place to hide one on the night of Jackson's death. (Ex 40, P. 38, denied having one that night but did admit he may have had a screwdriver at some point in time prior to that night)

When Finnical offered [REDACTED] testimony in Carr, Finnical knew that a knife with a white vinyl-taped handled knife was found in a search of [REDACTED] cell. Below, we discuss the Brady evidence establishing [REDACTED] as an alternative suspect to the murder, including:

(1) that a white tape knife was found in/behind [REDACTED] cell and

(2) that [REDACTED] admitted having a knife *during* the riot.

In his closing argument, Finnical emphasized, **“There’s six people here who say they saw Rodney Carr with the knife.”** (T. 456, 481). Clearly, connecting Petitioner to a white tape handled knife was the lynchpin of the state’s case against him, despite the state only having attenuated information, at best, to connect Petitioner to such a knife.

The Suppression of [REDACTED] White Tape Handled Knife

During the investigation of this case, Carr’s counsel obtained transcripts from Co-Defendant Driscoll’s first trial, which took place in November 1984 and was unavailable to Carr at the time of his trial; it was not transcribed until August 12, 1985, months after Mr. Carr’s trial. Driscoll I, (Ex 8) T. 2144.

The *Driscoll I* transcript included testimony that:

In October 1984, Department of Corrections investigator [REDACTED] and [REDACTED], a Missouri Public Defender investigator on Co-Defendant Roberts’ legal team, discovered a white tape-handled knife that had been hidden in the cell where [REDACTED] lived, along with information that it was “evidence of a crime hidden in the institution...**related to the riot of July 3 1983**” (*Driscoll I*, Ex 8, T. 1763-1766) (emphasis added).

The discovery of this knife - including when, where, and how it was found - was not disclosed to Carr.

The prosecution’s suppression of the [REDACTED] Knife is highly relevant because the state contended that Petitioner used a white tape handled knife to stab Officer Jackson. The state took this position even though it was never able to establish a chain of custody for the white tape handled

knife introduced against Carr at his trial, instead adducing testimony that it was found on the rotunda floor, with no specificity as to who, following the uprising.

In contrast, the knife found in [REDACTED] cell not only matched the description of the one alleged to have been used by Carr, but it was the only one with a verifiable chain of custody. We know, through undisclosed Driscoll I testimony, which cell the [REDACTED] knife came from, who found it, and when.

Not only can a white tape handled knife be connected to [REDACTED] with this undisclosed evidence, but its materiality is underscored by [REDACTED] central role in the uprising. This makes him a clear alternative perpetrator, along with Driscoll. [REDACTED] was alleged by several witnesses to have possibly started the uprising when he shouted “rush the guards.” Carr testified to seeing [REDACTED] with a white taped handled knife during the Uprising. (Ex 6, T. 404). At Carr’s trial, [REDACTED] pleaded the fifth. “I would like to take the Fifth on anything. I have nothing to say whatsoever, my name or anything else.” (Ex 6, T. 440).

The [REDACTED] knife’s chain of custody, and the other white knife’s lack thereof, become even more crucial when put in the context of another piece of evidence containing Brady material, the affidavit of Officer [REDACTED]. Officer [REDACTED], emergency squad member in 1983, states in his 2023 affidavit: (see further discussion of [REDACTED] affidavit, P. 96 of the instant petition)

“On the morning of July 4, members of the E-squad assisted with clean up in the housing unit. We gathered up all the knives and other weapons we found on the unit and filled one of those big trashcans with everything we found.” (Ex 41).

Officer [REDACTED] affidavit further undermines the credibility and integrity of the white-handled knife introduced against Carr at trial, as any knives recovered immediately following the

chaos were tainted by improper handling of evidence. Connecting such a knife to Carr was a large stretch. In contrast, a white tape handled knife was found in a search of [REDACTED] living quarters.

The [REDACTED] knife is critically material as it undercuts the State's only piece of physical evidence used against Carr. The State's theory of the case against Carr relied heavily on three key evidentiary scenarios, including:

1.) Connecting Carr to a white-tape-handled homemade knife allegedly used to stab the victim and purported to have been recovered from the rotunda of the prison wing where the stabbing occurred;

2.) Establishing that a white-tape-handled homemade knife admitted into evidence at the trial was the same knife recovered;

3.) The credibility of State's witnesses that allegedly saw Carr with a white- taped-handled knife on July 3, 1983.

2. The Suppression of the Driscoll I Testimony of [REDACTED]

[REDACTED] denied that he had a knife the night of July 3, 1983, or even having a place to hide one, in his deposition prior to trial. (Ex 40). This deposition, taken in the *Driscoll I* case in 1984, is the only record of [REDACTED] testimony provided to Carr prior to his trial.

In contrast, at Driscoll's trial, only months before Carr's, and undisclosed to him, [REDACTED] admitted to having a knife during the uprising. This is further inculpatory evidence against [REDACTED] suppressed and not disclosed to Carr. (Ex 40: P. 37-38, Ex 8: *Driscoll I* T. 205).

3. Cause and Prejudice- [REDACTED] Knife and Testimony

Although this exculpatory white knife found in [REDACTED] cell, and [REDACTED] testimony at Driscoll's trial– was known to the prosecution prior to Carr's trial, this information was never disclosed to him.

Despite the state's continuing constitutional duty to disclose exculpatory information in its possession, there is no evidence in the file to suggest Petitioner was ever provided this transcript or any of the exculpatory evidence contained therein. In fact, the transcript had not yet been prepared at the time of Petitioner's trial.

This case is strikingly similar to the facts in *State v. Woodworth*, 941 S.W.2d 679 (Mo. App. W.D. 1997). In that case, a murder conviction was reversed because the trial court refused to allow the defendant to present evidence that a surviving victim of a double shooting had previously identified his daughter's boyfriend as the shooter and was "adamant" that the boyfriend be prosecuted. This direct link to the alternate perpetrator was corroborated, as it is here, by physical evidence—i.e. the boyfriend had tested positive for gunshot residue shortly after the shootings.

Here the physical evidence suppressed by the prosecutor was corroborative physical evidence linking Bolin to the crime as an obvious alternative perpetrator with the motive to influence other inmates to incriminate Carr.

The subsequent history of the *Woodworth* case is equally apposite to the instant case. *Woodworth*, after reversal of the first murder conviction, was again convicted by a second jury. However, documentary evidence and other *Brady* evidence possessed by the Court, the investigators, and the prosecutor establishing that the victim had, in fact, identified the alternative perpetrator continued to be suppressed. It was only discovered years later by a news reporter who was allowed to examine the prosecution files. After the Missouri Supreme Court ordered a show cause hearing and the appointment of a Special Master, extensive discovery in the case uncovered a record rife with *Brady* violations. Based, inter alia, on the *Brady* violations, the Supreme Court reversed the convictions and remanded for a third trial. Ultimately, a special prosecutor reviewed

the evidence and dismissed the charges against Woodworth. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 344 (Mo Banc 2013)

The “[REDACTED] Knife” evidence is inconsistent with Carr’s guilt. The prosecution thereby possessed independently corroborated information that would have strengthened the credibility of Carr’s trial testimony that he never possessed a white-handled knife, and that he observed [REDACTED] possessing such a knife during the incident. See, e.g. *United States v. Udechukwu*, 11 F.3d 1101, 1106 (CA 1, 1993).

Had this crucial evidence not been suppressed it would have allowed Carr to present a direct link between [REDACTED] and the crime, and to present a credible alternative perpetrator defense. See, e.g., *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 245 (Mo. App. 2011: where the court found the failure to disclose Brady evidence material because physical evidence connecting an alternative suspect to the offense would have enabled defense to argue that someone else committed the crime.) This direct link is corroborated by existing evidence that [REDACTED], as an instigator of the violence, had urged other inmates to “rush” the guards. It is also corroborated by his pleading the fifth at Carr’s trial.

Evidence of the knife found in [REDACTED] cell would have allowed Carr to present strong evidence that [REDACTED] and his co-actors, not Carr, were the perpetrators of this crime. It also would have strengthened Carr’s own testimony that he was innocent and saw [REDACTED] with a white taped handled knife on July 3, 1983. This further would have weakened the identification of Carr by guard [REDACTED] and others.

[REDACTED] testimony in Driscoll I, and the white-tape handled knife found in the search of his cell, were not disclosed to Carr, and he was prejudiced by their nondisclosure pursuant to *Brady v. Maryland*, Carr is entitled to habeas corpus relief on the above claims.

**C. TRANSCRIPTS OF CO-DEFENDANT TRIALS THAT ESTABLISH
IRRECONCILABLE INCONSISTENCIES IN THE TESTIMONY OF KEY
STATE'S WITNESSES**

The following is an early observation made by one of the State's primary investigators:

"Every investigative effort has been and is being made to determine the identity of and to bring to justice the individual or individuals who are responsible for the death of CO/I Thomas Glen Jackson and the subsequent assaults upon other correctional officers at MTCM on July 3, 1983. Due to the number of inmates who were intoxicated and who, to varying degrees, participated in the riot, the full extent of the number and identity of those involved may never be known. The greatest obstacle which has hampered ongoing investigation thus far has been the inability of potential eyewitnesses to remember anything as to the identity of the officers' assailants. This is not to say that the officers have not honestly made such attempts. The hard facts are that when one is fighting for life itself there is no time to sit down and take notes."

██████████, Former Chief Internal Affairs Officer MODOC: Memo dated July 18, 1983 (Ex. 7, P.17)

██████████ conveyed the aftermath of July 3, 1983 in what we now know is one of the most accurate portraits of the chaos which ensued during and after the violence. He noted that despite the officers' best efforts, they could not identify specific assailant(s) from the group of prisoners. However, what followed this July 1983 memo was an effort by State Officials to portray unwarranted certainty in each co-defendant trial using shifting fact patterns and ignoring local consistency and the truth.

Due Process required the state to disclose these inconsistencies, whether they were revealed before or after Carr's trial. The obligation of the prosecution to come forward with exculpatory, impeaching evidence exists not only at the trial, but is an ongoing constitutional and ethical duty that continues throughout all stages of judicial proceedings. See, *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997). ("We also agree, and the State concedes, that **the duty to disclose is ongoing**

and extends to all stages of the judicial process,” citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (Emphasis added)).

The transcripts from Mr. Carr’s Co-Defendant’s trials, not disclosed to Petitioner, show glaring and irreconcilable inconsistencies among crucial state’s witnesses, mutually-exclusive and competing case theories and fact patterns, serious *Brady* violations, and State officials who chose to ignore the words of DOC Investigator [REDACTED] [REDACTED]. These transcripts include, but are not limited to: Ex 8: *Driscoll I* trial transcript, Ex 9: *Roberts* trial transcript, Ex 10: *Driscoll II* trial transcript, Ex 1: *Driscoll III* trial transcript.

Due Process required the state to disclose these inconsistencies, whether they were revealed before or after Carr’s trial. The obligation of the prosecution to come forward with exculpatory, impeaching evidence exists not only at the trial, but is an ongoing constitutional and ethical duty that continues throughout all stages of judicial proceedings. See, *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997). (“We also agree, and the State concedes, that *the duty to disclose is ongoing and extends to all stages of the judicial process*,” citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (Emphasis added)).

Analysis of the witness testimony against Carr at his trial, and available to him prior to his trial, shows that the State’s witnesses were inconsistent, unreliable, and cannot be used to sustain a credible conviction.

What was unknown to Carr at the time of his trial was that more inconsistencies in the testimony of witnesses against him existed than he knew- **and more would come to be.**

TRANSCRIPT INCONSISTENCIES

i. MATERIAL INCONSISTENCIES AND THE KNOWING PRESENTATION OF CONTRADICTORY TESTIMONY: THE “BIG THREE” GUARDS

Some of the main witnesses against Carr were three guards who testified that they allegedly saw Carr stab Jackson: Officer [REDACTED], Officer [REDACTED] and Officer [REDACTED], *the “Big Three” Guards*.

Diametrically opposed to the state’s theory that Driscoll was the primary stabber, none of these officers claimed to have seen Robert Driscoll stab Jackson. Not until Officer [REDACTED] identified Driscoll as Jackson’s stabber, undisclosed, in *Driscoll II*.

The Big Three testified differently to themselves and each other at each of the Moberly trials. Shifting fact patterns were molded to fit each co-defendant trial. The bulk of this material testimony was undisclosed to Carr.

These undisclosed inconsistencies in the star witnesses’ testimony undermine the “Big three” in a way similar to the way the Judge John D. Wiggins in *Driscoll II* would describe the cross examination of Officer [REDACTED] and his sudden flip in identification of the stabber: **“I think you’ve impeached him.”** (Ex 10; P. 876)

1. GUARD [REDACTED]

[REDACTED] was the senior officer in charge on July 3, 1983. *Bolin v. Black*, 875 F.2d 1343, 1346 n.2 (8th Cir. 1989). [REDACTED] denied using excessive violence against inmates during the Moberly prosecutions. However, court findings in a civil suit filed by the inmates at Moberly dispute his veracity:

“His direct abuse of some inmates demonstrated his deliberate disregard for plaintiffs’ constitutional rights and, by virtue of his supervisory authority, invited other corrections officers to follow his example. His conduct rose at least to the level of ‘tacit authorization.’” *Bolin v. Black supra* at 1348.

The testimony [REDACTED] provided during Carr's trial differed from his account in other trials undisclosed to Carr: *Driscoll I*, *Roberts*, and *Driscoll II*. In Carr's trial, [REDACTED] testimony adds incriminating details against Carr that he failed to include in the other trials and his Carr testimony omitted pertinent facts he added elsewhere regarding Carr's actions.

Officer [REDACTED] provides varying timelines and sequences of events. Every single sequence of events that [REDACTED] provides for Carr's actions is mutually exclusive. None of them work with each other:

Officer [REDACTED] Changing Sequence of Events:

***July 4, 1983 Initial Statement (Ex 14)**: No identification of Jackson's stabber, no mention of Carr at all, [REDACTED] "discovered" that [REDACTED] was stabbed. Does not note actually seeing Jackson or [REDACTED] being stabbed.

***July 10, 1983 Interview (Ex 11)**: "A large number of inmates rushed the officers and started to stab them", no other pertinent details, no mention of Carr at all.

***September 8, 1983 Highway Patrol Interview (Ex 11)**: No identification of Jackson's stabber, does note that he saw Jackson stabbed. Carr was around [REDACTED]' neck and Carr was knocked to the floor, no other pertinent details.

***January, 1984 Preliminary Hearing (Ex 12)**: Carr stabbed Jackson⁸, Carr then entered the rotunda, Carr then fought [REDACTED] while [REDACTED] moved Jackson, Carr was then hit on the head and was helped up by inmates.

***September, 1984 Driscoll I Deposition (Ex 54)**: Carr was the stabber of Jackson, no other pertinent details. P.12, 25.

*November, 1984 **Driscoll I- undisclosed (Ex 8)**: Carr entered the rotunda, then went back into the wing and stabbed Jackson. Carr never entered the rotunda again.

***January, 1985 Roberts- undisclosed (Ex 9)**: Carr was fighting someone then approached Jackson. Carr stabbed Jackson. Carr then went out the rotunda door, fighting

⁸ This is [REDACTED]' first identification of Carr as the stabber of Jackson in documents known to Carr.

with [REDACTED] (this is inconsistent with [REDACTED] account of events, in which he always fought Carr *before* Jackson was stabbed).

***February, 1985 Carr (Ex 6):** [REDACTED] says vaguely Carr fought with [REDACTED] at some point in the violence. Carr stabbed Jackson, then joined 12-15 inmates and followed [REDACTED] and [REDACTED] as they moved Jackson.

-This is the only account of [REDACTED] which is potentially consistent with [REDACTED], but it is inconsistent with [REDACTED]' testimony of events (wherein Carr stabbed Jackson, then fought [REDACTED], and then was knocked out after stabbing [REDACTED]).

-[REDACTED] testimony in Carr is still inconsistent with Officer [REDACTED] at a different point in the timeline- [REDACTED] says that [REDACTED] fought off the 12-15 inmates following them in Carr (T.207), [REDACTED] never mentions fighting off inmates in any piece of testimony.

-[REDACTED] testimony in Carr doesn't corroborate any other officer's account of events.

***March, 1999 Driscoll II Deposition- undisclosed (Ex 13):** Carr lunged at Jackson; [REDACTED] did not see Carr in the rotunda after he made the motion at Jackson (P.22). [REDACTED] changes his testimony mid-deposition to say that he did see Carr in the rotunda after the lunge at Jackson, fighting "someone" and he was hit in the head with a bat. (P.26, 27).

***March, 1999 Driscoll II- undisclosed (Ex 10):** Initially says Carr lunged at Jackson (P. 864), then testifies that Driscoll stabbed Jackson (for the first time) (P. 867), then **disagrees** that Carr was the stabber (P. 873), the Court found him to have been "impeached" by inconsistencies from his previous testimony (P. 875-6).

Despite making initial statements, [REDACTED] did not mention Carr until his September 9, 1983 Missouri State Highway Patrol Report where [REDACTED] states only that Carr attacked [REDACTED] (Ex 11: [REDACTED] MSHP Report). [REDACTED] did not identify Carr as *Jackson's stabber* until the joint preliminary hearing. (Ex 12: Joint Preliminary Hearing transcript).

At Carr's trial, [REDACTED] described Carr as wearing gray trousers (Ex 6, T. 215). This was testimony not corrected by the prosecutor, although he knew that the State had Carr's cut off jean shorts in their possession. (See Shorts Section P. 13)

[REDACTED] account in *Carr* differs substantially from his original statement the night of the violence. That statement only mentioned a mob of inmates, named no individuals, and stated that "they" were holding Jackson. (Ex 14: [REDACTED] Initial Statement)

[REDACTED]: *What was Not Disclosed to the Jury*

Both *Driscoll I* (Ex 8) and *Roberts* (Ex 9) preceded Carr's trial, however Carr did not have access to these transcripts, which contained evidence that went directly to [REDACTED] credibility. Neither of the transcripts were made until after Carr's trial.

Driscoll I, not disclosed

In *Driscoll I*, [REDACTED] states Carr first made his way into the rotunda and "made his way back [into the wing]" (T. 879). Here, [REDACTED] says that Carr then started "making a jabbing approach" towards Jackson (T. 872, 874), made "a motion towards him" (T. 877-878), or "lunge" at Jackson (T. 880, 884, 891). After [REDACTED] said he took a blow to the head, [REDACTED] said he got ahold of Jackson and alone dragged him across the rotunda (T. 858-860, 891).

Unlike in *Carr* or any subsequent testimony, [REDACTED] does not mention any inmates following him as he moved Jackson's body, nor does he describe [REDACTED] actions at the time. After Jackson was stabbed, [REDACTED] says here that he did not see Carr enter the rotunda. (Cite check T. 882). He does not discuss Carr's subsequent actions. This is directly contrary to his testimony in *Carr* that Carr followed him.

[REDACTED] sequence of events in *Driscoll I* varied from his account in *Carr*. In *Driscoll I*, [REDACTED] recalls that eight to ten inmates were around Jackson (T. 857-858). Roy Roberts had

Jackson “by the head of his hair” and held him “solidly against the door casing” (T. 856, 857, 894).

██████ was knocked down three times trying to rescue Jackson and he was struck over the head with a pipe (T. 858). ██████ was struck a separate time by an unknown inmate (T. 890). After being knocked on the floor, ██████ witnessed ██████ try to help Jackson and get stabbed (T. 858). Around this point, Carr approached Jackson (T. 872, 874). In *Driscoll I*, ██████ does not mention Roberts striking him.

██████ never mentions Roberts “releasing” Jackson, punching ██████, or grabbing Jackson again.

Roberts, not disclosed

In *Roberts*, ██████ focused most of his testimony on Roberts. At first, ██████ struggled to recall the name of an “unknown inmate” that was around Jackson and Roberts before the stabbing (T. 257, 280). **But after having lunch with his “fellow officers”, ██████ recalled that the unknown inmate was Driscoll, and confirmed that the stabber was Carr (T. 277).**

██████ recalled in *Roberts* that Carr “had been battling out in the rotunda,” possibly with ██████ (T. 281, 264). Carr returned to the wing. (T. 281). Then, Carr made “a stabbing motion” towards Jackson (T. 258) and he “went in with the thrust motion” (T. 259). ██████ struggled but was able to grab Jackson and pull him out of the wing.

At this point, ██████ testimony changes in a **big way**; here, Carr turned and went out the rotunda door fighting (259). However, ██████ does not state that Carr followed him and Jackson across the rotunda.

Driscoll II, not disclosed

Lastly, [REDACTED] suppressed testimony in *Driscoll II* (Ex 10) radically changed from his previous accounts [REDACTED] for the first time, identified Driscoll as the stabber, not Carr. (T. 862, 867, 870).

At the beginning of *Driscoll II*, [REDACTED] said that Roberts grabbed Jackson while Driscoll stabbed, however AAG Fusselman did not note the discrepancy at that point. (T. 862). [REDACTED] did not mention Carr until Fusselman asked:

Q: Do you know an inmate named Rodney Carr?

A: Oh, I knew of him around there. I never had any, you know, close relationship of any kind with him.

Q: Did you know him when you saw him?

A: Oh, yes.

Q: Can you describe what conduct you saw Mr. Carr engage in?

A: Well, he was trying to bounce around and inflame words; I think he wanted to be a big wheel with the rest of them. And I never did see a knife now; I'm not saying that he did have, that he could have, but I saw him making a lunge at – toward Jackson at one time. (T. 864).

[REDACTED] continues to attribute the stabber's actions with Carr until Fusselman asks:

Q: When did you first see the knife?

A: As he was actually stabbing Tom Jackson.

Q: Who? As who? Who is he?

A: Driscoll.

Q: Is Mr. Driscoll present here in the courtroom today?

A: That's him over there. (T. 867)

[REDACTED] disavowed his preliminary hearing testimony that Carr was the stabber (T. 870). [REDACTED] stated that he could not understand “how could I have kept from seeing [Driscoll during the melee] when I saw him kill [Jackson]?” (T. 870).

[REDACTED] then further disavowed his March 1999 Deposition (Ex 13: [REDACTED] 1999 *Driscoll II* Deposition, not disclosed) that stated Driscoll was not present during the uprising (*Driscoll II* trial, T. 873). [REDACTED] said that his deposition was not right.

Similarly, he said he did not know “how I could have done such a thing like that...I either misunderstood or something, because there was no way I could have missed Driscoll” (T. 873).

In addition to identifying Driscoll as the stabber, [REDACTED] affirmed that Carr was not the stabber (T. 875).

Q: Do you recall testifying that when Carr made the motions, you saw Jackson respond with a grunt?

A: No, no. No. (T. 875).

Immediately after this exchange, the attorneys approached the bench to address [REDACTED] inconsistencies. Driscoll’s Attorney requested a recess due to the significant difference in testimony. The Court granted a recess and stated, “it seems to me that you’re doing an admirable job of cross-examination using his prior testimony. I think you’ve impeached him.” (T. 876, emphasis added).

There were no explanations given for the changes in [REDACTED] testimony, no medical or cognitive issues were noted or apparent in his testimony. He showed clarity in his new, undisclosed, identification of Driscoll. (T. 873)

[REDACTED] sequence of events in *Driscoll II* begins with thirty-five to forty inmates rushing the guards (T. 860-861). Unlike the other accounts where he left the wing himself, [REDACTED] recalls an unknown inmate striking him with a pipe while he was in the wing (T. 861). Someone then dragged [REDACTED] into the rotunda (T. 861).

[REDACTED] inconsistencies, if disclosed, would have given Carr the ability to thoroughly impeach a key witness against him.

2. **GUARD** [REDACTED]

Officer [REDACTED] is believed to be the first person to identify Carr as the stabber of Officer Jackson. He claimed to have also been stabbed by Carr as he attempted to rescue Jackson. At one point, however, the investigation had leaned so heavily towards Driscoll and when paired with his confession, lead investigator [REDACTED] told [REDACTED] he was determined to prove [REDACTED] wrong.

[REDACTED] was sure that Driscoll was the stabber, not Carr, and [REDACTED] had been on pain medication and had seen a photo of Carr before viewing a tainted lineup (See Ex 7: Investigator [REDACTED] Report, Memo dated July 18, 1983 and Ex 53: Driscoll's written confession).

The investigator who interviewed [REDACTED] noted [REDACTED] was shown a photograph of Carr prior to [REDACTED] entering the room to identify Carr in the line-up. The investigator stated, "*this fact potentially might seriously damage the validity of the lineup utilized by the investigators.*" This suggestive identification likely influenced [REDACTED] to make the incorrect identification of Carr. [REDACTED] along with Lt. [REDACTED], was hypnotized by local sheriff [REDACTED] in the presence of state officials. (Ex 7. [REDACTED] Report P. 7-8, Ex 15: Hypnosis Transcript of [REDACTED])

[REDACTED] would never be able to change [REDACTED]' mind.

The testimony [REDACTED] provided during Carr's trial differs significantly from his recollection in *Driscoll I* and *Roberts*.

Carr

In *Carr*, (Ex 6), [REDACTED] recalled how the uprising began—twenty-five to forty of the inmates began to approach him, [REDACTED], [REDACTED] and Jackson (T. 225). Only one of the inmates visibly had a knife in his hands (T. 225). This inmate was "up on top of the stairway, up on top of the flag (T. 226). [REDACTED] identified Carr in the courtroom as the inmate with the knife (T. 226). He identified a white-taped handled knife (T. 226, 228). This testimony was adduced by prosecutor Finnical,

despite his knowledge that an undisclosed knife matching that description had been found in the cell of alternate suspect [REDACTED]. (See Knife Section P. ____).

Once the inmates reached the guards, [REDACTED] said he grappled with other inmates. (T. 227). Then he claimed to have witnessed Carr stab Jackson (T. 227).

After Carr stabbed Jackson, [REDACTED] said he wrestled Carr and attempted to get the knife (T. 231). Carr cut [REDACTED] on the finger and stabbed [REDACTED] on his shoulder while they wrestled (T. 231). [REDACTED] stated that Carr was holding on to him when he was cut (T. 232). Carr was prepared to stab [REDACTED] again, however an officer hit Carr with a bat, knocking him off [REDACTED] (T. 231-232). He said Carr then walked back to the wing after the strike to the head (T. 232).

[REDACTED] claimed that Carr wore gray pants and a blue tank top (T. 233, 241-242). This description is more consistent with the clothing Driscoll was known to be wearing, and inconsistent with the blue cut-off jean shorts that were taken from Mr. Carr. [REDACTED] thought he remembered Carr having a mustache, but said he “didn’t pay no attention to mustaches” (T. 247).

That night, [REDACTED] received about thirty stitches at the facility in MTCM (T. 231). [REDACTED] received further treatment at a hospital in Moberly where he was given motrin and pain medication (T. 235). The following morning on July 4, [REDACTED] returned to MTCM to identify Jackson’s stabber (T. 235). Neither the lineup that [REDACTED] viewed nor the suggestive circumstances surrounding it were discussed at Carr’s trial.

[REDACTED] testified that Lieutenant [REDACTED] approached him on July 4 or July 5 after his initial interview (T. 245-246). [REDACTED] said he was “going to prove [REDACTED] wrong” because [REDACTED] “got the wrong man” (T. 245). The interaction was documented in [REDACTED] July 9 statement (T. 245).

Regarding Robert Driscoll, [REDACTED] said he did not see Driscoll during the uprising, nor did he see Driscoll stab Jackson (T. 238, 241).

Q: What did [Driscoll] have on that night?

A: Had on clothes.

Q: All right. Describe them. What kind of a shirt? What color of pants? What kind of shoes?

A: He had on gray pants and a white shirt.

Q: A white shirt?

A: Like I said, I did not see Robert Driscoll. What I just seen was a bunch of inmates come up there. And they all had about the same color of clothes on. And you got about 40 inmates rushing you, you know, how can you pick out one man?

Q: That's what I am trying to find out, sir.

A: But I know that man right there, he's the one that stabbed him. (T. 241).

█ subsequently identified Carr as the stabber, wearing a blue tank top and gray pants (T. 241-242). (See Shorts Section for Further Discussion, P. 13)

Driscoll and Roberts, Carr's co-defendants, had their trials prior to Carr's, however Carr did not have access to these transcripts which contained testimony below that challenged █ reliability:

Driscoll I, not disclosed

In *Driscoll I*, █ does not include pertinent facts regarding Carr's actions and changes details. █ begins his narrative stating that he "seen this here man taking a knife and stabbing that Officer Jackson" (T. 1023). He later clarified that Carr was the stabber (T. 1024).

Here, █ said that after Carr stabbed Jackson, Carr cut █ hand and his shoulder using a "jabbing motion" (T. 1023-1024). █ did not discuss how he or any other guard stopped Carr from proceeding to harm █, nor did █ mention Carr returning to the wing. █ did not describe Carr's clothing or facial hair.

Roberts, not disclosed

In *Roberts*, █ first identifies Carr as one of the inmates coming down the wing with a knife in his hand (T. 319). █ recalled that twenty-five to forty inmates were in the crowd (T. 315). █ stated Carr as the man who stabbed Jackson (T. 304). However, █ later states that

he never met Carr before (T. 306-307). In fact, [REDACTED] did not know the name of any of the inmates that were approaching the door (T. 315-316). This is [REDACTED] first time affirmatively saying in trial that he didn't know *any* of the inmates' names.

Here, [REDACTED] said that after Carr stabbed Jackson, Carr "jumped" [REDACTED] and stabbed him on the shoulder (T. 309). The two "got in a scuffle" (T. 309). [REDACTED] recalled that he was able to get "him in the floor and he got back up and was going to make a second stab" (T. 309). [REDACTED] said that Officer [REDACTED] stopped Carr by hitting him on the head with a ball bat (T. 309).

[REDACTED] testified that Carr "got on the floor and [the inmates] pulled him back in the wing" (T. 310). The violence ended after Carr was struck (T. 310).

That night, [REDACTED] had to go to the hospital and receive stitches (T. 309). The following morning on July 4, [REDACTED] gave a statement to the investigators (T. 317).

[REDACTED] stated in *Driscoll I* that when he gave his testimony, he "was on drugs" and "all doped up" (T. 318). The doctors had him on painkillers, then he was taken to give his statement (T. 318). After he gave his statement, he identified Carr as the stabber from a lineup (T. 306). [REDACTED] did not discuss here any conversation he had with Lieutenant [REDACTED]

Regarding Driscoll, [REDACTED] said he did not see Driscoll on July 3 during the uprising (T. 314). [REDACTED] saw Driscoll after the uprising was over (T. 314).

Driscoll II, not disclosed

In *Driscoll II*, [REDACTED] summarized the uprising then went into further detail. [REDACTED] recalled inmates coming from the back of B Wing (T. 881). After seeing this, he and the other guards attempted to shut the wing door but could not (T. 881). [REDACTED] could not identify any of the inmates at the wing door (T. 882). The guards were unable to get the inmates back in the wing, but "they

just came out and took [them] over, and they stabbed [REDACTED] in [his] shoulder” (T. 882). [REDACTED] identified the inmate who stabbed him as Carr (T. 882).

At *Driscoll II*, unlike in *Carr*, [REDACTED] could not recall seeing Carr with a knife at the top of the stairs (T. 899). He said here that the first time he saw Carr with a knife was in the rotunda area (T. 899).

After Carr stabbed Jackson, Carr was “on” [REDACTED] about to stab him again until Officer [REDACTED] hit Carr with a baseball bat (T. 891). [REDACTED] was not asked what Carr did after being struck. [REDACTED] did not describe Carr’s clothing or facial hair.

Driscoll III, not disclosed

In *Driscoll III*, [REDACTED] said after [REDACTED] and [REDACTED] removed the inmate, Jackson stopped at the bottom of the steps and added a new detail that Jackson “lit a cigarette” when inmates were approaching. (T. 262)

[REDACTED] said then that thirty to forty inmates rushed the guards (Id.). [REDACTED] did not know any of the inmates in particular (Id.).

[REDACTED] said he was stabbed when he was “grabbing hold of Jackson, outside, right by the wing door” (T. 263). [REDACTED] **does not say this anywhere else.** [REDACTED] was stabbed in the shoulder by

Carr (Id.). After [REDACTED] was stabbed, Carr stabbed Jackson (Id.). **This is the first and only instance**

in which [REDACTED] states he was stabbed before Jackson. Every testimony [REDACTED] provided preceding *Driscoll III* had Carr stabbing Jackson first. These accounts are factually inconsistent.

Unlike in *Carr*, [REDACTED] did not describe Carr’s clothing or facial hair. [REDACTED] did not discuss any of the medical treatment or medicine he received for his wounds.

Hypnosis transcript of [REDACTED]

Between July 16 and September 1, 1984, [REDACTED] participated in a Hypnosis with Randolph County Sheriff [REDACTED]. Although the hypnosis transcript was not admitted into trial, it contains pertinent evidence that casts doubt on [REDACTED] reliability. (Ex 15).

While under hypnosis, [REDACTED] recalled "a bunch of inmates" came up the wing and one had a knife (P. 4). [REDACTED] saw the knife, but he did not know the inmate who held it (P. 5). The inmate stabbed Jackson, and someone said, "get that knife" (P. 5). The inmate made multiple stabbing motions at Jackson (P. 11).

[REDACTED] said while under hypnosis that Jackson didn't have a chance because "he had him in a headlock" (P. 12). From this account, [REDACTED] describes that the stabber and the person holding Jackson in the headlock are the same person. **No other officer presents a similar theory.** After [REDACTED] was stabbed, the inmate "had gone back up and Jackson fell down to the floor" (P. 6).

[REDACTED] said under hypnosis that he tried to pull Jackson out of the wing while Jackson was getting stabbed "in the middle of the chest" (P. 12). Jackson's body was in the rotunda, but his head was in the wing (P. 12). [REDACTED] attempted to get the knife at this point and was cut on his fingers (P. 8-9; 12). The inmate that stabbed Jackson then attacked [REDACTED] and cut his right shoulder (P. 5-6, 13). [REDACTED] did not know the name of the inmate that stabbed him while under hypnosis (P. 6-7).

[REDACTED] said he managed to get the knife away from the inmate (P. 13).

[REDACTED] fell, came back up swinging, slipped, fell, and noticed someone was on his back (P. 23). The inmate was knocked off because some guard hit him (P. 23). This occurred between the wing and the rotunda near the desk (P. 23). The inmate then "took off down the wing" (P. 11).

[REDACTED] did not see the knife after he was stabbed, but he knew a guard had the knife, "the one with the tape on it" (P. 13-14). That guard put it in his pocket (P. 14, 22-23).

described the stabber as a white inmate with blond hair, about 5'7 or 5'8 and wearing a white and blue tank top (P. 8). During the second hypnosis session, reiterated that the inmate wore a blue, sleeveless tank top with white trim down the neck" (P. 11). The inmate had a tattoo low on his arm (P. 11).

said under hypnosis he did not see a ball bat that night (P. 23). only knew of an inmate getting hit with one and falling to the floor (P. 23). The uprising ended "when the man got hit with the ball bat, that's when he went back into the wing and the rest of the inmates went back in there with him" (P. 30).

Regarding the ball bat and the inmate on his back, said that it was not possible for a guard to reach over the desk and hit the inmate off him because the desk is too high (P. 24). This makes Officer testimony at Carr impossible. (Carr trial Ex 6: Officer Testimony P. 317-324) **did not believe it was possible that what said happened based on his location in relation to the desk (P. 24-25).**

did not discuss any of the medical treatment or medicine he received for his wounds. He only recalled telling him to go to the hospital (P. 18).

inconsistencies should have been disclosed to Carr, as Carr could have impeached and the integrity of the entire investigation. His testimony cannot be used to sustain a credible conviction.

3. GUARD ROBERT [REDACTED]

Robert [REDACTED], the third of the “Big Three” Guards and similar to his fellow guards, inconsistencies in [REDACTED] statements of events undermine the credibility of Carr’s conviction.

Robert [REDACTED] testimony was not consistent regarding Carr’s actions surrounding the stabbing.

In *Carr*, [REDACTED] first encountered Carr at the wing door (T. 254). Carr was holding the door to the wing open (T. 254). This is different from [REDACTED] August 30 Missouri State Highway Patrol Interview in which he says [REDACTED] was holding the door open. (Ex 11). [REDACTED] claimed he put Carr in a headlock. [REDACTED] said he released Carr only after Carr cut [REDACTED] hand (T. 254). **[REDACTED] is the only guard who places Carr at the wing door.**

[REDACTED] account is further undermined by testimony at the same trial. **At Carr, a medical worker testified that he treated the wounded guards and Officer [REDACTED] was not cut.** (*Carr* trial, Dolan Testimony P. 354.)

After claiming to be cut by Carr, [REDACTED] said that Carr “ran back toward the wing to go back inside the wing” and “stuck Officer Jackson somewhere in the lower stomach” (T. 255). [REDACTED] did not discuss moving Jackson’s body. [REDACTED] recalled being hit with a ball bat, retrieving a knife, and seeing Carr dragged back into the wing (T. 257-b-258).

However, at Carr’s trial, [REDACTED] mis-identified Driscoll’s knife as Carr’s. He then backtracked once prompted by prosecutor Finnical:

Q: Are you contending that that’s Rodney Carr’s knife or just a knife you found on the floor?

A: No, sir. That’s a knife I found on the floor. (*Carr*, P. 262)

[REDACTED] identified Carr as wearing gray pants and a blue t-shirt (T. 256, 261). The identification of Carr in gray pants was a theme at his trial, however, the State hid that they were in possession of the cut off jean shorts Carr was actually wearing. (See Shorts Section P. 13)

Driscoll I, Not Disclosed

changes his testimony in *Driscoll I*. says that Carr and engaged in a heated wrestle, and while this may be feasible within account, it's factually impossible when compared to and.

- in the majority of his accounts says:

1. Carr stabbed Jackson,
 2. Carr then fought
 3. Carr was knocked out by Officer , and either:
 - 4a. was dragged back into the wing (*Roberts* Ex 9, T. 309) or:
 - 4b. got up and went back himself (*Carr* Ex 6, T. 232).
- Undisclosed to Carr, testified very differently in *Driscoll III*: he said that Carr stabbed then Jackson. (*Driscoll III*, Ex 1, T. 263).

***Carr never fights Officer , or has time to fight , in any of trial testimony. Based on trial testimony it is impossible for Carr to have fought .**

- on the other hand said:

- 1a. Carr stabbed Jackson, or,
- 1b. does not identify a stabber of Jackson in either his Initial Statement or his Highway Patrol Interview, or,
- 1c. identifies Driscoll as the stabber of Jackson for the first time in *Driscoll II*. (Ex 10, 11, 14).

When identifies Carr as a stabber of Jackson, says that Carr subsequently:

- 2a. Carr returned to the wing immediately and never re-entered the rotunda (*Driscoll I*, 880)(that makes Wilson and timeline impossible: if Carr is in the wing, he is out of the action) or:
- 2b. Carr followed across the rotunda as they moved Jackson (*Carr* 207) (this conflicts with timeline because has Carr fight him immediately after Jackson is stabbed), or
- 2c. Carr fought with (*Driscoll II* Deposition, Ex 13 P. 26, 27. Preliminary Hearing, Ex 12, P. 95) (this conflicts with because in that sequence there is no time for Carr to follow them across the rotunda. This testimony aligns with but is diametrically opposed to)

Neither [REDACTED] nor [REDACTED] account for [REDACTED] having a heated fight with Carr. **There is no room in [REDACTED] or [REDACTED] timeline for him to lunge back in.**

At *Driscoll I*, [REDACTED] testified that after cutting [REDACTED], Carr “went forward and stuck it into Officer Jackson” (T. 987). [REDACTED] said that Carr lunged at Jackson “below the shoulders” (T. 1001). [REDACTED] attempted to get Jackson out of the wing (T. 988). Carr “moved around behind [Jackson] by this time” (T. 988). [REDACTED] and [REDACTED] dragged Officer Jackson out of the wing towards the Control Center (T. 988). As they moved Jackson, Carr followed them:

A: Well, I knew Carr and there was – he was between two inmates. And Carr kept jabbing at us with a knife from between these two inmates.

Q: As you were dragging – as you and [REDACTED]...

A: Yes, as we were dragging Jackson. (T. 988-989).

[REDACTED] added later, **for the first time**, that Carr was “cutting at us and at Jackson” and repeated the account above (T. 1001, 1005). This is factually inconsistent with [REDACTED], and largely [REDACTED] espoused version of events that Carr would have been fighting Officer [REDACTED] at this point in the timeline.

Roberts, Not Disclosed

In *Roberts*, [REDACTED] timeline again doesn’t work with his fellow officers.

[REDACTED] testified that after cutting [REDACTED], Carr “ran straight across this way and stabbed Officer Jackson” (T. 293). [REDACTED] and [REDACTED] pulled Jackson out of the wing and into the control center (T. 295). [REDACTED] wrestled with another inmate before he and [REDACTED] were able to drag Jackson away (T. 295). While they were moving Jackson, Carr, Roberts, and an unknown inmate followed them (T. 295). Carr was between Roberts and the other inmate lunging at [REDACTED] and [REDACTED] with a knife (T. 295). This is, again, factually inconsistent with [REDACTED] and [REDACTED].

Driscoll II, Not Disclosed

In *Driscoll II*, [REDACTED] said the inmates were “milling and coming up toward the front of the wing” (T. 922-923). [REDACTED] identified Driscoll as one of the inmates that rushed Jackson (T. 923). [REDACTED] **had never before said that Driscoll was present.** Carr could have used this to undermine [REDACTED] credibility.

For the first time, [REDACTED] identified Carr and Roberts as having rushed Jackson (T. 923). He will later, in *Driscoll III*, add Driscoll to this group.

[REDACTED] repeated his timeline, inconsistent with [REDACTED] and [REDACTED], detailed above.

At one point, [REDACTED] said he was struck with a bar and knocked to the floor (T. 926, 936). A shank fell in front of [REDACTED], and he retrieved it (T. 926). Here, [REDACTED] described the knife he found, **for the first time**, to be made from a ruler and have white tape on the handle (T. 926). Previously, in *Driscoll I* and in *Carr*, [REDACTED] said the knife was made from a ruler with black tape.). [REDACTED] then attempted to correct himself and went on to identify the ruler knife with black tape in his testimony.

Driscoll III, Not Disclosed

In *Driscoll III*, [REDACTED] said the inmates attacked Jackson at the bottom of the steps (T. 180). [REDACTED] now identified Roberts, Carr, and Driscoll as individuals in the group (T. 181). [REDACTED] said he never actually saw Driscoll stabbing anyone but he did see him present in the group of inmates (T. 189).

Carr and [REDACTED] began to fight (T. 188). This is the first time that [REDACTED] recalls Carr and [REDACTED] fighting prior to moving Jackson. Officer [REDACTED] hit Carr with a ball bat and knocked Carr off [REDACTED] (T. 189). Around this point, [REDACTED] and [REDACTED] pulled Jackson out of the wing (T. 187).

A: Me and Captain [REDACTED] tried to pull Tom out of the wing and they were stabbing at us with knives and pulling him away. We was trying to get him away from the rest of the inmates.

Q: All right. And when you say “they” you are referring to inmates?

A: Inmates. Yes, sir.

Q: So there’s more than one person with a knife?

A: Yes, sir. Carr had a knife and he was still jabbing at us but he didn’t connect with nobody after that. (187).

[REDACTED] testimony has vast discrepancies, within itself and when compared to [REDACTED] and [REDACTED] “Big Three” inconsistencies contained in the undisclosed transcripts (including, but not limited to, (Ex 8) *Driscoll I*, (Ex 9) *Roberts*, (Ex 13) *Driscoll II* depositions, (Ex 13), *Driscoll II*, and (Ex 1) *Driscoll III*) were not disclosed in violation of *Brady v. Maryland, supra*. As these guards formed a key part of the State’s case against Carr, he could have used these differences to impeach their credibility and that of the entire investigation.

ii. UNDISCLOSED TESTIMONY OF AND EVIDENCE ABOUT THE “LUCKY THREE”

INMATES

Carr’s prosecutor made the following argument to the jury at Co-Defendant Driscoll’s trial, and would make a similar argument many times:

“The Attorney General’s office of the State of Missouri is not going to put witnesses on the stand who lie. It’s that simple... We don’t need to convict innocent people.”

-Driscoll I, (Ex 8) Prosecutor Finnical closing argument, P. 1975

Rumors swirled for years about possible deals made in the Moberly Prosecutions. The three names mentioned were the primary inmate witnesses for the State in the Moberly Prosecutions:

[REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. All three of these men testified that Robert Driscoll stabbed Officer Jackson. All of these men would eventually make statements implicating Roy Roberts as a participant, but [REDACTED] [REDACTED] was not called to testify at his trial. All of three

of these men would be called to testify at Carr's trial. [REDACTED] would not implicate Carr at his trial, but his testimony and later interviews, discussed in more detail below, will show that he was expected to by the prosecutor and that undisclosed deals were made with and benefits given to the Lucky Three Inmates in exchange for their testimony as State's witnesses.

[REDACTED] testified at Carr's trial that he saw Carr with a knife in the area of the fight.

[REDACTED] testified that he saw Carr stick a "brown shirt" with a knife, but could not testify for sure who that guard was.⁹ **These pieces of testimony would form a significant part of the prosecutor's argument to Carr's jury in his closing argument:**

"Joe [REDACTED] testified. [REDACTED] testified he saw him [Carr] with the knife in the rotunda area. He says that." Carr, Ex 6, T. 458
"...when [REDACTED] testified, there was a ring of truth to what he said." Id.

What we now know is that these inmates told conflicting and mutually exclusive versions of what happened. And we have more evidence as to why.

Newly discovered evidence supports the theory that undisclosed deals and undisclosed threats were made with the Lucky Three in exchange for their testimony throughout the investigation and Moberly prosecutions. This new evidence includes:

1. Undisclosed, substantial inconsistencies in the Lucky Three's testimony.
2. Undisclosed testimony that [REDACTED] was accused by state investigators of killing Jackson and was threatened with the death penalty.
3. Undisclosed testimony that [REDACTED] admitted lying to State Officials about seeing Driscoll's knife prior to the incident. [REDACTED] was a main witness against Carr, and his credibility would have been undermined using this undisclosed admission that he lied to State Officials during

⁹ Officers ranked sergeant and above wear uniforms with white shirts, and that all others wear uniforms with brown shirts, and inmates commonly refer to corrections officers as "white shirts" or "brown shirts."

his interview. This calls into question all the information [REDACTED] gave investigators, including his inculpatory statements against Carr.

4. Undisclosed testimony that [REDACTED] was actually more specific about his identification of who Carr stabbed in Driscoll's trial, contrary to the prosecutor telling the jury in *Carr* that [REDACTED]'s vagueness made him believable.

5. Undisclosed testimony that [REDACTED] didn't really know he had been cut by Driscoll's knife when Driscoll stabbed Jackson, like he testified to early on. [REDACTED] would later testify, undisclosed to Carr, that that fact was actually put into his mind by State Officials. This impeaches the credibility of the entire investigation, an investigation wherein State Officials were apparently putting "facts," into the minds of state's witnesses.

6. Undisclosed testimony showing that [REDACTED] stated reason for testifying, that he cared about Officer Jackson, was not true, and that [REDACTED] was not even familiar with who Jackson was.

7. A new affidavit from [REDACTED] stating that life got easier after cooperating and enumerating undisclosed benefits he and the rest of the Lucky Three received from the State including: being allowed to smoke pot, being granted unsupervised time with their girlfriends and a "special smile" from Prosecutor Finnical when they asked when they were getting out.

8. Newly discovered and previously suppressed documents showing that [REDACTED] had detainers dropped prior to both of Driscoll's second two trials, and that an Assistant Attorney General signed documentation claiming to be [REDACTED] legal counsel.

9. An undisclosed letter from Driscoll's former attorney stating that when he reviewed the Lucky Three's DOC files, he saw documents indicating they were released from DOC custody on or around the same day. Undisclosed testimony from [REDACTED] in his 1999 deposition and trial

testimony confirms this. (Ex 16: P. 6-7). This supports the conclusion that the State granted leniency to these witnesses without disclosing such leniency to Carr.

10. Newly discovered, undisclosed documents showing retaliation against inmate Johnnie [REDACTED] following his 1984 deposition testimony that the Lucky Three had gotten deals and discussed the details with him. This followed Prosecutor Finnical's threat to charge [REDACTED] with perjury.

All of the above listed were unavailable to Carr at his trial. In fact, the Missouri Attorney General would go out of their way for years to explicitly deny any deals, leniency or untoward conduct had taken place. In combination, these newly discovered documents and testimony paint a very different picture, one of secret deals and evolving testimony altered to fit the State's shifting and inconsistent theories of guilt.

1. [REDACTED]: STATE'S WITNESS, FORMER INMATE

Q: What is your deal with the State for testifying? What are they going to do for you?

A: I don't care if they do anything. I wanted these three guys fried.

Q: Did you see Rodney Carr do anything?

A: Yes, I did.

Q: You didn't say anything about Rodney Carr so far?

A: Not Rodney Carr. It's not his trial. You didn't ask. Neither did Finnical.

Q: You are going to wait for Rodney Carr's---

A: I hope he fries.

Q: Prior to this time had you had any problems with Roy Roberts?

A: I never even associated with him, never liked him, never will and hope he fries.

-Driscoll I, testimony of [REDACTED] P. 337- 338

[REDACTED], one of the lucky three inmates, was wholly uncredible in his testimony and that may be because he was and is a credible suspect in the death of Thomas Jackson.

[REDACTED] made no mention of seeing a stabbing in his first statements to investigators.

The first known place in which he mentions seeing a possible stabbing is a statement in October

1983. In his very first statement immediately following the violence, [REDACTED] only mentions Driscoll and says Driscoll “punched” Jackson. Neither Carr nor Roberts are mentioned until the joint preliminary hearing in January 1984. ([REDACTED], Chart A, P. 57)

Driscoll I Deposition Testimony - Disclosed

[REDACTED] gave more detail in an October 1984 *Driscoll I* deposition when he mentions, for the first time, that he saw Carr with a white-taped handled knife. (Ex 17). This is something he had never mentioned to State investigators immediately after the incident, when one would assume events were freshest in his mind. This deposition was also the first time he said that the guard Carr was allegedly fighting was [REDACTED]. [REDACTED] does not specifically testify as to the sequence of when he saw Driscoll administering stabs to Jackson versus Carr supposedly making stabbing motions at another officer.

Driscoll I Trial Testimony - Undisclosed

In his undisclosed *Driscoll I* trial testimony, [REDACTED] suddenly gets specific in his timing and testimony that during the 15 second span he was at the top of the stairs, he saw Driscoll stab at Jackson multiple times, and, in the same span of time, saw Carr fighting with, and stab at, Officer [REDACTED]. [REDACTED] never testified he saw Carr stab Jackson. (Ex 8).

This undisclosed testimony makes the State's version of events in Carr impossible.

The State presented the theory in *Carr* that Driscoll stabbed Jackson, then Carr did until he was stopped by Officer [REDACTED]. The state then posited that Carr stabbed [REDACTED] in the shoulder and was subsequently knocked out by Officer [REDACTED] using a bat, and therefore removed from the action. (See [REDACTED] Section P. 36).

If, as [REDACTED] testified in *Driscoll I*, Driscoll was stabbing Jackson within the same 15 second time frame that [REDACTED] says he saw Carr stab Officer [REDACTED], then Carr could not have

stabbed Jackson, as according to Officers [REDACTED] and [REDACTED], Carr was knocked out after fighting with [REDACTED] and drug back into the wing.

[REDACTED] would have seen Carr stab Jackson under the State's theory, because he supposedly saw the stabbing of Jackson by Driscoll and the altercation between [REDACTED] and Carr. Under the State's theory at Carr, Carr was supposed to have been the last to stab Jackson before being confronted by Officer [REDACTED].

Testimony in *Driscoll I* that [REDACTED] had not seen what he claimed to have seen, and was an unreliable witness making deals with the State was adduced by Driscoll's defense, was never disclosed to Carr. (See Ex 8: testimony of witnesses of [REDACTED] and [REDACTED], among others).

[REDACTED] testified in *Driscoll I* that lucky three member [REDACTED] told him that the State was threatening to charge him if he didn't testify how they wanted, [REDACTED] told [REDACTED] that he didn't see who stabbed Jackson and said that he was trying to get out of trouble by lying, and that final lucky three member [REDACTED] said he was beaten to testify for the State. (See *Driscoll I*, Ex 8, P. 1591-1599.)

[REDACTED] testified that in *Driscoll I* that [REDACTED] told him he was a suspect in a murder at Moberly. [REDACTED] told him, "the administration was offering him little favors here and there and they was threatening him with prosecution on the murder case if they didn't -- if he didn't tell them what they wanted to hear." (Id, P. 1502-3). [REDACTED] told [REDACTED] that he didn't see anything the night of Jackson's death because he was drunk. (Id. P. 1504). (See also, [REDACTED] letter, Ex. 22).

Roberts Trial, undisclosed

██████ testimony would change even more in his undisclosed *Roberts* trial testimony.

At this trial, he testified, for the first time, that Roberts had stopped Jackson from getting to the control area after Jackson was knocked down. (Ex 9).

██████ also says for the first time at Roberts trial that Roberts was an instigator of the riots, testifying that Roberts and ██████ said, “are we going to let them guards take Jimmy like that? Let’s rush them.” (Ex 9, T. 326-327).

Prior to this testimony, ██████ inconsistently testified (1) that *Driscoll* and ██████ made that statement, (2) that “somebody” made the statement, and (3) that “one” unidentified inmate made the statement. He would change who he attributed this statement to at least two times after *Roberts*. (See ██████, Chart B. P. 58)

This fits within the pattern of State’s witness testimony being conveniently tailored at each different trial of the defendants within the Moberly prosecutions.

██████ also changes his testimony significantly regarding Carr in *Roberts*, saying that he “hit guards up in the wing area.” In this testimony he omits any mention of which guards Carr was fighting and says “hit” instead of “stab.” Interestingly, this terminology is given to him in questioning by Prosecutor Finnical, “Did you see Rodney Carr hit any of the guards up there?” (T.369). This clearly cannot be squared with his testimony at the *Carr* trial and should have been disclosed to Carr as exculpatory and impeaching *Brady* evidence.

Further impeaching ██████ credibility in a way that should have been disclosed to Carr, ██████ testified in *Roberts* about an undisclosed letter that he sent saying that he heard ██████ was holding Jackson while he was stabbed. ██████ said he wrote this undisclosed letter for his own protection to make Roberts think he wasn’t testifying against him T. 335.

At the joint preliminary hearing in January 1984, [REDACTED] said he could not recall Roberts coming into the room where the inmates were drinking hooch. But, reflecting the pattern of the State's witnesses' testimony being uniquely tailored to each trial to maximize the chance of conviction, [REDACTED] changed this testimony at Roberts' trial to say Roberts *really did* come by. (Roberts Ex. 9, T. 410)

- "At that time I didn't remember"

"You remember now?"

"Yes" (T.367)

Carr

At Carr's trial, only months after *Driscoll I* and *Roberts*, [REDACTED] again uniquely molded his testimony to fit a theory to convict Carr.

At Carr's trial, [REDACTED] does not mention Carr stabbing *anyone* unlike at the preliminary hearing and the *Driscoll I* trial. Presumably [REDACTED] Carr trial testimony changed in this way because, as discussed above, [REDACTED] earlier and undisclosed testimony in *Driscoll I* regarding the timing of Carr stabbing [REDACTED] would make the State's theory that Carr stabbed Jackson *impossible*.

Carr's counsel had no reason to question [REDACTED] about this because [REDACTED] saying Carr stabbed Officer [REDACTED] didn't help the case: **unless he knew about [REDACTED] undisclosed testimony about the sequence of events.** It appears the state went out of its way to keep this timing testimony hidden. Thus, to uniquely tailor the case to convict Carr, the State elicited from [REDACTED] that Carr had a white-taped handled knife and *was in the area*.

Had Carr known that [REDACTED] previous testimony about the timeline of events made it impossible for Carr to have stabbed Jackson, the cross examination of [REDACTED] at Carr's trial would have been drastically different (and more effective in exculpating Carr).

Another fact unknown to Carr, was that [REDACTED] testimony would change in even more significant and shocking ways in later years, during *Driscoll II* and *III*.

Driscoll II Deposition and Trial, undisclosed

[REDACTED] sequence of events and the actions of Carr would change significantly during his deposition for *Driscoll II*. At that deposition, he testified that Carr cut [REDACTED] in the rotunda in the shoulder area, then 15 seconds passed and *Carr and Roberts held each side of Jackson while Driscoll stabbed once*. A completely different version of events for Mr. Carr, and one [REDACTED] never testified to before. (Ex 16).

The Missouri Attorney General would also recognize this discrepancy and take action to uniquely tailor [REDACTED] trial testimony.

At the *Driscoll II* trial—only a few days after his deposition [REDACTED] testified that somebody from the state asked him to review the deposition to check for accuracy. With that helpful suggestion, he made changes about Carr. At trial, he testified that he was provided with transcripts of previous testimony and, upon reviewing the transcripts, he realized that he didn't testify previously that Carr was holding Jackson. *Driscoll II*, Ex 10, T. 1015.

[REDACTED] then testified at the *Driscoll II* trial that Carr was not holding Jackson, that he saw Carr slice [REDACTED] across the neck, turned around and saw Driscoll stabbing Jackson. **This matches his testimony in the *Driscoll I* trial that makes the State's theory against Carr impossible.** He even testifies here that the difference between seeing Driscoll stab Jackson and Carr stab [REDACTED] was a matter of **two seconds**. (Ex 10, T. 1008-9)

One of the biggest pieces of new, undisclosed testimony to come from *Driscoll II* is [REDACTED] testimony that officials thought he killed the guard. He was threatened with prosecution and the death penalty. He confirmed this in his *Driscoll II* deposition and trial

testimony. *In all testimony disclosed to and available to Carr prior to trial, [REDACTED] had denied this fact.* (See [REDACTED], Chart C, P. 59). [REDACTED] had every incentive to falsely implicate Carr to protect himself.

Driscoll III, undisclosed

In *Driscoll III* in 2004, [REDACTED] testimony would change to a different version of events again. At that point, for the first time, [REDACTED] testified that Carr attacked Jackson. He testified there that Carr was the *first* to attack Jackson by throwing punches, but could not recall whether or not Carr stabbed Jackson. (See [REDACTED], Chart A, P. 57)

In 2022 investigators for Carr attempted to interview Mr. [REDACTED] about this case. He refused to talk. His refusal to speak with Carr's investigator is unsurprising considering [REDACTED], according to his own statements, was a suspect. (See Ex 18: Affidavit of [REDACTED] [REDACTED] re: Vogelpohl)

Despite originally being a suspect, the State treated [REDACTED] like he was not a suspect. For years, the State used [REDACTED] in the Moberly prosecutions, knowing, but not disclosing, that he had been threatened with prosecution and the death penalty, that his version of events was constantly changing and that at least two versions of his testimony made their theory against Carr impossible.

In closing statements prosecutor Finnical asked the jury to rely on [REDACTED] testimony about Carr having a white taped handled knife. What he was hiding, and knew the state was hiding, constitute *Brady* violations, and make his use of [REDACTED] as a witness a prosecutorial misconduct violation in violation of Carr's due process rights. (See Knife Section P. 18).

CHART A: ACTIONS OF CARR

	Actions of Carr
7/4/83 Statement (Ex 19) See also: <i>Driscoll II</i> (Ex 10)- T. 1054-5	No mention of Carr. Driscoll assembled a knife and punched Jackson.
7/15/83 Interview (Ex 20)	No mention of Carr. <i>No identification of perpetrator.</i>
10/3/83 Interview (Ex 21)	No mention of Carr. <u>During fight saw Driscoll moving his arm in a stabbing motion and could see Jackson reacting as if hurt. Heard Driscoll say "did I take him out?"</u>
1/27/84 Preliminary Hearing (Ex 12)	Sequence: <u>Carr hits one of the guards around the neck with a knife</u> as Driscoll stabbing Jackson a couple of times, went in once, <u>while Roberts was holding him</u> , does not recall Carr getting knocked out. T. 59-62
10/24/84 Driscoll I Depo (Ex 17)	Sequence: Driscoll stabs Jackson once, Carr stabs [REDACTED] <u>with a white taped handled knife.</u> T. 39, 45.
11/28/84 Driscoll I Trial (not disclosed) (Ex 8)	Sequence: Driscoll stabs Jackson twice, went in once. Within 15 seconds, <u>Carr fought with [REDACTED] and Carr was keeping the door open, stabbed [REDACTED] in the shoulder.</u> T. 943-954
1/29/85 Roberts Trial (not disclosed) (Ex 9)	Sequence: Jackson is pushed down, Roberts stopped him from getting to control area, <u>Driscoll stabs Jackson twice while Roberts held him, Carr was preventing the door from being shut, Carr "hit guards up at the wing area"</u> T. 369
2/23/85 Carr Trial (Ex 6)	Sequence: Driscoll swings at Jackson 3 or 4 times, sees go in once, Roberts holding, <u>Carr had a white taped handled knife but did not stab Tom Jackson.</u> T.. 302, 310
12/1/99 Driscoll II Depo (not disclosed) (Ex 16)	Sequence: Carr cuts [REDACTED] in rotunda in shoulder area, 15 seconds pass, <u>Carr and Roberts hold each side of Jackson while Driscoll stabs once.</u> T. 21-27, 53-58
12/3/99 Driscoll II Trial (not disclosed) (Ex 10)	Saw Carr slice [REDACTED] across the neck, turned around and saw Driscoll stabbing Jackson. <u>Repudiates his 12/1/99 testimony, Carr was not holding Jackson.</u> T. 974-976, 1003-1016
3/23/04 Driscoll III Trial (not disclosed) (Ex 1)	<u>Carr was the first to attack Jackson, throwing punches, but does not recall whether or not Carr stabbed Jackson.</u> T. 323-325

CHART B: STATEMENTS OF INMATES BEFORE THE FIGHT

	Statements by Inmates before the Fight
7/4/83 Statement	No mention
7/15/83 Interview	No mention
10/3/83 Interview	Overheard Driscoll and [REDACTED] stating they should prevent the guards from taking [REDACTED]. [REDACTED] said "let's rush them"
1/27/84 Preliminary Hearing	No mention
10/24/84 Driscoll I Depo	"Somebody" said "let's rush them" T. 5
11/28/84 Driscoll I Trial (not disclosed)	One inmate said, "let's rush them" T. 908-909
1/29/85 Roberts Trial (not disclosed)	Roberts and [REDACTED] said to the other inmates "are we going to let them guards take [REDACTED] like that? Let's rush them" T. 326-327 -Roberts, not Driscoll and [REDACTED], said they should prevent [REDACTED] from being taken. "If I did say that, I wasn't in the right mind because I know Rabbit didn't say nothing. . . He put that knife in his back and walked out. Didn't say a word." T. 341
2/23/85 Carr Trial	Inmates had "gotten together, approximately about thirty of them were saying things like "We ain't going to let these guards take out [REDACTED]" T. 296
12/1/99 Driscoll II Depo (not disclosed)	Roberts said we're a sorry bunch if we let him take him out of here- rush 'em. T. 20
12/3/99 Driscoll II Trial (not disclosed)	Roberts, not [REDACTED], said we're a sorry bunch if we let him take him out of here" and he heard someone say "rush em," T. 970-971
3/23/04 Driscoll III Trial (not disclosed)	Somebody said out loud if we let the guards take [REDACTED] we're a sorry bunch of inmates, let's rush 'em. T. 322

CHART C: INTERROGATION OF [REDACTED], AS SUSPECT

[REDACTED]	Interrogation of [REDACTED], [REDACTED] as a Suspect Not asked about, mentioned in 7.4.83 statement, 7.15.83 statement, 10.3.83 statement, Driscoll I Depo, Driscoll I trial, Roberts Trial, Driscoll III
1/27/84 Preliminary Hearing	Was not questioned intensely by state officials, was never asked in early interrogations if he struck anyone with a knife T: 52
2/23/85 <i>Carr Trial</i>	Not asked, not mentioned.
12/1/99 Driscoll II Depo (not disclosed)	Officials thought he killed the guard, he was threatened with the prosecution and the death penalty T: 33, 46
12/3/99 Driscoll II Trial (not disclosed)	When interviewed by DOC officials, there was talk of [REDACTED] being prosecuted. T: 1039-1041

2. [REDACTED]: STATE'S WITNESS, FORMER INMATE

[REDACTED] lived the shortest life of the Lucky Three, with his passing coming after *Carr* (the last of the original prosecutions), but prior to *Driscoll II*. [REDACTED] was the cellmate of Moberly co-defendant Robert Driscoll.

[REDACTED] was alleged by most to be the inmate Jackson and other guards were coming to remove from the wing because [REDACTED] was rowdy and intoxicated. [REDACTED] was also the main target of Driscoll's first defense. (See *Driscoll I* Ex 8: T. 1944-1945).

In his closing statement, Driscoll's first defense attorney, Robinson, would allege that [REDACTED] was the real killer of Officer Jackson. Robinson cited Officer [REDACTED] who testified that [REDACTED] was struggling with guards and that [REDACTED] changed his appearance. He cited inmate [REDACTED] who testified [REDACTED] stabbed Jackson. He cited Officer [REDACTED] who said

██████ was fighting with two guards. He cited the following witnesses who also said they saw ██████ with a knife in their testimony at *Driscoll I*: Officer ██████, ██████, ██████, Inmate ██████ and inmate ██████. (*Driscoll I*, Ex 8, T. 1944). *Driscoll I* testimony was not disclosed to Carr.

██████, ██████' testimony and statements, namely their unreliability, support the undisclosed allegations made at *Driscoll I*.

In his first available statement, made while being interviewed on the day of the uprising, ██████ said simply, "I didn't see who did nothing." (Described in *Driscoll I*, T. 1173.) In this interview he said he had never seen Driscoll's black knife, but the official noted that he seemed evasive when asked.

More than two months later, in late September 1983, ██████ told officials he saw who stabbed the guard but would not talk until he was assured of his release from the Department of Corrections.

Joint Preliminary Hearing Testimony, disclosed

At the joint preliminary hearing, for the first time, ██████ gives "details." He testified that Carr stabbed an unknown guard, then struck at a guard being pulled away. (Ex 12 T.134-5). He said he saw the guard who Carr stabbed by the doorway in the courtroom. This testimony also included ██████ first allegation against Roberts, with his testimony that he saw Roberts holding a guard and saw Roberts and Carr, with a hand on his waist, sticking at some guard pulling another guard away. (T.135).

██████ said at the preliminary hearing that he knows Officer Jackson and Jackson wasn't the guard in the doorway described above. (T.139-40). He then said he only saw Carr stick one guard. (T.140).

And finally, [REDACTED] would use the preliminary hearing to implicate the last of the Moberly co-defendants, Driscoll. He said that Driscoll came to Room 417 after the uprising and said "I killed the freak" (T.136). However, when questioned about that allegation he testified, "I just made that statement when I realized I wanted to go home." (T.143).

[REDACTED] was also questioned at the preliminary hearing about a letter [REDACTED] allegedly wrote to Driscoll saying that DOC official [REDACTED] [REDACTED] wanted [REDACTED] to cross everyone. At the preliminary hearing, [REDACTED] denied writing this letter but said it is his handwriting. T. 144-145.

Driscoll I Deposition Testimony, disclosed

[REDACTED] testimony would change in many ways, as so many of the State's witnesses, at his deposition prior to *Driscoll I* in October 1984. (Ex 23).

[REDACTED] said at this deposition that he passed Carr on his way to the wing- had to go behind Carr, saw him stab a brown shirt and now added that Roberts had a knife. T.15. He again testified that Driscoll said "I killed the freak" when he returned to his cell, but this time testified that he saw Driscoll's black handled knife a week prior to the incident. This contradicts his original statement to investigators that he had never seen it.

At his 1984 deposition, [REDACTED] was asked again about the letters he wrote. He testified that he wrote letters offering to give favorable testimony if the State would do things for him. He said he asked to drop detainers which haven't been dropped. T.7-9. For more discussion on the detainers, see the Wolfrum Letter, P. 85-86. He said he did not remember writing the letter to Driscoll when he testified at the preliminary hearing, but he did it to throw Driscoll off. (T.22-24).

Driscoll I trial testimony, undisclosed

In his first piece of undisclosed testimony, [REDACTED] would give the most different testimony in his tenure as a witness. (Ex 8).

Despite his assertions at the preliminary hearing that Carr did not stab Jackson, he testified in *Driscoll I* that he saw Carr stick a brown shirt one time, maybe Jackson, and, for sure Jackson, another time. T.1127-8. [REDACTED] said he did not see the face of the brown shirt who Carr stuck when [REDACTED] first saw him, but when he turned around he saw Carr again, Roberts was holding Jackson, and “they” were “still” sticking at him, [REDACTED] could “clearly” see it was Jackson who was being knifed as he was pulled away by another guard. T.1129, 1144-7.

Contrary to his deposition testimony only a month prior, [REDACTED] does not recall at *Driscoll I* if Roberts was holding a knife. [REDACTED] was not used as a witness in *Roberts*.

[REDACTED] went on to testify again that Driscoll came back and said “I killed the freak” P. 1132. [REDACTED] said he would not say anything to investigators about the 7/3 incident until he had his protective custody P. 1148. [REDACTED] testified that he did see Driscoll’s knife prior to July 3, and this time admitted, undisclosed to Carr, that he **lied to investigators about this in his early interview** T.1167.

[REDACTED] went on in his *Driscoll I* testimony to say that he wrote letters to Driscoll because he was getting questioned by investigators “every other day” and wanted to throw inmates off. P. 1136. He says here he was not trying to make deals with the State, but understood he could get “play”. T. 1148-9. [REDACTED] said his Nevada detainer was dropped, but not by the Attorney General’s Office. T. 1156-7.

Carr Trial Testimony

At Carr's trial, [REDACTED] removed his specificity about Carr, and Finnical attempted to use this to the State's advantage. Remember, Finnical said in closing there's a "ring of truth" to [REDACTED]' testimony. (Ex 6).

[REDACTED] testified in *Carr* that he saw Carr stick a brown shirt in the doorway but can't say who for sure. He said he saw Carr with a knife in the rotunda area and assault guards. (T. 348). Then, [REDACTED] said he went behind Carr into the wing and saw Carr on the other side of Roberts, sticking at a guard.

This time, only a few months after Driscoll's trial, [REDACTED] testified that he can't say for sure if the guard was hit or not or who the second guard was. (T. 339-346). He said Roberts was holding a brown shirt the second time [REDACTED] saw Carr and Carr made lunging motions at the guard being dragged away. T. 348.

[REDACTED] said here that he saw Driscoll fighting with guards and Driscoll came back and said "I killed the freak." T. 343-346. When first presented with Driscoll's knife at Carr's trial, [REDACTED] said he can't identify it, but then changed his testimony and says Driscoll made his knife in the sign shop. T. 346-7.

Despite watching [REDACTED]' evolving, and un-credible testimony, prosecutor Finnical continued to use him as a witness. Not only did Finnical use him as a witness, he bolstered his alleged honesty to the jury in *Carr*,

"...ring of truth to what [REDACTED] said- he saw Rodney Carr stabbing a brown shirt- if he was going to lie- what would he saw? He would say he saw him stab Tom Jackson. He couldn't honestly testify to that- he said he honestly can't tell you that." T. 459.

When he argued this, prosecutor Finnical knew all the testimony at *Driscoll I*: about [REDACTED] being a suspect, about [REDACTED] saying he was making deals, and more importantly, he knew that [REDACTED] had gone from certainty about the guard's identity in *Driscoll*, to complete uncertainty in *Carr*. Finnical used this uncertainty to bolster [REDACTED] while not telling Carr or the jury that [REDACTED] had claimed to be able to identify the guard a few months prior. Had Carr had access to the Driscoll trial testimony, he could have undermined the testimony of [REDACTED] and the credibility of the prosecution as a whole.

[REDACTED] CHART A: WHO STABBED THE GUARD?

[REDACTED]	Who stabbed the guard
7/4/83 [REDACTED] Interview (Ex 24)	"I didn't see who did nothing." (described in <i>Driscoll I</i> , T. 1173)
9/21/83 MSHP Interview (Ex 25)	Saw who stabbed the guard- but would not talk until he was assured of his release from DOC
1/27/84 Preliminary Hearing	Carr T.134-40
10/24/84 Driscoll I Depo	Passed Carr on way to wing- had to go behind him, saw him stab a brown shirt T.15
11/28/84 Driscoll I Trial (not disclosed)	-Saw Carr stick a brown shirt (maybe Jackson) and Tom Jackson. T.1127-8 -Does not recall saying to MSHP that he would talk if his release was guaranteed T.1150
1/29/85 Roberts Trial- DID NOT TESTIFY	
2/23/85 Carr Trial	-Saw Carr stick a brown shirt in doorway- can't say who for sure. - He saw Carr with a knife in rotunda area and assault guards. T. 348

CHART B: WHICH GUARD WAS STABBED?

	Which Guard Was Stabbed
7/4/83 Interview	
9/21/83 MSHP Interview	
1/27/84 Preliminary Hearing	-Carr stabbed an unknown guard, then stuck at a guard being pulled away T.134-5. - sees the guard who Carr stabbed by the doorway in the courtroom, knows Jackson and he wasn't the guard in the doorway T.139-40. -Only saw Carr stick one guard T..140
10/24/84 Driscoll I Depo	
11/28/84 Driscoll I Trial (not disclosed)	-Did not see the face of the brown shirt who Carr stuck when first saw him.. -Turned around and saw Carr again, Roberts holding Jackson and they were "still" sticking at him, could "clearly" see it was Jackson who was being knifed as he was pulled away by another guard. T.1129, 1144-7
1/29/85 Roberts Trial- DID NOT TESTIFY	
2/23/85 Carr Trial	-Saw Carr stick a brown shirt in doorway- not sure who. -Then, went behind Carr into wing- saw Carr on the other side of Roberts, sticking at guard. Can't say for sure if the guard hit or not or who the guard was, the guard was being pulled away. T. 339-346

	Roberts' Involvement
7/4/83 [REDACTED] Interview	
9/21/83 MSHP Interview	
1/27/84 Preliminary Hearing	Saw Roberts holding a guard and saw Roberts, and Carr with a hand on his waist, sticking at some guard pulling another guard away. T.135
10/24/84 Driscoll I Depo	Roberts had a knife T. 16
11/28/84 Driscoll I Trial (not disclosed)	Doesn't recall if he saw Roberts with a knife. T.1172 Roberts was holding a brown shirt the second time [REDACTED] saw Carr, "they" were sticking at him. T. 1144-7
1/29/85 Roberts Trial- DID NOT TESTIFY	
2/23/85 Carr Trial	Roberts was holding a brown shirt the second time [REDACTED] saw Carr, Carr made lunging motion at guard being drug away T. 348

CHART D: DRISCOLL'S INVOLVEMENT/KNIFE

Driscoll's Involvement/Knife	
7/4/83 Interview	Has never seen Driscoll's black knife (interviewer noted he seemed evasive)
9/21/83 MSHP Interview	
1/27/84 Preliminary Hearing	Driscoll came to Room 417 and said "I killed the freak" T.136 -"I just made that statement when I realized I wanted to go home." T.143
10/24/84 Driscoll I Depo	-Driscoll said "I killed the freak" T.20 -Saw Driscoll's knife a week prior to the incident T. 17
11/28/84 Driscoll I Trial (not disclosed)	-Driscoll came back and said "I killed the freak" T. 1132. -Would not say anything about the 7/3 incident until he had his protective custody T. 1148 -Did see Driscoll's knife prior to July 3- <u>lied to investigator about this in his early interview</u> T.1167-8
1/29/85 Roberts Trial- DID NOT TESTIFY	
2/23/85 Carr Trial	-Saw Driscoll fighting with guards. Driscoll came back and said "I killed the freak." T. 343-346 -When first presented with Driscoll's knife- says he can't identify it- then said Driscoll made his knife in the sign shop. T. 346-7

CHART E: LETTERS TO/ABOUT [REDACTED], DOC

[REDACTED]	Letters to/about George [REDACTED], DOC
7/4/83 [REDACTED] Interview	
9/21/83 MSHP Interview	
1/27/84 Preliminary Hearing	Denied sending a letter to Driscoll saying [REDACTED] wanted him to cross everyone, but it is his handwriting T. 144-145
10/24/84 Driscoll I Depo	-Wrote letters offering to give favorable testimony the State would do things for him. Asked to drop detainers which haven't been dropped. T..7-9 -Did not remember writing letter to Driscoll when testified at prelim, did it to throw Driscoll off. T..22-24
11/28/84 Driscoll I Trial (not disclosed)	Wrote letters to Driscoll because he was getting questioned by investigators "every other day" and wanted to throw inmates off. T.. 1136. -Was not trying to make deals with the State, <u>but understood he could get "play"</u> T. 1148-9 -Nevada detainer was dropped- not by AG T. 1156-7
1/29/85 Roberts Trial- DID NOT TESTIFY	
2/23/85 Carr Trial	No mention.

3. ██████████: STATE'S WITNESS, FORMER INMATE, THE "OTHER" MEMBER OF THE "LUCKY THREE"

██████████ may be the most complicated of the Lucky Three inmates, as he was once termed by a Judge in *Driscoll III*, "reasonably unmanageable." (Ex 1, T. 386). Unfortunately for the State, ██████████ was indispensable to their case against Driscoll.

██████████ claimed to see what happened more closely than almost anyone, saying that he was right next to Driscoll and watched him stab Officer Jackson. He subsequently helped move the body of Jackson to the infirmary once the action had dissipated.

While ██████████ may exhibit characteristics that make him appear "unmanageable," his testimony, records from his file and new affidavits show that State appeared to try to manage Ed ██████████ anyway, just like the other two members of the Lucky Three described above.

Although ██████████ displayed wild discrepancies in parts of his testimony, the State continued to use him at every trial of the Moberly defendants. Despite ██████████ having never made implicating statements against Carr prior, the State attempted, unsuccessfully, to use ██████████ as a witness against Carr at his trial. While ██████████ testimony didn't end up going the way the State had hoped in *Carr*, they were much more successful a few months prior in *Roberts*.

In *Roberts*, ██████████ followed the State's witness pattern throughout the Moberly prosecutions; he made implicating statements against Roberts for the first time at Roberts' trial.

The State's attempt to use ██████████ against Carr, knowing that any implicating testimony by ██████████ against Carr would be wholly unreliable, constitutes prosecutorial misconduct in violation of Carr's due process rights.

██████████ undisclosed prior testimony, prison records and new affidavit, contain *Brady* material, including, but not limited the following:

Initial Statements/Interviews, disclosed

The first record made about [REDACTED] the night of the incident was a medical report, noting a laceration on arm. (Ex 26). When interviewed, he made statements that [REDACTED] had instigated the fighting, and was the “spokesman” for the inmates that night. (See Section on, [REDACTED], P.18 for more information on [REDACTED] as an alternative suspect, and that a white-handled knife that was never connected to Carr was found in [REDACTED] cell). [REDACTED] would re-affirm these statements about [REDACTED] in later testimony (Ex 28: [REDACTED] *Driscoll I Depo T.4*). He said in his interview that [REDACTED] resisted officers. Then, Driscoll rushed at the officers, knife in hand. [REDACTED] saw Driscoll with his knife one week prior to the interview date. [REDACTED] said that as Driscoll rushed at officers, he began swinging and stabbed Jackson. (Ex 27).

[REDACTED] stood next to Driscoll and saw him stabbing officer Jackson with his right arm in the chest and stomach around 5 times (this accounts for all wounds on Jackson and discounts Carr as a stabbing suspect). (Ex 27).

[REDACTED] said in his interview that when Jackson fell inside of the rotunda door, Driscoll kicked him on the left side of face or head. Driscoll continued to charge into the rotunda and threw the knife. [REDACTED] then helped carry Jackson to infirmary. The interview report also noted [REDACTED] had a small clean laceration on his left elbow and that [REDACTED] thought he got it from Driscoll. (Ex 27).

[REDACTED] made no mention of Roberts or Carr in any early interviews or statements known to Carr.

Joint Preliminary Hearing, Disclosed

At the joint preliminary hearing, [REDACTED] said that he only saw a knife in the hand of Robert Driscoll, and saw no one else with a knife. (Ex 12: T.73). [REDACTED] testified that he saw Carr's face and did not see him participate. [REDACTED] said Carr was in the doorway near Jackson. (T.77-79). When cross examined [REDACTED] testified:

Q: Did you discuss your testimony that you would give here today with Mr. Finnical before coming here?

A: Yes

Q: Did he ask you about Mr. Carr's participation in this matter?

A: He asked me did I see him.

Q: And what was your response?

A: I seen his face.

Q: Did he ask you if you saw him participating in this matter?

A: Yes

Q: And what was your response?

A: All I seen was his face, I did not see him participate (T.77).

[REDACTED] further stated that he did not see Roberts except for seconds before the fight (T.81).

Driscoll I Deposition, disclosed

At his deposition prior to *Driscoll I*, [REDACTED] said that the only face he saw up where Jackson was stabbed was Driscoll. Driscoll was next to [REDACTED] stabbing Jackson in the chest. (Ex 28: T.6). Here, [REDACTED] said he saw the knife go in Jackson's body one time.

[REDACTED] testified that, in his first statement to investigators, he just said what investigators wanted to hear. (T.12). He had been beaten by the prison guards and was scared. *Id.*

[REDACTED] attempted to clarify that no one beat him to get his initial statement, but only when prompted in questioning by Finnical. (T.17). Finnical further asked [REDACTED] to affirm there were no deals for his testimony. (T. 20). [REDACTED] said that he was testifying because he knew Driscoll did wrong and Jackson was one of the best officers at Moberly. (T.19.)

Finnical, like with the others, has [REDACTED] affirm that all Finnical has promised is a letter in their file saying they cooperated. *Id.*

[REDACTED] testified again he saw no one else with a knife besides Driscoll. (T. 22).

When re-crossed by Driscoll's counsel, [REDACTED] stated that a portion of his initial statement that involved inmates mooning officers was not true, he made it up, and would have told investigators anything to stop from being beaten. (T. 24).

Driscoll I trial, Undisclosed

At *Driscoll I*, [REDACTED] makes one of his most interesting moves: [REDACTED] is no longer named by [REDACTED] as the instigator of the fighting. [REDACTED] testimony identifying who made the instigating statements becomes: "someone." (Ex 8, T.1041).

Prosecutor Finnical elicited testimony from [REDACTED] that Jackson was not being restrained, going outside of their "overarching" theory that Jackson was restrained by Roberts as Driscoll, then Carr, stabbed him. (T.1042).

Finnical does, however, elicit testimony from [REDACTED] that Roberts and Carr were in the group that rushed the guards. (T.1041).

This time, [REDACTED] says he saw Driscoll's hand come from behind with a knife and swing three or four times and penetrate Jackson's chest (T.1043). [REDACTED] testified that investigators didn't believe [REDACTED] the first time, until Driscoll confessed (T. 1047-8).

Finnical has [REDACTED] affirm, again, that the State hasn't promised anything in exchange for [REDACTED] testimony, and that Finnical will write a letter saying that he cooperated in his file. (T.1051-2)

█████ testified again that when he made his initial statements, he was afraid of the guards and afraid for his life and told them anything they wanted to hear. (T.1058). Undisclosed to Carr,

█████ said **it's the authorities' job to protect him now.** (*Id.* T.1044, 1064-1066).

During this testimony █████ calls Finnical "Tim". "well, I just call him Tim." (T.1060).

However, the biggest piece of *Brady* material to come from this undisclosed testimony is that █████ says for the first time that he doesn't know how he got cut the night of the incident.

█████ said that he thought he got cut from falling down, but a prison investigator put into his mind that he was cut by Driscoll's knife.

Had Carr had access to this testimony at his trial, he could have undermined the credibility of the investigation by showing that State officials were putting implicating facts against the Defendant's into the mind of witnesses.

Roberts Trial, Undisclosed

At *Roberts*, █████ testified for the first time that prior to the fighting, Roy Roberts said "are we going to take this man out of the wing," and then █████ said "no" and █████ said "let's rush them." (T.354).

Finnical elicited his usual testimony that █████ had not been promised anything except for the letter in his file. (T.355-6).

█████ testified again that he saw Driscoll stab Tom Jackson. █████ said he saw the knife enter Jackson's shirt one time and saw Driscoll swing 3-4 times. █████ said there were other people around when Jackson was stabbed, but that he only saw Driscoll's face: he was in shock from what he had seen (T.352)

█████ said he saw Driscoll "start" to stab Jackson in the upper chest area. This has to be the case for the State against Roberts. █████ didn't testify that Roberts held Jackson, so the State

wanted Roberts to still have an opportunity to hold Jackson through more stabs. The State needed to have [REDACTED] see **less** here. (T. 358)

Carr

Why [REDACTED] was brought in as witness at Carr might be explained by his sudden testimony a few months prior at Roberts about Roberts as an instigator of the fighting. It appears that Prosecutor Finnical thought [REDACTED] would do something similar, and suddenly provide incriminating testimony, against Carr.

[REDACTED] testified at Carr that Driscoll's hand came out from behind his back with a knife and stabbed Jackson in the chest area (T. 327). [REDACTED] then testified that, contrary to his testimony in *Driscoll I*, he was cut as a result of swings by Driscoll across his left arm. He does not say here that he originally thought he fell, or that prison investigators put the idea about being cut by Driscoll into [REDACTED] mind. Because this testimony from *Driscoll I* was not disclosed, Carr's counsel had no reason to ask about the cut further.

[REDACTED] said he saw Driscoll swing at Jackson several times, but only saw the knife actually go into his shirt one time. Even though he originally noted more swings in his first statements, [REDACTED] says here that Driscoll swung at Jackson 2-3 times. (T. 332).

[REDACTED] Non Compliance with Finnical at Carr

Then came [REDACTED] noncompliance with Finnical, the kind of noncompliance that would get [REDACTED] later termed, "unmanageable." The following are three different exchanges between [REDACTED] and Finnical at Carr, these interactions seem to show that Finnical thought [REDACTED] would testify against Carr:

Q: Now, after you got into the rotunda area, can you give me the names of the other people? Do you recall the specific names?

A: No sir, I don't.

Q: Okay. You know Rodney Carr, don't you?

A: Yes, sir.

Q: Was he in the group?

A: I didn't see him.

Q: You didn't see him?

A: No, sir. (P. 328-329)

Q: You are telling this jury, [REDACTED], that you don't know any of the names of the other people?

A: No, sir, I don't. I didn't see no faces. It happened so quickly.

Q: The only person you saw was Driscoll?

A: Yes, sir.

Q: Can't give the name of [REDACTED] [Carr's uncle], can't give the name of anybody but Driscoll?

A: No, sir, I can't. He's the only face I remember seeing T. 330-331

Q: Now, while you were on the flag area next to where Tom Jackson was, you can't name for this jury one person who you lived with who was on that flag?

A: No, I can't. When I first got to the top of the stairs and I seen Robert Driscoll stabbing that officer is the first time in my life I had ever seen anything like that, and I was astounded, and that's the only thing I seen.

Q: Now you were a friend of Rodney Carr's weren't you?

A: Yes, sir.

Q: And did you particularly like Robert Driscoll?

A: He was okay. (T. 336)

These passages from the *Carr* trial show a frustrated prosecutor, seemingly looking for testimony from [REDACTED], against Carr, that he wasn't getting. But the State couldn't get rid of [REDACTED] just yet, Driscoll's case was already on appeal. And they would need [REDACTED] again.

████████ Middle Years, Part I, Undisclosed

████████ was released, apparently on the same day as ██████ and ██████, on September 5, 1985. He would soon be back in prison. (Ex 29: Affidavit of ██████). In between *Carr*, and the second Driscoll trial, a few things happened in ██████ file (none of the following was disclosed to Carr):

- In 1996, *Driscoll I* was officially reversed.
- In September 1996 a warrant was issued by Texas County for ██████. In February 1998 the warrant was acknowledged by MODOC. (Ex 30: P. 1)
- On May 22, 1998, ██████ received a dismissal of his charges in Texas County. (Ex 30: P. 2)
- On June 10, 1998 the detainer was withdrawn by Texas County, “from prosecuting attorney” (Ex 30: P. 3-4)
- *Driscoll II* went to trial, after years of motions, depositions and discovery, and with Ed ██████ as a main state’s witness, in November 1999.

Driscoll II, Undisclosed

At *Driscoll II*, ██████ testified that contrary to his previously stated reason for testifying (his adoration of Jackson), ██████ was not familiar with Officer Jackson.

████████ testified that as guards were escorting ██████ out, ██████ yelled “rush them.” ██████ testified that Roberts and Carr were around, however, contradicting his testimony at Roberts, ██████ said in *Driscoll II* that he did not hear anyone say anything before ██████ said “let’s rush them.” (Ex 10: T.1068-9, 1084)

████████ said he was to the right of Driscoll, facing the same direction and was a foot or two away from Jackson being stabbed. (T.1072). ██████ said he was then pushed inside the rotunda and saw Jackson fall directly down.

██████ said he did not see where Roberts was, nor where Carr was, at the time of Jackson's stabbing (T.1073).

However, in this testimony we get a glimpse of what Finnical may have been trying to elicit from ██████ in *Carr*: ██████ testifies, for the first time ever, that he saw Carr stab an officer, not Jackson, in the upper neck/shoulder area and that he told the prosecutor this. (T.1073, 1122-4)

Also for the first time, ██████ said that someone was holding Jackson from behind when he was stabbed. (P. 1086).

██████ re-affirmed here, unlike at *Carr*, that an investigator at MSPD told ██████ he was cut by Driscoll's knife- not falling down. (T.1075, 1110-1103).

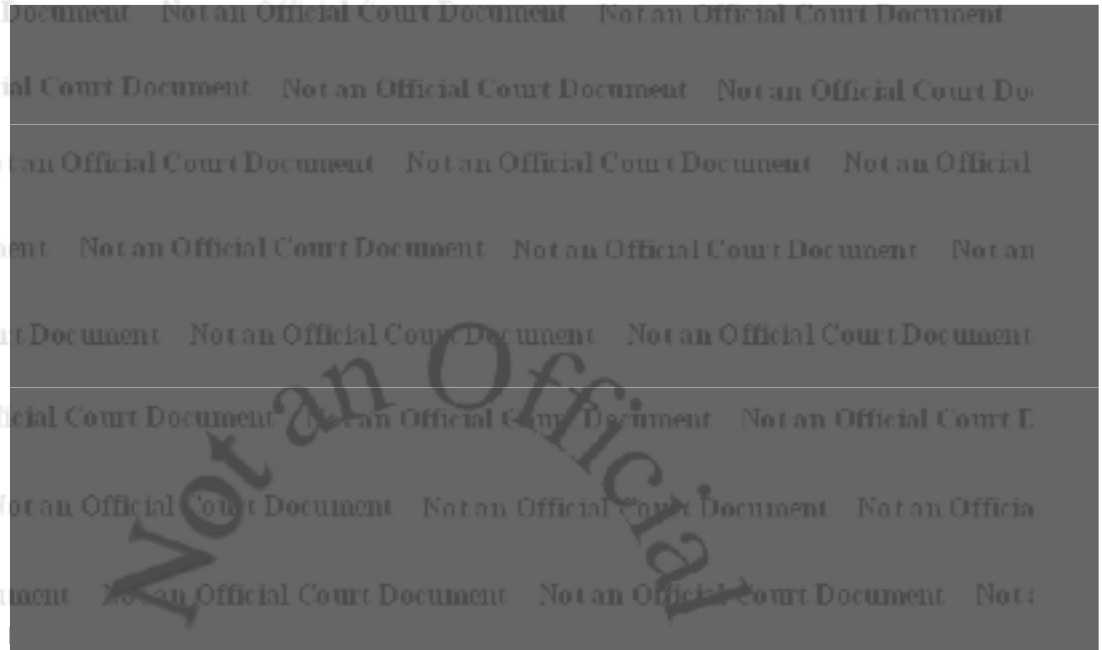
Even though ██████ says he did not make any false statements to investigators, he admitted that he partially told them anything they wanted to hear out of fear. He confirmed that he said in a 1999 deposition he believed cooperating with the State could get him released early. (T. 1068-70, 1094-1103, 1122).

██████ Middle Years, Part II, Undisclosed

Following *Driscoll II*, ██████ continued to have legal trouble (none of the following was disclosed to Carr):

- In August 2001 the City of Desloge had a detainer on ██████ and the Court denied request for time served in lieu of fine. (Ex 30: P. 5-6).
- *Driscoll II* was reversed by the Missouri Supreme Court on September 11, 2001.
- **On March 18, 2002 the Attorney General's Office claimed to represent ██████ when visiting him in prison. Both ██████ and Prosecutor, Assistant AAG**

Ahsens, filled out access to attorney forms (Ex 30 P. 7, partial below)



- On August 7, 2002 Assistant Attorney General Investigator and Prosecutor Ahsens, came to visit [REDACTED] in prison. (Ex 30: P. 8)
- On September 10, 2002 [REDACTED] fine was paid, after he had previously indicated to the Court he could not afford to pay, and the warrant was lifted in Desloge. (Ex 30: P. 9-10)
- After years of more depositions and discovery, *Driscoll III* went to trial, again with [REDACTED] as a main state's witness, in March 2004.

Driscoll III, Undisclosed

In *Driscoll III*, [REDACTED] reverted to his previous testimony that he knew Officer Jackson:

[REDACTED] said he saw him every night and knew him by name. (Ex 1, T. 367-368).

Ruegg [REDACTED] that he asked for a few things from Missouri AG that never got done. (T. 431-433). He testified that he saw Carr 3-4 ft away, but did not see him stab Officer Jackson. [REDACTED]

went on to say that he saw Carr stab [REDACTED] or [REDACTED]. (T. 399). He also testified for the first time that Carr had a knife. (T. 372)

█████ said that he saw Jackson being stabbed by Driscoll and then saw Carr reach out with a knife and cut Officer █████ on the neck. (T. 372, 399). However, he testified that he did not see Roberts holding Jackson. (T. 398).

█████ admitted in this testimony that although he told █████ he saw Driscoll's knife a week earlier, in fact, he had not seen it previously. (T. 421).

6-9-22 Affidavit of █████

Investigators for Carr interviewed █████ on several occasions in 2022. Following the last one of these meetings, █████ executed an affidavit laying out several points he discussed with investigators. (Ex 29).

█████ said that did not see who stabbed █████ (Par 4). He said that he decided to cooperate because he knew if you cooperate, you get out (Par 6).

█████ said he, █████ and █████ were pulled out of line together after they were transported to Jeff City from Moberly (Par 8). █████ said that's when he knew something was up.

He went on to state that he was allowed to pick where he was transferred to after Jefferson City. █████ had his own wing with █████ and █████ in Pacific. His parents were allowed to mail him a tv when everyone else had to buy them from the commissary. (Par 13-14).

█████ said that **Rodney Carr did not do anything or stab anyone.** (Par 18).

█████ said that he has a memory of Joe █████ saying he wasn't honest in his testimony and █████ told █████ he didn't see the things he said he did. (Par 19-20).

He doesn't believe █████ saw the stabbing, █████ was cuffed by the time it all started, and it was his behavior that brought the Officers to the wing in the first place. (Par 21).

█████ said he smoked pot with █████ the day before Driscoll's trial in front of officers (Par 27).

9-20-23 Affidavit of Investigator

Investigator [REDACTED] executed an affidavit about her conversations with [REDACTED] in 2023. (Ex 31). [REDACTED] said that [REDACTED] did not want some of the perks discussed in their conversations put in his affidavit, because he didn't want it to "look" like he got special treatment for his testimony, including:

- a. Life got easier after he cooperated with authorities (Par 5)- he could visit privately with family and smoke pot with his brother.
- b. [REDACTED] and [REDACTED] got unsupervised time with their girlfriends (Par 6).
- c. When the Lucky Three asked prosecutor Finnical when they were getting out, he would give them a "special smile." (Par 7).
- d. [REDACTED] then asked the investigator if Finnical could be his lawyer on an old case. (Par 9)
- e. [REDACTED] told [REDACTED] that The Lucky Three would throw their weight around the prison because of testifying in this case, doing things like asking the guards for an extra tray of food and then if they didn't give in, telling them they would "tell" the attorney general's office on them. (Par 8).

[REDACTED] new affidavit, and that of Investigator [REDACTED] show undisclosed benefits given to the Lucky Three by the State for testifying in the Moberly prosecutions and undermine the credibility of the Lucky Three inmates and the investigation and prosecutions in their entirety.

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CHART A: CAUSE OF LACERATION ON [REDACTED] ARM

7/4/83 Interview, Moberly (Ex 27)	7/21/23 Adjustment Board Hearing (Ex 32)	11/84 Driscoll I Trial (not disclosed)	2/85 <i>Carr's Trial</i>	'99 Driscoll II Trial (not disclosed)
Small clean laceration on left elbow, thought he got from Driscoll	Got sliced by the guy swinging the knife, didn't realize until the next day	Doesn't know how he got cut, thought he got it from falling down but <u>a prison investigator put into his mind he was cut by a knife.</u> P.1044, 1064-1066.	Cut as a result of swings by Driscoll, across left arm T.327- 328	<u>An investigator at MSPD told [REDACTED] he was cut by a knife, not by falling down.</u> P.1075,1103

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CHART B: INTIMIDATION AND DEALS

10/84 Driscoll I Depo (Ex 28)	11/84 Driscoll I Trial (not disclosed)	2/85 Roberts Trial (not disclosed)	9/99 Driscoll II Trial (not disclosed)	04/04 Driscoll III Trial (not disclosed)	06/22 Affidavit of [REDACTED] (Ex 29) -not disclosed	03/23 Aff. of Investigator re: [REDACTED] Interviews (Ex 31) -not disclosed
-Not beaten to get his initial statement, no deal in exchange for testimony. -Prosecution promised letter in file for cooperating. -Testifying because Officer Jackson was one of the best officers at Moberly. T. 17-19 <u>- not asked about at Carr's Trial</u>	-Not expecting favors for testimony. - When he made initial statement, he was scared and beaten, was afraid of guards. -Told them anything they wanted to hear. -It's the authorities' job to protect him. T. 1051-1067	Has not been promised anything except for the letter in his file. T.355-6	-Was not familiar with Officer Jackson. -Did not make any false statements to investigators. Partially told them anything they wanted to hear out of fear. -Said in 99 depo he believed cooperating could get him released early. T. 1068-70, 1094-1103, 1122	-Knew Officer Jackson, saw him every night and knew him by name. (T. 367-368) -Asked for a few things from AG that never got done.(T. 431-433)	-Cooperated because if you tell on people, you can get out. (Par 6) -Picked his jail, had his own wing w/ [REDACTED] and [REDACTED] (Par 12-14) -Parents could mail him TV (Par 14) -Remembers [REDACTED] saying his testimony was dishonest; he didn't see what he said he saw. (Par 20) -Had pot with [REDACTED] in front of guards before Driscoll's trial (Par 27)	-Life got easier after cooperating. (Par 5) -Visited privately with family, smoked pot with brother, [REDACTED] and [REDACTED] got unsupervised time with ladies. <i>Id.</i> -Did not want to discuss perks in affidavit, didn't want it to look like special treatment (Par 6) -Finnical would give a special smile when they asked when they were getting out (Par 7) -Lucky three threw their weight around DOC, would threaten to tell AG on guards if didn't comply with requests (Par 8)

CHART C: ROBERTS' INVOLVEMENT

1/84 Joint PH, all three co defendants	11/84 Driscoll I Trial (not disclosed)	2/85 Roberts Trial (not disclosed)	'99 Driscoll II Trial (not disclosed)
Did not see Roberts except for seconds before the fight T.81	Roberts was in the group that rushed the guards. T.1041	Roy Roberts said are we going to take this man out of the wing, [REDACTED] said no, then [REDACTED] said let's rush them. T.354	As guards were escorting [REDACTED] out, [REDACTED] yelled rush them. Roberts and Carr were around. Did not hearing anyone say anything before [REDACTED] said let's rush them T.1068-9, 1084
- not asked about at Carr's Trial			

CHART D: CARR'S INVOLVEMENT

1/84 Joint PH, all three co defendants	11/84 Driscoll I Trial (not disclosed)	2/85 Carr's Trial	'99 Driscoll II Trial (not disclosed)	'04 Driscoll III Trial (not disclosed)	01/22 Affidavit of [REDACTED] (Ex 55) -not disclosed
Saw Carr's face, did not see him participate. Was in the doorway near Jackson. T.77-79	Carr was in the group that rushed the guards. T.1041	Did not see Carr in the group, only saw Driscoll. T. 328-331, 335	Did not see Carr at the time of the stabbing. Saw Carr stab an officer, not Jackson, in the upper neck/shoulder area. Told the prosecutor this. T.1073, 1122-4	Saw Carr 3-4 ft away. Did not see him stab Jackson. Saw Carr slice [REDACTED] or [REDACTED]. T. 372, 399	Carr was not close to any officers, did not and could not have hurt Jackson. [REDACTED] only saw one guard stabbed. Doesn't remember seeing Carr with knife.

THE LUCKY THREE GOT DEALS

4. THE WOLFRUM LETTER, UNDISCLOSED

On June 10, 1998, prior to Driscoll's second trial, his attorney, Robert Wolfrum, sent a copy of a letter he wrote to the court. This letter was addressed to Assistant Attorney General Ahsens, representing the State at the time. Mr. Wolfrum discussed his review of the Lucky Three's Department of Correction Files. (Ex 33: Wolfrum letter, below)

He said that upon his review, all of the Lucky Three were released on or around the same day.

Wolfrum also mentioned that there were letters from Prosecutor Tim Finnical in all three files. Although the possibility of letters in their file was disclosed to Carr, the substance or that letters were actually written, was not.

Wolfrum said that detainers were dropped on [REDACTED], and that his file showed threats not to testify if not treated better and threats to escape MECC. These threats were never disclosed to Carr.

Notably, when counsel for Carr requested copies of these files through open records law in 2022, only the detainer being dropped in Nevada was included. Nothing else mentioned in the Wolfrum letter was included in the Department's disclosure.

These materials reviewed by Wolfrum should have been disclosed to Carr and could have been used to impeach the Lucky Three and the entirety of the prosecution.



(Ex 33)

5. [REDACTED] [REDACTED] UNDISCLOSED DOCUMENTS: POTENTIAL DEFENSE

WITNESS JOHNNIE RONO WAS THREATENED AND SILENCED

Despite the steps taken by Finnical and other members of the prosecution team to affirmatively deny and hide that deals were made with the Lucky Three, one MODOC inmate testified under oath that he had personal knowledge of Finnical's Deal and had even written letters to Finnical on behalf of [REDACTED] related to the terms of that deal. [REDACTED] [REDACTED] was in the Department of Corrections' Pacific facility on the night of the Moberly Uprising, but what he learned in the wake of the violence and subsequent cover-up created a number of problems for Finnical and the prosecution team.

a. [REDACTED] 1984 Driscoll I deposition, Disclosed

[REDACTED] was deposed by Driscoll's legal team on September 6, 1984, after more than a year had elapsed following the Moberly Uprising. In his deposition testimony, [REDACTED] did not shy away from where he was physically located on July 3, 1983 – he was working inside the supermax facility at the Missouri Eastern Correctional Center in Pacific, Missouri, where he heard radio communications come through from Moberly.

[REDACTED] was clear to Finnical and Driscoll's attorney that his knowledge of the Moberly Uprising came directly from [REDACTED] and [REDACTED] themselves, while he shared a wing at the Missouri State Penitentiary with the Lucky Three from March 31 until May 2, 1984. (Ex 34: [REDACTED] 1984 Driscoll I deposition)

[REDACTED] detailed how he helped the Lucky Three negotiate the terms of their respective deals through communications with Finnical himself. [REDACTED] described how he helped [REDACTED] write a letter to Finnical about a detainer that [REDACTED] had from another state - a "hold" that stood between [REDACTED] and freedom in the event that he testified against Carr and his co-defendants. He recounted

his observations of watching [REDACTED] put a stamp on the letter and went with him to drop off the letter to mail. (*Id.*, T. 4-8, 27).

[REDACTED] also recalled that, by the time he spoke to [REDACTED], one of [REDACTED]'s two detainees - in the state of Nevada - had been released because of Finnical's intervention, and [REDACTED] had asked [REDACTED] for help with writing a letter to Finnical about the remaining hold, believed to be in California. Probation & Parole records show that [REDACTED] was released on parole in September 1984, indicating that there were no other state "holds" on him before his discharge that would have resulted in his transfer to another state. (Ex 34, T. 7-9, 11, 27, Ex 35: [REDACTED] class file sheet)

[REDACTED] testified that [REDACTED] showed him a map of Moberly, as drawn by Finnical, that supposedly depicted the prosecutor's case and where each co-defendant was standing at the time of Jackson's stabbing. [REDACTED] also testified that [REDACTED] told him, "it didn't happen that way," but that [REDACTED] (and [REDACTED] and [REDACTED]) would get special favors from the state if he testified about something he did not actually witness. (Ex 34, T. 5-6, 22).

Later, [REDACTED] shared with [REDACTED] that he was told the same - that although [REDACTED] did not see anything during the uprising at Moberly, he was supposed to testify that he observed Carr and the co-defendants murder Jackson. [REDACTED] had also described the beatings that followed the Moberly Uprising - a part of the story often left out, but well-documented in the federal civil rights litigation that followed.¹⁰ [REDACTED] told [REDACTED] that he had been a victim of the Moberly corrections officers' abuse following Jackson's death. Finally, [REDACTED] discussed seeing Finnical visit the Lucky Three while they were housed in the hospital wing of the State Penitentiary. (*Id.*, T. 8-9, 11, 13, 20-21, 23-24).

¹⁰ See generally, *Bolin v. Black*, 875 F.2d 1343 (8th Cir. 1989): affirming a U.S. District Court judgment finding corrections officials liable for beating inmates after the Moberly riot.

Not only did [REDACTED] seem to know specific details of two of the Lucky Three's deals with Finnical, but [REDACTED] also knew that [REDACTED]' testimony was going to be false.

Under oath, [REDACTED] never wavered from his testimony that he helped [REDACTED] to get the benefit of his deal to have the California detainer dropped.

In the middle of [REDACTED] deposition, the record shows that Finnical lost his composure; when [REDACTED] began sharing specifics of the letter he wrote to Finnical for [REDACTED], Finnical responded by threatening to charge [REDACTED] with perjury. (Id. P. 7-8). [REDACTED] did not back down from his testimony that the prosecuting attorney himself gave the Lucky Three a deal in exchange for their testimony - a deal that Finnical never disclosed to any of the co-defendants and a deal that would have cost him three convictions and two death sentences. Upon information and belief, this deposition was the last piece of discovery referencing Mr. [REDACTED] that was disclosed to Mr. Carr.

b. The Retaliation that Followed [REDACTED] Deposition, Undisclosed

Finnical did not file a perjury charge on [REDACTED] after his deposition, but on or around November 8, 1984, a grand jury was convened in Cole County (where the Missouri State Penitentiary was located) to investigate [REDACTED] alleged involvement in a "sexual abuse in the first degree" charge. [REDACTED] was falsely accused of sexually abusing an inmate - also housed with the Lucky Three at the State Penitentiary - who died on the same date as the alleged abuse incident. Despite the lack of evidence and falsified testimony elicited from one of the inmates, the Cole County grand jury returned an indictment of [REDACTED] on January 24, 1985. (Ex 36, P.1) On March 1, 1985, [REDACTED] attorney requested a change of venue on the "sexual abuse" charge to Callaway County. (Id.).

Once the "sexual abuse" charge was moved to Callaway County, [REDACTED] filed a defamation civil lawsuit in Cole County against all of the corrections officers and cooperating inmates. (Ex

36, P. 2-5). On April 8, 1985, [REDACTED] asserted that the allegations of “sexual abuse” were withheld from him for ten (10) months and he was not asked about them or investigated related to the charges until the grand jury returned its indictment in January 1985. However, at the time of filing his defamation lawsuit, [REDACTED] alleged that a key witness for the state, fellow inmate [REDACTED], had recanted his false testimony about [REDACTED] and [REDACTED] had signed “an affidavit that he was forced to make the false statements” about [REDACTED]. (Id.)

On April 17, 1985, [REDACTED] voluntarily dismissed his defamation lawsuit against the State Penitentiary officers and he was transferred to Oklahoma’s Department of Corrections on April 18, 1985, with several years still remaining on his Missouri sentence. On April 22, 1985, the prosecuting attorney of Callaway County dismissed the “sexual abuse” charges against [REDACTED]. (Ex 36, P. 6-7, Ex 37, P. 1-3)

Records provided to Carr by the Oklahoma Department of Corrections in 2022 included a 1986 letter from [REDACTED] to a Missouri DOC, where [REDACTED] questioned incorrect information contained in his file related to the prosecution, upon information and belief, stemming from the Moberly Uprising. (Ex 37, P. 4-8).

[REDACTED] specifically questioned a note in his file from the Missouri DOC, where he was incorrectly identified as a witness who testified against a person accused of murder. (Id.) [REDACTED] was housed at Pacific, not Moberly, during the night of the July 1983 Uprising, and had no testimony to offer outside of his separate conversations with [REDACTED], [REDACTED], and [REDACTED]. The file reflects that he was taken to Oklahoma from Missouri for “protective reasons.” (Ex 37).

This information would further suggest that the State inserted false information into [REDACTED] corrections file in their effort to remove access to him as a potential witness for the co-

defendants. None of the information in [REDACTED] Cole County, Callaway County or Oklahoma DOC file was available to Petitioner until 2022. (Ex 36, 37).

The State was able to neutralize and dispose of [REDACTED] [REDACTED], who had personal knowledge and his own involvement in making the deal with the Lucky Three. Although Finnical did not directly charge [REDACTED] with perjury as he had promised, the chronology of events supports Carr's theory that Finnical went out of his way to silence [REDACTED] and the damning testimony that stood to discredit Finnical's entire case.

The threats and retaliation against [REDACTED] also constitute a claim that the State intimidated and threatened witnesses in violation of Carr's due process rights pursuant to *Webb v. Texas*, 409 U.S. 95 (1972), *State v. Brown*, 543 S.W.2d 56 (Mo. Ct. App. 1976) and *State v. Allen*, 800 S.W.2d 82 (Mo. Ct. App. 1991); For further discussion see: Prosecutorial Misconduct Section, P. 100).

D. Testimony and statements that inmate witness [REDACTED] [REDACTED] was threatened with prosecution and death row when he told investigators Petitioner could not have stabbed Officer Jackson

[REDACTED] [REDACTED] is a key eyewitness not only to the events at Moberly on July 3, 1983, but also to the threats and intimidation used by investigators in this case. He provided an affidavit in 2021 giving details of the following:

- a. What he saw during the uprising, and that Carr could not have been involved in the death of Tom Jackson;
- b. His attempts to relay these events to investigators, and;
- c. Investigator's accusations and threats towards [REDACTED], including showing him a write up against him for murder.

This 2021 affidavit was the first time these statements by Mr. [REDACTED] were discovered by Carr. (Exhibit 47: 2021 Affidavit of [REDACTED]).

In 2021, Carr also first discovered a 1984 deposition of Mr. [REDACTED] was taken and filed with the court in *Driscoll I*. (Exhibit 48). This deposition, never disclosed to Petitioner, contains statements from [REDACTED] that confirm large parts of his 2021 affidavit. Mr. [REDACTED] details in 1984 that he was accused of the murder of Tom Jackson during his interrogation by DOC Investigator [REDACTED]. [REDACTED] testified he was told by investigators he would go to death row and they were going to kill him. Id.

In *Woodworth v. Denney* (supra), the Missouri Supreme Court found (in adopting the findings of its special master), that the failure to disclose exculpatory evidence prejudiced Mr. Woodworth because, “due to the weakness of the case against him, any additional advantage that could have been gleaned from this evidence might have resulted in a verdict of ‘not guilty.’” *Woodworth*, (supra) at pg. 347.

Here, the statements provided to investigators detailed in [REDACTED] 2021 affidavit, the write up against him for murder, and his 1984 deposition testimony in *Driscoll I* would have provided Petitioner with numerous defense strategies in a weak case against him. Carr could have used [REDACTED] admissions to corroborate his own testimony. Further, Carr could have used evidence that [REDACTED] was told he was a suspect to raise questions about the integrity of the State’s investigation.

Carr’s Brady claims are reviewable under a “cause and prejudice” gateway because they are based on information in State control that the State did not provide to Carr during prior litigation. The information on which Carr’s *Brady* claims are based was suppressed by the State during his prosecution.

1. The 2021 Affidavit of [REDACTED]

The affidavit of inmate witness [REDACTED] is favorable to Petitioner as it outlines the account of a witness who very clearly saw the whereabouts of Rodney Carr and Robert Driscoll. [REDACTED] story, told while never having seen Carr's account of events, confirms Carr's testimony. Not only is the statement of [REDACTED] an exculpatory piece of evidence, it undermines the credibility of the entire investigation pursuant to *Kyles v. Whitley*, *supra*.

In his affidavit, [REDACTED] confirms Carr's testimony that Carr was wearing jean shorts during the uprising. Mr. [REDACTED] can account for Carr's whereabouts, saw him do no wrong, and did not see him with a knife. [REDACTED] also states that he saw Driscoll over Jackson's body, far from where Carr was laying on the floor having been knocked out by a guard.

When he was interviewed by State investigators, Mr. [REDACTED] was shown a prepared statement implicating Robert Driscoll, Roy Roberts and Carr. When [REDACTED] told investigators Rodney Carr was innocent, the threats against him went as far as showing him a write up against him for murder. [REDACTED] says,

"I felt threatened by investigators to implicate all three men. When I refused to do so, I was shown a write up, against me, for murder. Every time I was questioned, I told law enforcement that Rodney Carr was knocked out and could not have stabbed Officer Jackson. I was heavily dissuaded from saying this by officials. They wanted me to implicate Rodney Carr no matter what I saw." (Ex 47).

2. The Murder Write Up Against Rick [REDACTED]

The write-up against Mr. [REDACTED] for murder was presented to him when he refused to sign a pre-prepared statement from investigators and told them Carr was innocent. This is favorable and exculpatory on its face. A write up for murder and accusations against another inmate would have made it less likely that Carr was the perpetrator, and should have been disclosed under *Brady*

v. Maryland and *Kyles v. Whitley*, supra. This was a prime example of the State's unscrupulous and coercive practices in their investigation and throughout the Moberly prosecutions.

3. The 1984 Deposition of [REDACTED]

Mr. [REDACTED] suppressed 1984 deposition is favorable to Carr and corroborates large portions of his 2021 affidavit. In his deposition he describes the accusations made against him by investigators:

Q: Was Mr. [REDACTED] asking you about particular prisoners that he thought were responsible for the murder?

A: Yeah.

Q: Who did he ask you about?

A: Me?

Q: Did he ask you whether or not you had anything to do with it?

A: No. They told me I did it.

Q: They told you you did what?

A: Killed a guard. (Ex 48: T. 10 [REDACTED] Depo)

Mr. [REDACTED] elaborated on the threats, saying that he was in fear for his life and was told guards were going to kill him. (T. 15-16 [REDACTED] Depo). These threats of violence were credible given the behavior of the guards both during and after the disturbance on July 3, 1983:

"Plaintiffs testified that they were removed from their cells by two or more officers, thrown to the floor, kicked and hit, handcuffed and taken to the rotunda. In the rotunda, prison officials forced plaintiffs to lie on their stomachs over a laundry table while officers kicked them and beat them with night sticks, fists and slap jacks. Prison officials then removed plaintiffs from the rotunda. Plaintiff [REDACTED] was taken to another location in HU# 2 and was beaten on the way; plaintiffs [REDACTED] and [REDACTED] were taken to MTCM's medical facility, where they were subjected to further beatings by officers. The next morning, plaintiffs and other inmates were transported by bus from MTCM to MSP, a distance of sixty miles. During that trip, prison guards inflicted further injury on the inmates."

Bolin v. Black, 875 F.2d 1343, 1346 (8th Cir. 1989)

██████ also testified in this deposition that ██████ named Joe ██████, one of the inmates (the lucky three), to give key testimony against Carr and Driscoll as suspects. (T. 14-██████ Depo)

The 1984 deposition of ██████ was filed in Robert Driscoll's legal file in Phelps County, but, upon information and belief, there is no record of it ever being disclosed to Carr. **This is contrary to other depositions taken prior to *Driscoll I*, which were put in Carr's Court file and file-stamped at the prosecutor's request when they were disclosed.**

4. Cause and Prejudice, ██████

Statements by ██████ exonerating Rodney Carr and implicating Robert Driscoll, the threats and write-up against ██████ by State Officials, ██████ 1984 deposition, and the write up against him for murder were undisclosed and unknown to Rodney Carr until 2021. These statements and misconduct by state officials were known to other state officials and suppressed through non-disclosure and threats of violence.

Missouri courts have observed, "This prong of the cause and prejudice gateway is partially coextensive with the second element of a Brady violation because if [a petitioner] establishes that the State failed to disclose favorable evidence, he will have established an objective factor external to the defense," *Ferguson v. Dormire*, 413 S.W.3d 40, 54 (Mo. App. 2013), citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004), provided that the evidence in question "was not known to him during his direct appeal or post conviction case." *Ferguson*, supra, citing *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). Therefore, Carr can show cause and prejudice for not having raised these Brady claims while prior proceedings were available.

These statements by an eyewitness, and the state's attempts to silence him, are inescapably material to Rodney Carr's case: their non-disclosure prejudiced him at trial. The case against Carr was thin, as acknowledged by the trial prosecutor and trial judge. (Ex 4).

Here, as in *Woodworth*, the case against Carr was weak. Carr could have used the suppressed statements of [REDACTED], the write-up against him, and the threats against him to:

- a. Show he was innocent, as testified to by an eyewitness;
- b. Show Driscoll alone was responsible, as testified to by an eyewitness;
- c. Show another person was accused of and written up for murder by investigators;
- d. Impeached those who gave identifications of Carr;
- e. Impeached the credibility of the investigation: if [REDACTED] was threatened, who else was? And what kind of investigation took place that was threatening eyewitnesses? These are questions that could have tipped the jury to a not guilty verdict. (for further discussion of threats and retaliation by the State towards witnesses, including [REDACTED], see P. 100)

Mr. [REDACTED] statements in his 2021 Affidavit, the 1984 Deposition and the murder write up are favorable, were not disclosed to Carr and he was prejudiced by their nondisclosure pursuant to *Brady v. Maryland*. Thus, Carr is entitled to habeas corpus relief on the above claims.

D. The 2023 Affidavit of Officer [REDACTED] establishing: that a prisoner questioned by the Emergency Squad identified the perpetrators of the uprising, who were found hiding in a cell together, and omitting any reference to Mr. Carr; and that Department of Corrections Employees did not write their own reports, were told how to testify, and were directed not to talk about certain facts

[REDACTED] " [REDACTED] was a member of the emergency response squad—"E squad"--at Moberly. [REDACTED] prepared an affidavit with previously undisclosed information in 2023. (Ex 41). The 2023 affidavit outlines the following:

[REDACTED] lived close to Moberly and was one of the first members of the E squad to arrive on July 3, 1983 when the sirens went off. He passed Officer Jackson's gurney as it was being taken to medical. Once the E Squad was able to subdue the situation and get the inmates back into their cells, they fired on any inmate who tried to leave their cell. The E squad slept in the officer's lounge and didn't go home. (Ex 41: P. 1)

On the morning of July 4, the E squad and other corrections staff began cleaning up the housing unit. They gathered knives and put them in "one of those big trashcans with everything we found." (P. 2)

According to [REDACTED] none of the E squad members ever wrote their own statements, they just "signed whatever was put in front of them." There were several meetings he remembers where superiors called the squad together and "made sure our stories were consistent." [REDACTED] remembers DOC investigator [REDACTED] being in charge of most of that. (P. 2-3).

[REDACTED] states, "There were also things that happened that didn't show up in written statements. We knew not to talk about those things." He outlines that one of the things they weren't supposed to talk about: the E squad conducted individual interrogations of each prisoner. The E squad beat the prisoners' feet and asked about who killed Jackson. They made sure all the other inmates could see what was coming. (P. 3, emphasis added). [REDACTED] account is confirmed by

litigation finding [REDACTED], [REDACTED], and other corrections officials liable for beating inmates in the days after order was restored at Moberly. *See Bolin, et al., v. Black, et al.*, 875 F.2d 1343 (8th Cir. 1989).

After the E squad had interrogated everyone on the bottom tier of the housing unit, they were two-thirds of the way through the top tier of the last wing before an inmate told them who had done the stabbing. [REDACTED] says, "This old man told us that the perpetrators were all holed-up in a cell together. The old man told us which cell it was too." (Id. Emphasis added)

The E squad acted on the information they received from the elderly prisoner: "We went down to the cell the old man told us about and found Hogg Roberts and Rabbit Driscoll. We brought them out of that cell... **we did not take a third person out of that cell.**" (Ex 41: P. 4, emphasis added))

Towards the end of the affidavit, [REDACTED] states the prevailing attitude among staff about who was responsible for the death of Jackson: "Everyone knew that Rabbit Driscoll was the stabber and the man who killed Officer Jackson. Everyone was naming Hog and Rabbit as the perpetrators."¹¹ (Id.)

None of the foregoing information was disclosed to the defense prior to trial. This affidavit demonstrates that exculpatory and impeaching evidence, favorable to Carr was not disclosed.

[REDACTED] makes it clear that he and the members of the E squad were told to keep certain information out of their reports and testimony. There is no indication in the reports disclosed to Petitioner, or any documents disclosed to Carr, of the following:

¹¹ As noted above, Hog was the nickname for Roy Roberts, Rabbit was the nickname for Robert Driscoll.

- a. That officers signed whatever was put in front of them
- b. That there were “several” meetings where superiors got officers together to make sure their stories were consistent
- c. They knew not to talk about certain facts, including the beating of inmates
- d. An elderly inmate said where the perpetrators could be found. Subsequently, Roberts and Driscoll were found together in the cell the inmate identified; Petitioner was not named as being in or found to be present in that cell
- e. All the knives [REDACTED] found following the uprising were put into a big trashcan and not documented. Any documentation to the contrary is false.

These undisclosed statements would have been material to Carr’s defense for the following reasons:

Points a-c. These facts could have impeached the credibility of the officers who testified against Carr, including their reports and investigation pursuant to *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). [REDACTED] statements would have shown the jury that the officer’s testimony and reports were not their own, and that there were important facts left out of their reports.

Point d. The elderly inmate who identified the perpetrators and their location is exculpatory and favorable to Carr. The man told them, “The perpetrators were all holed-up in a cell together.” Carr was not identified as being present or found to be present in that cell, making it less likely that he was a perpetrator in the death of Tom Jackson. This information should have been disclosed and put in relevant reports, but was suppressed by state officials.

Point e. The knives found were material in Carr’s case. Petitioner testified he did not have a knife during the uprising; however, the State introduced a white-taped handled knife allegedly found in the rotunda as having been used by Carr. (See P. 18, re: knives). Had Carr had access to the information that knives found in the rotunda were simply put into a big trash can and

not documented, he could have impeached the credibility of the knife introduced against him as tainted and impeached the credibility of the entire investigation.

Further, had Carr been informed that a knife with a white-taped handle was found in the cell of [REDACTED], he could have used it to substantiate his otherwise uncorroborated testimony on cross-examination that he saw [REDACTED] with such a knife. There can be no argument that this was proper evidence collection.

These statements from [REDACTED], and the facts within, were known to state officials and suppressed through the silencing of their own employees. (See [REDACTED] Affidavit P. 2-3). Therefore, Carr can show cause and prejudice for not having raised these *Brady* claims in prior proceedings.

Supervisors explicitly telling government employees to omit events from both reports and subsequent testimony ensured this information would be unavailable to counsel until well after the trial.

It took almost 40 years, retirement and the death of his supervisor for [REDACTED] to disclose this information. These circumstances could not have been recreated prior to this petition given that [REDACTED] was not retired, still an employee and knew his supervisors were alive. Even now, [REDACTED] is worried that there will be consequences for disclosing facts he was specifically told not to disclose. (Ex 42: Affidavit of Investigator [REDACTED] re: [REDACTED]).

This nondisclosure by suppression prejudiced Carr pursuant to *Brady v. Maryland* and Carr is entitled to habeas corpus relief on the above claims.

II. PROSECUTORIAL MISCONDUCT, A DUE PROCESS VIOLATION

PROSECUTORIAL MISCONDUCT STANDARDS

“The (prosecutor) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones” *Berger v. United States*, 295 U.S. 78, 88 (1935)

a. Knowing use of false testimony, failure to correct

In *Napue v. Illinois*, the Supreme Court found that the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment. 360 U. S. 264, 265-272 (1959) Citing: *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213; *Curran v. Delaware*, 259 F.2d 707. See *New York ex rel. Whitman v. Wilson*, 318 U.S. 688, and *White v. Ragen*, 324 U.S. 760.

The Supreme Court has further held that the “...deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice.” *Giglio v. United States*, 405 U.S. 150, 153-54 (1972)

“The same result violation takes place when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Id.* See also: *Alcorta v. Texas*, 355 U.S. 28; *United States ex rel. Thompson v. Dye*, 221 F.2d 763; *United States ex rel. Almeida v. Baldi*, 195 F.2d 815; *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382.

“The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or

innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.” *Napue supra* at 269.

“When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.” *Giglio v. United States*, 405 U.S. 150, 153-54 (1972)

“Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare *N.Y. Central R. Co. v. Johnson*, 279 U.S. 310, 316-318.” *Berger v. United States*, 295 U.S. 78, 89 (1935).

b. Use of inconsistent prosecutorial theories

The Eighth Circuit held in *Smith v. Groose* that the State's use of inconsistent prosecutorial theories violated Smith's due process rights in a way that rendered his convictions fundamentally unfair. *Smith v. Groose*, 205 F.3d 1045, 1047 (8th Cir. 2000). The Court's main takeaway from the record was that “the State's argument here is not factually consistent,” *Id.* at 1051.

The State's use of factually contradictory theories was found to have constituted "foul blows," an error that fatally infected Smith's conviction. The Court held

“....that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth.” *Id.*

To violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime. In the present case, the State's zeal to obtain multiple murder convictions on diametrically opposed testimony renders Smith's convictions infirm. *Id.* at 1052.

c. **Intimidation and Threatening of Witnesses**

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Webb v. Texas*, 409 U.S. 95, 98 (1972) citing: *Washington v. Texas*, 388 U.S. 14, 19 (1967).

“A prosecutor is not allowed to intimidate a witness into not testifying and then benefit by having the witness's exculpatory testimony stricken. This deprives a criminal defendant of due process. Appellant's right to offer the testimony of witnesses on his behalf is guaranteed by the Sixth Amendment to the Constitution, and made applicable to the states through the Fourteenth Amendment.” *State v. Allen*, 800 S.W.2d 82, 87 (Mo. Ct. App. 1991) See also: *State v. Brown*, 543 S.W.2d 56, 59 (Mo. Ct. App. 1976).

ARGUMENT, PROSECUTORIAL MISCONDUCT

a. **The State's use of knowing use of false testimony, failure to correct and use of inconsistent prosecutorial theories in the Moberly Prosecutions**

Trial prosecutor Tim Finnical, in his new letter, admits that he knew Carr did not stab Jackson, and that the evidence against Carr was “thin,” the judge remarking to Finnical the same. (Ex 4). If Finnical knew that Carr was innocent, then he by extension knew that the evidence he presented against Carr was false and in violation of *Napu*, *Giglio* and *Berger*, *supra*.

Similar to *Berger*, we have here a series of Constitutional violations, not confined to a single instance, but “where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.” *Id.*

The State, through Finnical, and later different Assistant Attorneys General, presented vastly different fact patterns through their witnesses at each trial. The State presented testimony that, taken together, could not possibly be true. The State's witnesses changed their testimony about important facts from one trial to the next, e.g., Dr. [REDACTED] and the knife wounds being made by two or by only one knife, and the flip-flopping testimony of guards and inmates depending on which defendant was on trial and what they needed to convict.

For example: the State presented the theory in *Carr* that:

*The State presented the theory at Carr's trial that:

1. Driscoll stabbed Jackson,
2. Then Carr stabbed Jackson until he was stopped by Officer [REDACTED]
3. Then Carr stabbed [REDACTED] in the shoulder
4. and Carr was subsequently knocked out by Officer [REDACTED] using a bat, and therefore removed from the action.

*[REDACTED], a main State's witness, testified in *Driscoll I*, undisclosed to Carr, that Driscoll was stabbing Jackson within the same 15 second time frame that [REDACTED] says he saw Carr stab Officer [REDACTED]. He would later shorten that timeframe, undisclosed to Carr, to two seconds.

[REDACTED] never saw Carr stab Jackson, therefore his sequence of events doesn't work with the State's theory against Carr. The State's theory at Carr was that Driscoll stabs Jackson > then Carr stabs Jackson > then Carr stabs [REDACTED]. In [REDACTED] undisclosed testimony Driscoll is stabbing Jackson at the same time that Carr is stabbing [REDACTED], without [REDACTED] having seen Carr stab Jackson at any point in that timeframe. (See [REDACTED] Chart A, P. 57)

Like in *Smith v. Goose*, the state presented factually inconsistent theories in co-defendant trials. Not only did the State knowingly use these inconsistent theories espoused by their witnesses, they bolstered these witnesses as reliable and trustworthy to the jury time and time again.

“...suppose that Smith and Cunningham had been tried jointly. Would the prosecutor have been entitled to ask the jury to accept as true both of Lytle's accounts of who had murdered the [the victims] in an attempt to secure convictions of both Smith and Cunningham?”
Smith v. Goose, 205 F.3d 1045, 1051-52 (8th Cir. 2000)

b. The State committed a series of significant *Brady* violations to hide the shifting fact patterns.

To hide inconsistent theories and deficient investigation, the State committed a series of violations of *Brady v. Maryland*, *supra*.

This included repeated assertions by the State that deals had not been struck with the inconsistent and unreliable witnesses. However, we have new and undisclosed evidence to support that there were hidden deals with, threats made against, and leniency given to State's witnesses for their testimony in the Moberly prosecutions. (See P. 47-86).

This is similar to *Napue v. Illinois*, where the existence of an undisclosed deal was affirmatively denied by the prosecutor in front of the jury:

“That the Assistant State's Attorney himself thought it important to establish before the jury that no official source had promised Hamer consideration is made clear by his redirect examination, which was the last testimony of Hamer's heard by the jury.”
Napue v. Illinois, 360 U.S. 264, 270 (1959)

The State hid the deals they made with witnesses, inconsistencies in state's witnesses' testimony, and that guards were being told by supervisors what to put into their reports. (See [REDACTED] section P. 96).

In fact, emergency squad member Officer [REDACTED] says that they just “signed whatever was put in front of them.” There were several meetings he remembers where superiors called the squad together and “made sure our stories were consistent.” (Ex 41: [REDACTED] Affidavit).

Officer [REDACTED] also revealed that the State suppressed that an elderly inmate told officers where the perpetrators could be found the morning after the violence. Subsequently, Roberts and

Driscoll were found together in the cell the inmate identified; Carr was not named as being in or found to be present in that cell. (Ex 41).

██████ went on to say that all the knives he found following the uprising were put into a big trash can and not documented. Any documentation to the contrary is false. (Ex 41).

The State didn't just know about ██████ account of the problem with the knives, they knew and didn't disclose to Carr that a knife matching the description of the one Carr was alleged to have used was found in the cell of alternate suspect ██████ (See, P. 18-27)

The State knew about and suppressed the other white-taped handle knife and another piece of physical evidence that could have materially helped Carr, the cut off shorts he was wearing the night of July 3, 1983. (See, P. 13-18). Despite having these shorts in the State's possession,

Prosecutor Finnical put on evidence at Carr's trial that he was allegedly wearing gray pants because that was more consistent with the eyewitness accounts of the stabber's clothing. (Ex. 6, T. 233: ██████ T. 320: ██████)

When Carr filed a motion for DNA testing on Driscoll's shorts in 2005, the State finally told him that they had his shorts in their possession, but continued to suppress that Carr's shorts had tested negative for blood.

The State further hid from Carr testimony and statements that inmate witness ██████ was threatened with prosecution and death row when he told investigators Petitioner could not have stabbed Officer Jackson. (See, P. 90-96).

All of these violations, taken together, show a distinct effort by the State to get convictions in the death of Officer Jackson at all costs and hide their efforts to do so.

c. The State committed a prosecutorial misconduct in violation of Carr's Due Process Rights by intimidating and threatening witnesses

The State showed a pattern throughout the Moberly prosecutions of threatening and intimidating witnesses. Some of these witnesses include, but are not limited to:

1. [REDACTED]: Threats and Retaliation (See P. 86-90, See also Ex. 34, 36, 37)
2. [REDACTED]: Threats and Beatings (See P. 90-96, See also Ex 47, 48)
3. [REDACTED]: Threats and Beatings (See P.69-85, See also Ex 8: T. 12-17)
4. [REDACTED]: Threats on Criminal Prosecution (See P. 50-59)
5. Officer [REDACTED]: Scared to reveal the truth about what he saw, knew not to include facts in reports as directed by his superiors (See P. 96-100, See also Ex. 41, 42).

6. See generally, *Bolin v. Black*, 875 F.2d 1343 (8th Cir. 1989): affirming a U.S. District Court judgment finding corrections officials liable for beating inmates after the Moberly riot.

In *Brown*, the Court found that an intimidating warning given by the prosecutor drove that witness from the stand and prevented the Defendant from presenting a witness crucial to his defense in violation of his due process rights. *State v. Brown*, 543 S.W.2d 56, 59 (Mo. Ct. App. 1976)

Similar to the fact pattern in *Brown*, where, "The last quoted portion of Burke's examination does more than warn the witness that he might be prosecuted. It implies that the state has enough evidence to proceed against Burke but will do so only if Burke testifies," here, Prosecutor Finnical made explicit threats of prosecution to witness [REDACTED] if he continued his testimony. Then, the State effectively eliminated [REDACTED] by bringing false criminal proceedings against him to undermine his credibility, transferring him out of State and inserting false information into his DOC file. (See P. 86-90, See also Ex. 34, 36, 37) (See also *Webb v. Texas*,

409 U.S. 95, 97-98 (1972) where the Court found a due process violation when a judge assured a witness that he expected him to lie and he would be prosecuted for perjury if he did).

Explicit, but undisclosed, threats of prosecution and the death penalty were made against State's witness [REDACTED]. These threats ensured that [REDACTED] would become a State's witness, although he admitted to several people he didn't see what he claimed to have seen. Had [REDACTED] not been a State's witness, his claimed proximity to the action and lack of inclusion of Carr in his initial statements, could have made him a potential defense witness. (See P.50-59).

Threats of criminal prosecution were also made against inmate [REDACTED]. These threats from state officials followed his attempts to tell the real story to investigators after a false, pre-prepared statement was presented to him. (See P. 90-96, See also Ex 47, 48).

These continued threats and intimidation of witnesses by the State violated the basic principles of due process, and kept Carr from his constitutional right to present witnesses in his own defense. Therefore, Carr is entitled to habeas corpus relief on his prosecutorial misconduct claim.

III. PETITIONER IS ACTUALLY INNOCENT

LEGAL STANDARDS FOR ACTUAL INNOCENCE

Habeas relief is available where a petitioner can prove a “manifest injustice or miscarriage of justice” by showing that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Clay v. Dormire* supra quoting *Schlup v. Delo* at 217. The newly obtained statements and evidence described herein show that Petitioner is actually innocent of the murder of Officer Thomas Jackson.

Carr should be found actually innocent, and any alleged procedural default of his constitutional claims excused. In addition, Carr argues actual innocence as a freestanding claim for habeas corpus relief.

The chief investigator for MODOC, [REDACTED], was at one point determined to prove Wayne [REDACTED] medicated identification of Carr wrong. They knew the stabber was Driscoll because:

1. Driscoll told [REDACTED] what he was wearing, told him where the clothes he wore were, and the state seized a blue tank top and gray pants. (Ex 6: *Carr* T. 268).
2. Numerous witnesses saw Driscoll with his knife, identified during his confession, prior to July 3, 1983. (See Driscoll Confession Ex 53).
3. Numerous witnesses saw Driscoll stab Jackson.

The MODOC report came to the conclusion:

“It is the opinion of this Investigator, as is the case with both [REDACTED], Chief Internal Affairs officer, Dept of Corrections, and Sgt [REDACTED], Missouri Highway Patrol Investigator, who all worked on the case, and from statements and evidence relied upon, that inmate Robert Driscoll did stab COI [REDACTED], COI [REDACTED], and fatally wounded COI Thomas Jackson.”

[REDACTED] Jr., Former Lieutenant Investigator MODOC: Memo dated September 1, 1983. (Ex 49). Carr was not mentioned.

At Petitioner's trial, Bill Armentrout, warden of Missouri State Penitentiary at the time of the violence, testified that Carr's statements in interviews to him did not change. He also admitted that he told Petitioner that their investigation had revealed Driscoll killed Jackson. (Carr, Ex 6, T. 290).

(1) The initial investigation (above), (2) the undisclosed evidence (above), and (3) newly obtained statements exonerating Carr, come together to show a clear picture of actual innocence.

Newly Obtained Statements Exonerating Petitioner

A. Bradford Kessler, Attorney for and later Employer of Robert Driscoll

Dear Ms Grow:

I hereby consent to the release of, and any follow-up conversation regarding, any and all scientific testing done by your company on behalf of Robert Driscoll.

I represented Mr. Driscoll during the preparation of his final trial. After his release from prison he also worked for me as an investigator for approximately six years prior to his death.

We had numerous and repeated conversations regarding his desire to do anything in his power to assist Rodney Carr, whom he believed to be wrongfully convicted.

I can state without reservation that he desired for any and all potentially exculpatory evidence to be released to Mr. Carr and/or his legal representatives, including but not limited to test results performed by your company.

Sincerely,

Bradford Kessler

Attorney at Law

MO Bar #31280

The above email was sent by Bradford Kessler, who represented Robert Driscoll at his third trial in 2004. (Ex 3). This trial resulted in Mr. Driscoll being found guilty of manslaughter and sentenced to time served. After his release, Mr. Driscoll worked for Mr. Kessler as an investigator until his death.

Mr. Kessler's aforementioned email was sent to the testing lab to release results to Carr of testing done on Rodney Carr's shorts (See, P. 13) by the Driscoll defense team prior to Driscoll's third trial.

In this email, Mr. Kessler makes clear that:

"We had numerous and repeated conversations regarding his (Driscoll's) desire to do anything in his power to assist Rodney Carr, whom he believed to be wrongfully convicted. I can state without reservation that he desired for any and all potentially exculpatory evidence to be released to Mr. Carr."

This statement from Mr. Kessler constitutes strong, credible evidence of actual innocence. The real perpetrator, who the State has said all along was the undisputed major stabber, told his attorney and boss that he believes Petitioner was wrongfully convicted. Mr. Kessler's long, close relationship with Robert Driscoll, and with the facts of this case, lend an on-it's-face reliability to his statement.

B. [REDACTED] [REDACTED] Wife of Robert Driscoll

Robert Driscoll not only made statements that exonerated Petitioner to his attorney and boss, he also made detailed statements to his wife. [REDACTED] [REDACTED] (hereafter [REDACTED]), formerly [REDACTED] [REDACTED], was married to Robert Driscoll from January 1989 until his death in February 2010. She was with him through his second and third trials and beyond.

In February 2022, [REDACTED] executed an affidavit stating that she had talked to her husband extensively about the Moberly Prison Uprising throughout their relationship, before and after his release. (Ex 2). [REDACTED] goes through her husband's account of events and explains that he "acted out how Officer Jackson was stabbed by him. Robert showed me how he held the knife." (emphasis added). [REDACTED] went on, "Robert told me on several occasions **Rodney Carr was not involved in the death of Officer Jackson**, he said, 'they thought it was Rodney but it was me.'" (emphasis added).

██████████ 2022 affidavit also states, “Robert told me there were deals made by the State of Missouri with inmates ██████████ and ██████████ in exchange for their testimony including being transferred and their sentences reduced.” (See: Lucky Three Section P. 47-90).

Driscoll was telling the closest and most trusted people in this life that he had knowledge Carr was innocent. The way Driscoll went through details and acted out his crime for his wife are consistent with what the Constitutional violations above demonstrate– that Carr did not stab Officer Jackson.

C. ██████████, Law Professor and Practicing Attorney

██████████ is a Professor of Law and practicing attorney. When Robert Driscoll was confined in Potosi Correctional Center, Professor O’Brien interviewed him about another case. Professor O’Brien executed an affidavit about this conversation in January 2023. (Ex 50).

When they were speaking more informally post-interview, Driscoll volunteered information to Professor O’Brien about his case. His 2023 affidavit details the exchange,

“He (Driscoll) said the guards got a lot of the facts wrong, and he volunteered that Rodney Carr was not even involved but they set him up to be prosecuted. Driscoll said he was the one who stabbed the officer and that Rodney Carr had nothing at all to do with it.” (Ex 50: P. 2-3)

Driscoll had no reason to lie to Professor O’Brien. He volunteered information that exonerated Carr. What he said in this exchange is also consistent with the statements made to his attorney and boss, Bradford Kessler, and his wife, ██████████.

D. [REDACTED], exoneree and former cellmate of Driscoll

Lawrence [REDACTED] was a cellmate of Robert Driscoll at Potosi Correctional Center. In June 2020, [REDACTED] convictions were vacated by the Missouri Supreme Court. During his time living with Mr. Driscoll at Potosi, [REDACTED] had numerous conversations with Driscoll about the events of July 3, 1983. These conversations took place around 2001-2002 while Driscoll was awaiting a third trial.

In July 2020, Mr. [REDACTED] executed an affidavit about these conversations. (Ex 51). Driscoll confessed to Mr. [REDACTED] that he alone stabbed Officer Jackson, and that Petitioner was completely innocent of any involvement with his death:

“Robert Driscoll indicated to me that he stabbed Officer Thomas Jackson, acting alone, and that Rodney Carr was completely innocent and had no involvement in the incident.” (Ex 51).

This confession is consistent with Driscoll’s statements above to Mr. [REDACTED], [REDACTED], and his wife, [REDACTED]. Driscoll made clear to those around him that Carr was innocent. The quantity of these confessions to those around him gives them a quality all their own.

E. [REDACTED], inmate at Moberly in July 1983

[REDACTED] was an inmate in 2 house-B wing of Moberly Correctional Center during the 1983 uprising. He was present for the uprising and saw the death of Thomas Jackson from an unobstructed view.

In 2006, prior to his death, [REDACTED] executed an affidavit that states Petitioner did not participate in the stabbing. [REDACTED] states he was never interviewed by investigators, lawyers or Department of Corrections employees in regards to what he saw. (Ex 52).

This affidavit, especially when viewed in the totality of the circumstances, constitutes strong evidence of actual innocence from an eye witness.

IV. CONCLUSION

For all of the above stated reasons, including violations of *Brady v. Maryland*, Prosecutorial Misconduct Violations and his Actual Innocence, Carr is entitled to and respectfully prays this Court to:

- A. Order Respondent to show cause why the Writ of Habeas Corpus should not be granted;
- B. Allow a reasonable time for Petitioner to conduct discovery;
- C. Conduct an evidentiary hearing on Mr. Carr's Petition;
- D. Issue the writ of habeas corpus conditionally discharging him from his conviction and sentence; and
- E. Order such other relief as this Court deems just and equitable.

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