

IN THE CIRCUIT COURT OF DEKALB COUNTY, MISSOURI

STATE OF MISSOURI,)
 ex rel.)
DALE HELMIG)
 Petitioner,)
))
 vs.) **Case No. 09DK-CC00110**
))
LARRY DENNY,)
 Superintendent, Crossroads)
 Correctional Center,)
 Respondent.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Helmig petitions this Court for a writ of habeas corpus challenging his conviction for murder and resulting sentence of life without the possibility of parole, asserting both that he is factually innocent of the crime, and that his trial was tainted by error of a constitutional magnitude. This Court finds that both of Mr. Helmig’s assertions are true, and that Mr. Helmig is the victim of a fundamental miscarriage of justice.

Part I. Procedural History

1. Dale Helmig is incarcerated in Crossroads Correctional Center in Cameron, Missouri, pursuant to a conviction of First Degree Murder in the July 29, 1993, death of his mother, Norma Dean Helmig, in *The State of Missouri v.*

Dale L. Helmig, Gasconade County Case No. CR594-4-F. He was represented at trial and on direct appeal by Christopher J. Jordan.

2. Mrs. Helmig's body was found at the confluence of the Maries and Osage Rivers in Osage County on August 1, 1993; venue was changed to Gasconade County, where Petitioner on March 9, 1996, was found guilty after trial by jury and sentenced to life without parole.

3. The prosecution presented no direct evidence linking Mr. Helmig to the crime, and no physical evidence implicated him in its commission. *See*, Hrg. Tr. Vol. 2, 132, testimony of Deputy Paul Backues. The State alleged that Dale Helmig and his mother had argued over a phone bill, that they had an "altercation" the Sunday before her death, and that in the days following her disappearance he made statements giving rise to a subjective suspicion of guilty knowledge. According to the prosecution, Petitioner was too quick to suspect foul play in his mother's death, and he knew too much about the circumstances of her murder.

4. The defense by Christopher Jordan was even thinner: Jordan admittedly did nothing to contest or explain misleading testimony or arguments by the state, and put all his energy into pursuing the theory that Mrs. Helmig died by suicide or

accident. The trial court described Mr. Jordan's theory as "ridiculous," and the Court of Appeals, Eastern District, called it "unreasonable," because Mrs. Helmig was found in a river fifteen miles from her home in rural Osage County. She was barefoot, clad only in her nightgown, and tied to a concrete block.

5. Although the prosecution introduced evidence that Dale Helmig was checked into a motel in Fulton, Missouri, the night of his mother's death, Mr. Jordan did nothing to bolster or corroborate his client's very important alibi.

6. The Missouri Court of Appeals affirmed. *State v. Helmig*, 950 S.W.2d 649 (Mo. App. E.D. 1997) (*per curiam*). The main focus of Jordan's appeal was his frivolous claim that even though Helmig's body was found floating in the Osage river tied to a concrete block, the evidence was insufficient to prove the corpus delicti of murder.

7. Mr. Helmig timely filed a timely motion under Rule 29.15 primarily focusing on claims of ineffective assistance of counsel. *Helmig v. State*, E.D.Mo. 76067, Legal File on Appeal 1, 8-13, 14-91.

8. Senior Circuit Judge Jack O. Edwards entered findings of fact and conclusions of law overruling Petitioner's motion on April 12, 1999, adopting verbatim the State's proposed findings of fact crediting the testimony of Chris

Jordan, rejecting other evidence tendered by Petitioner, and ignoring other evidence adduced on Mr. Helmig's behalf. *Helmig v. State*, E.D.Mo. 76067, Legal File on Appeal 115.

9. The court of appeals affirmed the order denying relief, *Helmig v. State*, 42 S.W.3d 658 (Mo. App. 2001).

10. Mr. Helmig thereafter filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Missouri. The Honorable David Noce, after a hearing, ordered a new trial on the ground that during deliberations the jury was given a map, which had not been received in evidence, that was used to persuade one or more hold-out jurors to change their votes from not guilty to guilty. *Helmig v. Kemna*, No. 4:02 CV 574 DDN (E.D.Mo. Sept. 26, 2005).

11. The Eighth Circuit Court of Appeals reversed the district court's judgment granting relief, ruling that "the district court erred in applying the presumption of prejudice without taking into account that this is a habeas case." *Helmig v. Kemna*, 461 F.3d 960, 963 (8th Cir. 2006), cert. denied 127 S. Ct. 2137 (2007). Applying a more stringent standard of proof, the Court of Appeals reversed Judge Noce's decision granting habeas corpus relief. *Id.*

12. Petitioner filed a Petition for Writ of Habeas Corpus in the Missouri Supreme Court raising the issues presented herein, and suggesting that because the potentially available remedies in this case lie in courts situated in different appellate districts, it was impractical to proceed in a lower court. The Supreme Court on June 29, 2009, denied that petition without prejudice to proceeding in the Circuit Court of DeKalb County.

13. Mr. Helmig's Petition for a Writ of Habeas Corpus presents issues and evidence that were unknown to him when he filed his original motion for relief pursuant to Rule 29.15.

14. Mr. Helmig supplements his claims with persuasive evidence that he is actually innocent of killing his mother:

[I]f a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Schlup v. Delo, 513 U.S. 298, 316 (1995). Missouri courts apply the *Schlup* standard to claims for habeas corpus relief pursuant to Rule 91, *Clay v. Dormire*, 37 S.W.3d 214, 217 (2000).

15. Mr. Helmig also asserts that the evidence of his innocence is clear and convincing, and that reason alone is sufficient to justify habeas corpus relief, even if he had a fair trial. *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003).

16. In addition to his claim that he is innocent of the crime, Mr. Helmig's Petition for Writ of Habeas Corpus asserted six claims for relief:

Claim No. 1: Trial counsel was ineffective for failing to present the jury with the complete context of Dale Helmig's out-of-court statements, including evidence that Ted Helmig threatened and abused his wife prior to her murder, which explains Petitioner's allegedly premature suspicion that his missing mother was the victim of foul play;

Claim No. 2: Trial counsel was ineffective for failing to present persuasive defense evidence that Mrs. Helmig was going through a bitter divorce from her abusive husband, failed to rebut *any* of the false evidence and assumptions on which the State relied, and failed to present evidence corroborating Mr. Helmig's statement that he slept in a Fulton, Missouri, hotel room the night his mother disappeared.

Claim No. 3: The prosecutor engaged in repeated instances of misconduct, including:

A. Failure to disclose evidence that Mrs. Helmig asked Sheriff Fowler to protect her from her abusive husband three months before she was murdered, and that Tina Ridenhour told the prosecution that Mrs. Helmig armed herself with a pistol out of fear of her husband.

B. The State knowingly presented false testimony that Dale threw hot coffee in his mother's face on the Sunday before she was murdered;

C. The State presented false evidence that Petitioner tacitly admitted

to Trooper Robert Westfall that he killed his mother.

D. The State improperly argued that Mr. Helmig's failure to participate in a crime scene investigation proved consciousness of guilt, knowing that Deputy Paul Backues had ordered him to stay away.

Claim 4: The issue of trial counsel's ineffectiveness should be reopened in light of trial counsel's drug-related conviction.

Claim 5: New evidence that checks recovered from Mrs. Helmig's purse didn't clear the bank until well after her death establishes that someone other than Petitioner took her purse on the night of her murder and threw it in the water at some later date.

Claim 6: During deliberations, jurors obtained a map of unknown origin that was used to persuade one or more hold-out jurors to vote guilty.

17. Respondent has raised procedural bar grounds in response to all of Mr. Helmig's claims. This Court conducted a pretrial conference with counsel for both parties and determined that Claims 1, 2 and 4 have previously been adjudicated by the Missouri Court of Appeals, Eastern District, and that therefore it would be inappropriate for this Court to revisit those claims. The Court understands that Mr. Helmig contends that intervening changes in the legal landscape change the analysis, and consequently the outcome, of those issues. Further, Mr. Helmig argued, pursuant to *Schlup* and *Clay*, that his actual innocence should allow him to present additional evidence on those claims.

However, this Court has ruled, over Mr. Helmig's objection, that claims 1, 2 and 4 should be dismissed without prejudice to Mr. Helmig seeking appropriate relief from the Missouri Court of Appeals, Eastern District, as to those issues.

18. At a pretrial conference, this Court determined that Claims 3, 5 and 6 are new, and are properly before this Court. Further, this Court granted leave for Mr. Helmig to file a First Amended Petition for Writ of Habeas Corpus to include Claim No. 7, that at the time of Mr. Helmig's trial, Mr. Jordan abused controlled substances to the degree that his professional judgment and performance were impaired and unreasonable.

19. Mr. Helmig's claims of innocence under *Schlup v. Delo* and *Amrine v. Roper* are properly before this Court.

20. As a result of the foregoing issues, this case proceeded to a hearing on claims 3, 5, 6 and 7, and on Mr. Helmig's claims of innocence, on July 6, 7 and 8, 2010. Further, the Court left the record open to enable the parties to produce additional witnesses and evidences that were unavailable at the time of the hearing, which had been rescheduled over Mr. Helmig's objection to accommodate health problems of Respondent's counsel.

Part II. Actual Innocence

This is an extraordinary case, set apart from many others over which this Court has presided over the years, by the strength of Mr. Helmig's showing of actual innocence, especially when compared to the entirely circumstantial nature of the state's case. Mr. Helmig has never wavered in his assertion that he did not murder his mother, while the evidence against him is largely based on subjective suspicion, speculation and conjecture. No direct or physical evidence places him at the scene of the crime, and important aspects of the state's original case against Mr. Helmig have been recanted, retracted or clarified by law enforcement officers involved in the case. Still other witnesses presented by Mr. Helmig at the hearing provide facts and details making it very unlikely that he is the perpetrator of his mother's homicide. Before discussing the evidence, it is important to discuss the legal implications of Mr. Helmig's showing of innocence.

I. The Legal Framework for Assessing Mr. Helmig's Innocence

Under Missouri law, a prisoner's showing of innocence has both procedural and substantive implications. A prisoner who is probably innocent is entitled to habeas corpus review of the fairness of his trial, regardless of potentially applicable procedural bar grounds. *Clay v. Dormire*, 37 S.W.3d 214, 217 (2000). A prisoner who can demonstrate innocence by clear and convincing evidence is

entitled to habeas corpus relief, even if he had a fair trial. *Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003). Mr. Helmig's petition invokes both avenues of relief, so this Court will discuss the standards it will apply as to each aspect of his innocence claim.

A. Actual Innocence as a Gateway to Barred Claims

Procedurally a showing of actual innocence overcomes rules of default that would otherwise bar consideration of claims and evidence. *Clay v. Dormire*, 37 S.W.3d 214, 217 (2000), citing *Schlup v. Delo*, 513 U.S. 298, 316 (1995). The Court's reasoning is simple: habeas corpus is available in Missouri to correct a fundamental miscarriage of justice, and "[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Id.*, at 325-25. "[H]abeas corpus is, at its core, an equitable remedy," *Id.*, 319, and "the ultimate equity on the prisoner's side [is] a sufficient showing of actual innocence," *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part).¹

The application of these equitable principles is found in *Schlup's* actual innocence standard. If Mr. Helmig can show "a constitutional violation has

probably resulted in the conviction of one who is actually innocent," *Schlup v. Delo, supra*, at 327, quoting *Murray v. Carrier*, 477 U.S. at 496, then this Court must reach the merits of his constitutional claims, even if he has procedurally defaulted his claims by failing to assert them properly in prior proceedings. A petitioner is "actually innocent" within the meaning of this standard if "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo, supra*, at 327. For reasons discussed in further detail below, this Court finds that Mr. Helmig has established his actual innocence and is entitled to review on the merits of claims 3, 5, 6 and 7.

B. Actual Innocence Justifying Habeas Corpus Relief

Innocence is also a substantive claim under Missouri law, as Mr. Helmig asserts in Claim No. 5 of his Petition for Writ of Habeas Corpus. If this Court is persuaded that there is clear and convincing evidence that Mr. Helmig is innocent, then this Court must issue the Writ of Habeas Corpus even if it were to find that

Mr. Helmig's trial was free of constitutional error:

Because the continued imprisonment and eventual execution of an innocent person is a manifest injustice, a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.

Amrine v. Roper, 102 S.W.3d 541, 543 (Mo. 2003). Mr. Helmig asserts both substantive and procedural arguments based upon his innocence. For reasons discussed in further detail below, this Court finds that Mr. Helmig's evidence establishes "a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment." *Id.*

In analyzing claims of actual innocence based on newly discovered evidence, evidence is "new" if the jury did not hear it. *Schlup* itself made clear that a limited concept of "new" evidence defeats the purpose of the actual

innocence inquiry:

To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- *that was not presented at trial*.

Id., at 324. This formulation serves the fundamental purpose of habeas corpus to correct unjust incarcerations by focusing on the reliability of the verdict of the jury. Therefore, “[t]he habeas court must make its determination concerning the petitioner's innocence ‘in light of *all the evidence*, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.’” *Schlup v. Delo, supra*, at 328 (emphasis added).

The Missouri Supreme Court also requires a thorough analysis of the evidence, including in cases, such as Mr. Helmig’s, in which the evidence of innocence has grown with the passage of time, while evidence against him has proven false:

Amrine petitions this Court for a writ of habeas corpus, arguing that he is actually innocent of the Barber murder. Because the recantations were made over the course of years and between rounds of federal court proceedings, no court has addressed, at once, all of the evidence of Amrine's innocence. *This Court is the first*

forum in which all of the existing evidence of innocence will be considered.

Amrine v. Roper, supra, at 545. Just as in *Amrine*, this Court is the first forum in which all of Mr. Helmig's evidence of innocence will be considered. The Missouri Supreme Court made it clear that doors of Missouri courthouses are always open to claims of innocence; "Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness.'" *Id.*, quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982). Therefore, this Court's analysis of Mr. Helmig's innocence must be based upon a through review of all the evidence, old and new, including evidence produced at trial, at his Rule 29.15 hearing, at his federal habeas corpus hearing, and evidence presented to this Court in support of his Petition for Writ of Habeas Corpus.

II. Findings of Fact With Respect to Innocence.

In deciding Mr. Helmig's claim of actual innocence, this Court is mindful that the actual innocence exception to traditional rules of habeas procedure is reserved for cases that are "truly extraordinary." *Schlup v. Delo*, 513 U.S. at 327. Mr. Helmig's case fits that description. While Joseph Amrine's innocence case

depended entirely on the recantations of inmate informants, Mr. Helmig's innocence is supported by the recanted testimony of former Missouri State Trooper Robert J. Westfall and Osage County Sheriff Carl Fowler. Further, in sharp contrast to Lloyd Schlup and Joe Amrine, Mr. Helmig's innocence is supported by the testimony of law enforcement officers and solid citizens. Finally, where Schlup's and Amrine's convictions were based upon direct evidence of guilt, no direct or circumstantial evidence placed Mr. Helmig at the scene of the crime. This case is indeed one of those rare and exceptional cases in which new evidence demonstrates that the Petitioner is actually innocent of the crime for which he was sentenced to life without the possibility of parole. A detailed discussion of the evidence is necessary to explain this Court's findings.

A. The State's Evidence at Trial

Norma Dean Helmig was last seen alive just after midnight on July 29, 1993, during the Great Midwest Flood. She followed her usual Wednesday night routine of Bingo at the Legion Hall on Tanner Bridge Road in Jefferson City, followed by a western omelet, milk and coffee at the Country Kitchen just across Missouri Highway 54 from the Legion Hall.

Dale Helmig had been painting the Pizza Works in Holt's Summit,

Missouri, north of the Missouri River from Jefferson City. His attempt to return home Wednesday was frustrated when flood waters washed a leaking propane tank against the base of the Missouri Highway 54 bridge over the Missouri River at Jefferson City. The bridge was closed until the tank emptied itself and could safely be removed. It was undisputed at trial that because the bridge was closed, Dale Helmig checked into the Travelier Motel in Fulton Missouri, where Dennis Hazelwood delivered a pizza to him at 10:35 p.m. Ex. 596-97.

Dale Helmig told Osage County Sheriff Carl Fowler that he slept Wednesday night in his hotel room in Fulton, and Thursday morning around 9:30 a.m. he drove to Holt's Summit, where he looked for a friend and gassed up his car. He then drove across the bridge and went to La Casa Restaurant on Missouri Boulevard in Jefferson City. Ex. 286.² Pathologist Jay Dix estimated that Mrs. Helmig died in the early morning hours of July 29, 1993. Trial Tr. 393, 461-62. Therefore, if Mr. Helmig's statement to Sheriff Fowler is truthful, he could not have killed his mother.

Defense counsel made no attempt to present any evidence of alibi, or to investigate and present evidence to corroborate the truthfulness of his client's

statement to Sheriff Fowler. The “alibi” evidence was presented solely by counsel for the State, leaving a “seventeen-and-a-half hour” gap in the accounting of Petitioner’s whereabouts, and failing to draw out any of the evidence supporting Mr. Helmig’s claim that he slept in his motel room until 9:30 a.m. Trial Tr. 1186.

The trial evidence showed that on Thursday night, Dale Helmig encountered an acquaintance, Stacey Medlock, at a Jefferson City bar called The Jungle, and they spent the night together in a motel in Eldon, Missouri. Trial Tr. 536-39. On Friday morning, July 30, 1993, Mr. Helmig brought Ms. Medlock home with him to his mother’s house on Pointer’s Creek in rural Osage County. When they arrived around noon, Mrs. Helmig was not there. T. 541. He called several relatives, and learned that his mother had failed to meet her sister, Dorothy Bauer, at the Eagles Lodge for Thursday night Bingo. *Id.*, 470-72. Norma’s relatives gathered at the home, and by mid-afternoon Dale called the Osage County Sheriff to report his mother missing. *Id.*, 487. A law enforcement search for Mrs. Helmig was fruitless until Sunday, August 1, 1993, when boaters found her bloated body strapped to a concrete block, floating at the confluence of the Maries and Osage Rivers a few hundred yards south of Highway 50. *Id.*, 325-41.

The State's case focused heavily on statements made by Mr. Helmig at the home on Friday afternoon as he and his relatives were trying to puzzle out what might have happened to Norma. Mr. Helmig arrived to find the air conditioner on, which was inconsistent with her habit of turning it off whenever she went anywhere. Her cigarette case and lighter were by her bed, and she never left the home without them. Mrs. Helmig's bed was unmade, pillows and clothing were on the floor, all of which was inconsistent with her meticulous housekeeping. Mr. Helmig also noticed that a small fan had been knocked over, and a wood stove had been moved a few inches off its base. Outside the house, Mr. Helmig found a set of tire tracks in the grass, leading down toward the Pointer Creek Access Area, a public boat ramp on the nearby Gasconade River. He tried to measure the tracks using a chain he had found in a storage shed.

Shortly after Mr. Helmig and Ms. Medlock arrived, Velda Party, a neighbor and cousin of Mrs. Helmig, and her husband, Gus Party, drove into the driveway. As Mr. Helmig went out to meet them, Stacey Medlock followed a short while later, pulling the door closed behind her and locking everyone out of the house. Mr. Helmig's keys were inside on the coffee table. Mr. Helmig walked to the back of the house, intending to gain entry by dislodging a window fan he had

installed, but he found that the fan was missing. There was a scuff mark on the side of the house beneath the window.

On Friday, July 30, and Saturday, July 31, Osage County Sheriff Carl Fowler supervised the search of the premises. The sheets and blankets were taken from Mrs. Helmig's bed because there appeared to be small streaks of blood on them. A clump of hair was found in the trunk of Mrs. Helmig's car, and Sheriff Fowler ordered it towed away from the house. A rectangular spot of dead grass next to the house about the size of a cinder block was photographed. The chain Mr. Helmig used to measure the tire tracks were taken, but no measurements or casts were made of the tracks themselves. Hrg. Tr. Vol. 2, 142-43. Dale Helmig's guns were seized.

The Missouri State Highway Patrol Crime Lab examined Mrs. Helmig's sheets and blankets for trace evidence. The small streaks on her blanket were indeed made by body fluid that was human in origin, but the quantity was too little to analyze using technology that existed in 1993. Several human hairs were recovered from the sheets, and on microscopic examination it was determined that they belonged neither to Mrs. Helmig nor Petitioner. The hairs recovered from the trunk of the car were consistent with hairs recovered from a hair brush

belonging to Mrs. Helmig.

The State produced no direct evidence linking Petitioner to his mother's murder, and no physical evidence placed him at the scene of the crime.

Prosecuting Attorney Robert Schollmeyer told the jury that Dale Helmig was guilty because he "knew too much, too soon." Trial Tr. 1144. Mr. Helmig suspected on Friday evening that his mother was killed, two days before her body was found. *Id.*, 1143, 1149. The State also inferred guilt from the claim that Petitioner told police on Friday, July 30, that his mother's nightgown was missing, and Sunday, August 1, she was found in the river wearing the nightgown. *Id.*, 1144. When Mrs. Helmig's purse and car keys could not be found that Friday, Mr. Helmig speculated that they must be in her purse, and they were found in her purse seven months later when it was discovered in a Callaway County farm field after the flood waters subsided. *Id.*, 1180, 1182. On Friday, July 30, Petitioner told Ms. Medlock that whoever was responsible for his mother's disappearance had to be strong because a heavy antique window fan was missing from the house, *Id.*, 184-85, and he told Stacy Friday evening, "You know, somebody got crazy drunk and killed my mother." *Id.*, 1188.

The prosecution argued that although Dale Helmig was definitely at the

Travelier Motel on Wednesday night, hotel guest John Lilleston did not see his car in the lot when he checked out early the next morning. Trial Tr. 1145. Sheriff Fowler thought it was suspicious that when he told the family that a female body clad in a nightgown was found in the river, Dale Helmig reacted with anger rather than grief, and assumed she had been murdered. *Id.*, 1148-49.

The State also presented testimony of Missouri State Trooper Robert Westfall that Dale Helmig tacitly admitted that he killed his mother. When Trooper Westfall asked Petitioner what he would say to his mother if he could talk to her, Dale said, “I’m sorry. I’m sorry. I’m just sorry.” Trial Tr. 1032. Prosecutor Kenny Hulshof then asked Trooper Westfall if Mr. Helmig “at any time” denied killing his mother, and Trooper Westfall replied, “No sir, he did not.” Trial Tr. 1033. Mr. Jordan told Trooper Westfall, “You’re a very important witness for the state.” *Id.*

The State’s theory of motive was an alleged argument between Dale and Norma Dean over a phone bill. Trial Tr. 1188. The Prosecutor also argued, with no competent evidentiary support, that Petitioner had physically assaulted his mother in a restaurant in an argument over money three days before she was murdered. *Id.*, 1151.

B. The Defense Evidence at Trial

At trial, Mr. Jordan did virtually nothing to contest the State's theory, even though persuasive defense evidence was readily available. In the Rule 29.15 hearing, Mr. Jordan acknowledged that the State's allegation that there was animus between Mr. Helmig and his mother "flew in the face of" everything he knew about them. 29.15 Tr., 233-34. Instead, Jordan argued at trial and on appeal that Mrs. Helmig may have overdosed on her prescription pain medication, and that the State had failed to prove the "corpus delicti" of murder, Trial Tr. 1157-59, notwithstanding the fact that she was found in a river fifteen miles from her home, barefoot and in her nightgown, tied to a concrete block. "The idea that her death was an overdose is absolutely ridiculous when she's found floating in water with a concrete block tied to her." Trial Tr. 1128. The court of appeals agreed. "It would be unreasonable to say that she left her car at home, walked several miles to the river, carried or somehow obtained a concrete block, tied herself up with a rope, attached the concrete block, and jumped into the river." *State v. Helmig*, No. 70611 at 6 (Mo. App. E.D. July 22, 1997). Further, the prosecution easily refuted Jordan's drug overdose theory by introducing a lab report showing there were no drugs in Mrs. Helmig's system. Trial Tr. 1178-79.

Although the lab report was provided in discovery, the physician Jordan called to testify had never seen it. *Id.*

Based on the foregoing evidence, the jury found Mr. Helmig guilty of first degree murder after less than five hours deliberation.

C. New Evidence Supporting Mr. Helmig's Innocence

As noted above, the standard that this Court applies to its analysis of Mr. Helmig's innocence is first whether there is new evidence that the jury did not hear, and, if so, whether in light of all of the evidence presented at trial and at prior proceedings, Mr. Helmig can satisfy his burden of proving his innocence under the *Schlup* and *Amrine* standards. In making this inquiry, this Court may have to revisit previous credibility determinations. "The newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Schlup v. Delo, supra*, at 330. In *Amrine* itself, two of the three recantations relied upon by the Missouri Supreme Court to grant habeas corpus relief had been rejected by the Rule 29.15 court as not credible. *Cf., Amrine v. Roper, supra*, and *Amrine v. State*, 785 S.W.2d 531 (Mo. en banc 1990). This Court has heard sufficient new evidence, including the recantation of former Missouri State

Highway Patrolman Robert Westfall, the testimony of Osage County Sheriff Carl Fowler establishing that there was no basis for allegations at trial that Mr. Helmig had assaulted his mother three days before her death, and new evidence tying the cancelled checks in Mrs. Helmig's purse, which went missing at the time of her death, to Ted Helmig, a viable alternate suspect in this murder. This Court will therefore examine the all of the evidence supporting Mr. Helmig's claims of actual innocence.

1. Mr. Helmig's innocence claim is supported by the recantation of Trooper Robert Westfall and the testimony of Sheriff Carl Fowler and Deputy Paul Backues.

Credible testimony from a State's witness recanting inculpatory testimony given against the accused at trial qualifies as newly discovered evidence that may support a claim of actual innocence. See, e.g., *Amrine v. Roper*, *supra*, at 544, granting habeas corpus relief because "our confidence in the outcome of the first trial is sufficiently undermined by the recantation of all the key witnesses against him in the first trial..." Thus, a credible witness recantation is "substantial evidence." which may, in and of itself, warrant a new trial. *United States v. Ramsey*, 726 F.2d 601, 604 (10th Cir. 1984). In a separate concurrence in that case, Judge McKay explained the importance of recanted testimony:

Where, as here, the recanting affidavit is from the critical witness in the case, great danger lies in letting the verdict stand even if the recantation is subsequently recanted. . . The danger of an erroneous conviction based on such unreliable testimony is great indeed. As the Supreme Court has indicated, 'the dignity of the United States government will not permit the conviction of any person on tainted testimony.'" *Mesarosh v. United States*, 352 U.S. 1, 9 (1956).

726 F.2d at 605. The Missouri Supreme Court's decision in *Amrine* makes it very clear that Missouri courts, too, must act when necessary to assure the integrity of

its criminal judgments.

The nature and quality of the new evidence supporting Mr. Helmig's innocence sets this case apart from the typical case in which a claim of actual innocence is based upon recanted testimony. In cases such as *Amrine* and *Ramsey*, the recantations came from jailhouse informants or accomplices to the crime who testified for the prosecution. The new evidence correcting false impressions given to Mr. Helmig's jury comes from former Missouri State Highway Patrolman Robert J. Westfall, Osage County Sheriff Carl Fowler, and Osage County Deputy Paul Backues. The testimony of each of these officers recants, corrects, or clarifies significant issues of fact about which the jury was misled at Mr. Helmig's trial.

- a. Former Trooper Robert Westfall's recantation of his testimony that Mr. Helmig tacitly admitted his mother's murder supports Mr. Helmig's claim of actual innocence.*

Former Missouri State trooper Robert Westfall testified for the state at Mr. Helmig's trial. He was the very last witness called by the prosecution. Trooper Westfall testified about his questioning of Mr. Helmig in the Osage County Jail the night of his arrest. Mr. Hulshof chose to end his direct examination and case-in-chief with a dramatic flair, eliciting from trooper Westfall a tacit admission by

Mr. Helmig to his mother's murder:

Q. (BY MR. HULSHOF) Sir, at any time during these contacts and particularly during this conversation which you've just shared with us, did Dale Helmig ever deny killing Norma Helmig to you?

A. No, sir, he did not.

MR. HULSHOF: I think that's all that I have, Judge.

Trial Tr. 1033. The problem is that this testimony is completely false. Trooper Westfall's report of March 6, 1994, reflects exactly the opposite – that Mr. Helmig “stated that he did not murder his mother and that the sheriff was after him.” Deposition of Robert Westfall, pp. 27-28. Unfortunately, neither the prosecution nor defense counsel Chris Jordan corrected this false evidence, although both were constitutionally obliged to do so.

In his video deposition to preserve his testimony for this Court, Mr. Westfall testified that the discrepancy between his testimony and his report and his sworn testimony has caused him some consternation over the last several years. Deposition of Robert Westfall, 22-23. Mr. Westfall candidly and credibly admits that his report of his interrogation with Mr. Helmig is the truth, and that his testimony to Mr. Helmig's jury was false:

Q. Yes or no, did Dale Helmig ever deny killing his mother when you spoke to him?

A. Yes.

Deposition of Robert Westfall, 49. The Court believes that Mr. Westfall's deposition testimony on this matter is sincere and truthful. Mr. Westfall seems genuinely puzzled by his trial testimony, and could not explain why he gave inaccurate testimony on this important issue. Whatever the cause of this serious misrepresentation, the Court finds that Mr. Westfall's testimony that Mr. Helmig did not deny killing his mother was false, and that Mr. Helmig did in fact deny the crime during his questioning by Trooper Westfall. The Court commends Trooper Westfall for his honesty and forthrightness in coming forward at this time to correct the record.

Unfortunately, the prosecutor did not comply with his duty to correct false evidence when adduced in court. Nor did Mr. Jordan comply with his duty to subject the State's case to competent adversarial testing. Certainly, if Mr. Jordan had challenged trooper Westfall's testimony with the prior inconsistent statement in his report, he would have done considerable damage to the integrity of the state's case. Because of the failures of lawyers on both sides of this trial, trooper

Westfall's mistaken testimony went to the jury uncorrected and unchallenged.

Thus, the jury deliberated under the false assumption that Mr. Helmig had failed to deny the murder of his mother when formally accused during his interrogation.

The State counters this by arguing, "But when the entirety of Westfall's testimony is considered, it is apparent that he informed the jury not once, but twice that Petitioner denied his involvement." (Page 23 of Respondent's Proposed Findings). When Mr. Helmig was advised he was under arrest for the murder of his mother, "[h]is response was that the sheriff, indicating Carl Fowler, was responsible for all of this; that Sheriff Fowler in some way caused him to be put in that situation." *Id.* The second time quoted Petitioner that "he knew who did it, but no one could prove it." The Court finds these two denials were oblique and clearly overshadowed by the use of false testimony on the last question of the State's case-in-chief as strategically placed by the prosecution.

Based on the foregoing, this Court finds that Trooper Westfall's false testimony that Mr. Helmig failed to deny the accusation that he killed his mother contributed to Mr. Helmig's conviction. Mr. Helmig points out, correctly, that Missouri law considers a tacit admission to be direct evidence of guilt which, coupled with evidence that a crime has been committed, provides sufficient

evidence to prove guilt beyond a reasonable doubt. *State v. Case*, 140 S.W.3d 180, 189 (Mo. App. 2004). Thus, the false evidence of Mr. Helmig's alleged tacit admission is the *only* direct evidence connecting him with the crime. This Court therefore finds that because of the circumstantial nature of the state case, which lacked any direct or circumstantial evidence placing Mr. Helmig at the scene of the crime, that Mr. Westfall's recantation is significant new evidence supporting Mr. Helmig's innocence.

b. Sheriff Fowler's testimony about the undocumented, unsubstantiated claim that Mr. Helmig and his mother had an "altercation" in the Country Kitchen on the Sunday before her death supports Mr. Helmig's claim of actual innocence.

The State's thin circumstantial case received a substantial boost when the prosecution repeatedly suggested, in the complete absence of competent evidentiary support, that Mr. Helmig had an "altercation" with his mother at the Country Kitchen Restaurant in Jefferson City, Missouri, the Sunday before her death. The subject was first raised when Carl Fowler testified, without objection by defense counsel, that he had received information of such an assault:

Q. Sir, have you become aware that – Mr. Jordan asked you some questions about altercations. Have you become aware that Dale Helmig had an altercation with his mother?

A. Yes.

Q. Where?

A. Country Kitchen.

Q. When?

A. The Sunday before her death.

Trial Tr. 835. Sheriff Fowler did not identify any source for this accusation. He testified before this Court that this information “was never to my knowledge what we call substantiated.” Hrg. Tr. Vol. 3, 37. His testimony establishes that there is

indeed no basis in fact for the allegation that an altercation occurred:

Q. (BY MR. O’BRIEN) And what I’m asking for is what is the source of this information on page 835?

A. I can’t provide you with that.

Q. Can you name a witness?

A. No, sir, I can’t.

Hrg. Tr. Vol. 3, 39. Sheriff Fowler brought his investigative file with him to the hearing, as directed by Petitioner’s subpoena. At Petitioner’s request, this Court recessed for Sheriff Fowler to review the file to determine if there was any documentation concerning the alleged altercation. After the recess, Sheriff

Fowler testified that his file contained no information about such an altercation, and that there was no witness connected to any such information. Hrg. Tr. Vol. 3, 52.

Sheriff Fowler's testimony is only part of the story on the prosecution's continued efforts to convince the jury that Mr. Helmig assaulted his mother in the absence of any such evidence. On multiple occasions, counsel referred to Sheriff Fowler's alleged "altercation" through other witnesses, transforming it to a full-fledged assault in which Dale Helmig threw hot coffee in his mother's face in the Country Kitchen on the Sunday before her death during an argument about money—the alleged motive for the murder. Later in the trial, prosecutor Schollmeyer asked Carol McKinney, "And *the defendant threw coffee in her face* after he asked her for money?" Trial Tr. 910-11. The defense called Jefferson City Police Officer Douglas Shoemaker to testify that he had taken Norma Helmig's report of the July 11, 1993, assault in which *Ted* Helmig threw hot coffee in Norma's face. On cross-examination, Mr. Hulshof asked, "Did you ever talk to Osage County Sheriff Carl Fowler about a *similar* altercation between Dale Helmig and Norma Helmig at the Country Kitchen?" Trial Tr. 1054 (emphasis added). Based upon these multiple references, none of which were based upon

competent evidence, Mr. Hulshof argued to the jury, “And also you heard the testimony about the altercation in Country Kitchen a few nights before her murder with the defendant.” Trial Tr. 1151.

Each of the subsequent references to an “altercation” was tied to the same specific time and place identified by Carl Fowler, and specifically defined to mean that the defendant threw hot coffee in his mother’s face the Sunday before her death, and referred explicitly back to Sheriff Fowler’s original statement that he “had information” that there had been an “altercation” between Dale Helmig and his mother the Sunday before her death. Trial Tr. 835. In the jury’s mind, the “altercation” the prosecutor argued about in closing could have been that Dale Helmig had thrown hot coffee in his mother’s face on the Sunday before her death during an argument over money. This allegation, while damning, was also untrue.

Sheriff Fowler testified in this Court that the hot coffee-in-the-face incident involved *Ted* Helmig, *not* Dale. Hrg. Tr. Vol. 3, 37-38, and that he “always said it was Ted.” Hrg. Tr. Vol. 3, 54. Further, when asked if the undocumented, unsubstantiated “altercation” he was talking about was “similar in nature” to the hot coffee-in-the-face assault by Ted Helmig on the victim on July 11,” Sheriff

Fowler responded, “Similar in nature, no because an altercation can mean a lot of things, okay.” Hrg. Tr. Vol. 3, 55. Sheriff Fowler was adamant that he never had any evidence of an assault by Mr. Helmig against his mother, and never passed such evidence along to the prosecution.

Further, witness Diana Hedges told Sheriff Fowler on August 9, 1993, that Dale Helmig was with her on the evening of July 25, 1993, the Sunday before Mrs. Helmig was murdered. Hrg. Tr. Vol. 2, 70-71, and she testified accordingly at the hearing. This Court finds her testimony credible because on August 9, 1993, the coffee-in-the-face allegation was not an issue. The trial transcript reflects that it was injected into the case for the very first time on the morning of trial, March 4, 1996, two and a half years after Ms. Hedges’ statement to Sheriff Fowler. Trial Tr. 16-18.

While a party in a law suit often has a difficult time proving a negative, Mr. Helmig had succeeded in proving to this Court’s satisfaction that there is no evidentiary basis for the repeated allegation that he was involved in an “altercation” that involved throwing hot coffee in his mother’s face. If indeed there was an altercation,³ Sheriff Fowler’s testimony establishes that it was not

assaultive in nature. Thus, the state's thin circumstantial evidence case was considerably bolstered by "evidence" of an assault by the defendant against the victim, which Sheriff Fowler's current testimony establishes beyond question is not true.

This Court therefore finds that Sheriff Fowler's testimony repudiating the State's repeated allegation that Dale Helmig threw hot coffee in his mother's face is significant new evidence that supports Mr. Helmig's actual innocence. This issue will be discussed further in connection with Claim No. 3, below.

c. The prosecutor inferred guilt from Dale Helmig's absence from the search of Mrs. Helmig's house on Saturday, July 31; Deputy Paul Backues' testimony that he told Mr. Helmig not to bring his kids to the crime scene neutralizes that inference.

After Dale Helmig returned home on Friday, July 30, 1993, to find his mother missing, he eventually called the Osage County Sheriff's Office to make a missing person's report. On Saturday, July 31, he did not come to observe the law enforcement search of the premises. After eliciting that fact repeatedly from several witnesses Trial Tr. 493, 529, 576, 717, 730, the state argued that it showed Mr. Helmig's consciousness of guilt:

Richard Helmig was down there, the defendant's brother, through the course of this. But where's the defendant on Saturday? He's worried about Mom, tells

everybody on Friday, “Oh, my gosh. Something’s happened to Mom. Something’s happened to Mom.” He’s not down there all day on Saturday. Just a coincidence? Use your common sense, ladies and gentlemen. The people that weren't responsible were down there. *But the one person who caused the death of Norma Helmig is gone.* He never showed up on Saturday.

Trial Tr. 1149 (emphasis added). No witness, including Deputy Backues, was ever asked why Mr. Helmig was not at the crime scene on Saturday. The jury received no other explanation for Mr. Helmig’s absence, even though one was evident on the face of the police reports. Dale Helmig was simply following instructions from Deputy Backues, who told him to keep his children away from the investigation. He documented his instructions in his report, Ex. 224, Report of Paul Backues, July 30, 1993, and he told Stacey Medlock in her tape-recorded interview, “I told him I didn’t think it was a good idea to bring his kids down there,” Ex. 38, p. 214, and he repeated that fact in his testimony before this Court.

⁴ Hrg. Tr. Vol. 2, p. 156. The evidence that Mr. Helmig was complying with the instructions of Deputy Backues negates some of the incriminating inference that could be drawn from his conduct. Mr. Helmig could have temporarily placed his children with other people and then gone to the scene. Even so, the Court finds

that evidence of Deputy Backues' instructions to Mr. Helmig, which the jury did not hear, further weaken the State's case against Mr. Helmig.

d. New evidence that Ted Helmig handled the cancelled checks found with Mrs. Helmig's purse after her death supports Petitioner's claim of actual innocence.

Mrs. Helmig's purse was found in Donald Phillips' farm field north of the Missouri River, about a mile and a half East of the Highway 54 Bridge at Jefferson City, on February 17, 1994. Trial Tr. 623-26, 638-646. It was the last piece of evidence to be developed before the prosecutor sought a warrant for Mr. Helmig's arrest, and it played a central role in the state's theory of guilt. Sheriff Fowler testified before this Court that in his view, the purse was "a significant piece of evidence." Hrg. Tr. Vol. 3, 65. It was shortly after the purse was found that the Sheriff and the prosecutor sought and obtained a warrant charging Mr. Helmig with his mother's death. *Id.*, 67-68.

The state argued forcefully to the jury that Dale was guilty because he had surmised, correctly, that his mother's missing car keys and gold chain might be in her purse. Trial Tr. 1143, 1181-82.⁵ The State hired a hydrologist, Jerome Westphal, to testify that based on the water currents during the flood and the

location of the purse, it was probably thrown from the Highway 54 Bridge at Jefferson City. Trial Tr. 943-963. From this evidence, the State argued that Dale Helmig must have thrown the purse over the bridge as he drove back to Fulton, Missouri, after having killed his mother:

And the purse, where was it found? Close to the highway that the defendant himself said he had been on, according to him, not until Thursday afternoon, but *the very highway he told the Sheriff's Department he had been on*. And you heard Professor Westphal talk about his findings in regards to that purse. Based on his study, recall that he said that *the purse could only have been thrown from the bridge*.

Trial Tr. 1142. Thus, the purse was a critical piece of evidence, according to the state's theory.

New evidence has come to light that proves this theory completely wrong. According to Paul Backues' property inventory and his testimony before this Court, cancelled checks on Mrs. Helmig's account were recovered along with her purse. Hrg. Tr. Vol. 2, pp. 149-150, Ex. 126. Petitioner has focused this Court's attention on Exhibit 128, check no. 1251,⁶ which was recovered in farmer Phillips' field with Mrs. Helmig's purse. Hrg. Tr. Vol. 2, p. 152. Sheriff Fowler and Deputy Backues testified that they never investigated the travels of check no.

1251 through the banking system. Hrg. Tr. Vol. 3, p. 68; Vol. 2, p. 153..

Sheriff Fowler could not say one way or another whether he asked the local postmaster who was picking up Norma Helmig's mail. Hrg. Tr. Vol. 3, p. 72.

After August 9, 1993, Sheriff Fowler did not determine the identity of the person who was picking up Norma Helmig's mail. Hrg. Tr. Vol. 3, p. 73.

Sheriff Fowler testified that his theory at the time of trial was that whoever killed Norma Helmig threw her purse in the river, *Id.*, and that theory is certainly reflected in the State's presentation at trial. The prosecution's view of the importance of this issue is reflected in the fact that the prosecution went to the expense of hiring an expert hydrologist to give an opinion that the purse was thrown into the river from the bridge over which Mr. Helmig would have to travel between the scene of the crime and the Fulton, Missouri, hotel where he stayed that night.

Mrs. Helmig's cancelled, personalized check no. 1251 which was recovered along with the purse completely disrupts the State's theory about the purse. It was dated July 21 or 26, 1993, Ex.128, several days before Mrs. Helmig's death, and one can infer that the check was written on one of those dates. Further, the signature appears consistent with other checks written by Mrs. Helmig before her

death, Ex. 127, 129, 130, 131, and there is no reason to question that this check, too, was written by her before she died. Check no. 1251 appears on Mrs. Helmig's bank statement dated August 9, 1993. Exs.138, 139.

Mr. Duane Muck, Senior Vice President of Hawthorne Bank, formerly known as Exchange Bank, testified by deposition to explain the proper interpretation of the documentation surrounding check no. 1251.⁷ Check no. 1251 appeared to be written by Norma Helmig on July 26th, 1993, to Southwestern Bell Telephone Company. Deposition of Duane Muck, 8. It bore a mechanically printed endorsement of "SWBT," reasonably interpreted to be Southwestern Bell Telephone Company, and the endorsement of the Federal Reserve Bank, meaning it had been processed through the Federal Reserve Bank before being returned by courier to Exchange Bank. *Id.*, 8-9. Mr. Muck identified Exhibit No. 139 as a representative of an archived copy of Norma Helmig's bank statement for the period from July 12, 1993, through August 9, 1993. *Id.*⁸

Mr. Muck determined from Exhibits 128 and 139 that check no. 1251, dated July 26, 1993, signed by Norma Helmig, and payable to Southwestern Bell

in the amount of \$210.13, was returned to Exchange Bank on July 30, 1993.

Deposition of Duane Muck, 11-12. The testimony of pathologist Jay Dix, and other testimony about Mrs. Helmig's activities prior to her death, established the time of death as five or six hours after her last meal, which she finished just before 12:30 a.m. on July 29, 1993, Trial Tr.392-93, so Mr. Muck's testimony and Exhibit 139 establish that check no. 1251 arrived at Exchange Bank at least one full day after she was murdered.

Mr. Muck's testimony further established that check no. 1251 was folded into Mrs. Helmig's bank statement on the first business day after the statement date. Since the statement was dated August 9, 1993, the earliest the statement and the check would have been mailed to the address shown on Mrs. Helmig's statement was August 10, 1993. Deposition of Duane Muck, 12-13. Therefore, the earliest it could have arrived at her address was August 11, 1993. *Id.*, 14. Stating the obvious, Duane Muck did not see how it could happen that Ms. Helmig's check would have been thrown in the river on July 29, 1993. *Id.*, 14-15.

The evidence surrounding the check establishes that Mrs. Helmig's purse could not have been thrown into the river on the night of her death, as argued by the prosecution. The significance of this fact is enhanced by the testimony of Ted

Helmig before this Court. Prior to the initiation of divorce proceedings, he and the victim argued about money. Hrg. Tr. Vol. 1, 52. He testified that two to four weeks after his wife's murder, he picked up her mail at the Post Office. Hrg. Tr. Vol. 1, 60-61. Mr. Helmig opened her mail, and admitted, a little reluctantly, that he had concerns about where she was getting the money she was spending. He said, "She wasn't getting no money from me, and she wasn't working, so..." *Id.*, 81. After she was gone, Ted Helmig opened her mail, including her bank statement, and he "looked at the cancelled checks that were in there." *Id.*, 81.

Petitioner contends that the evidence surrounding the cancelled checks found in Phillips' field along with her purse, coupled with Ted Helmig's admission that he collected her mail, opened her bank statements and looked at the victim's cancelled checks, is very significant new evidence directly tying him to the crime. This Court agrees that the new evidence connects him to the purse that had been missing since the murder, and this connection supports a strong inference that he was at the scene of the crime at the time of her death. Although Ted Helmig denied that he then put the check in his wife's purse and threw it in the river, and denied that he murdered his wife, Hrg. Tr. Vol. 1, 74-75, 81-82, his admission, coupled with the physical evidence and other evidence of motive and

opportunity, would be important facts implicating Ted Helmig in the murder of his estranged wife. As such, it is very persuasive new evidence that supports Petitioner's claim of actual innocence.

This physical evidence has added significance in that the totality of the evidence now available satisfies Missouri's rule that the defendant may offer evidence implicating another person in the crime only if "such other person committed some act directly connecting him with the crime." *State v. Chaney*, 967 S.W.2d 47 (1998), *quoting State v. Easley*, 662 S.W.2d 248, 251-52 (Mo. banc 1983). Such evidence is not admissible if it has "no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another. . . ." *State v. Chaney, supra, quoting State v. Umfrees*, 433 S.W.2d 284, 288 (Mo. banc 1968). The parties disagree over the issue of whether the Supreme Court's decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006), abrogates or modifies the application of the rule in *Chaney*. However, this discussion is academic at this point, as the new evidence indeed supports the direct inference required by *Chaney*. It puts in Ted Helmig's hands evidence directly associated with the crime and disposed in a manner calculated to avoid detection. Indeed, on the evidence now available, if Ted Helmig were charged

with the commission of this crime, the only evidence remaining of the state's case against Petitioner would be excluded from his defense, as it does nothing more than support "bare suspicions" and "conjectural inferences" that Petitioner was involved in this crime.

This Court finds that the evidence that Ted Helmig opened the bank statement containing the checks that ended up in the river with her purse is significant new evidence, and that the evidence that Dale Helmig is innocent of this crime is clear and convincing.

e. Petitioner's innocence is supported by other evidence implicating Ted Helmig in the murder of his estranged and battered wife.

There is other considerable evidence strengthening the case against Ted Helmig and adding to the weight of the evidence that exonerates Dale Helmig of this crime. Petitioner asserts three separate reasons that evidence implicating Ted Helmig in the murder of his wife should be admissible in support of his claim of actual innocence. First, as noted in the preceding section, evidence indicating that Ted Helmig opened his wife's bank statement and threw the cancelled checks into the river along with her purse that was taken on the night of the murder is an act directly connected with the crime, making the evidence implicating him in the

murder admissible under Missouri law. *State v. Chaney*, 967 S.W.2d 47 (1998).

Second, Petitioner argues that the *Schlup* standard, as applied in the Supreme Court's subsequent decision in *House v. Bell*, *supra*, permits, if not requires, the consideration of evidence implicating Ted Helmig tendered in support of his claim of actual innocence. Under the *Schlup* standard, this Court must consider "'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House v. Bell*, 547 U.S. 518, 538 (2006), *quoting Schlup v. Delo*, 513 U.S. at 327. In *House* itself, the petitioner's innocence was based on evidence implicating the victim's husband in the murder. *See, House v. Bell*, *supra*, at 540.

Third, Petitioner asserts that evidence of physical violence committed by his father against his mother explains why he suspected the worst when he discovered his mother had been missing for two days, thus making such evidence relevant, exculpatory and essential to his Due Process guarantee of "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, *supra*, at 324, *quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

This Court finds that it is appropriate to consider the evidence tendered by

Petitioner in support of his claim of actual innocence, as it adds probative value to evidence which directly connects Ted Helmig to acts connected with the murder of his wife discussed in the preceding section. In addition to the evidence connecting him to his wife's checks that cleared the bank after her death and ended up in the river with her purse, the credible testimony of Patty Rogers further connects him directly to his wife's murder. After the verdict of guilty, the Petitioner was taken into custody. Ms. Rogers moved in with Ted Helmig temporarily until she could earn enough money to acquire a place to live. She testified that Mr. Helmig would start drinking in the afternoon, and "He would say 'I'm sorry. I didn't mean to hurt you. I didn't mean for this to happen.' He would say Norma's name a lot." Hrg. Tr. Vol. 2, p. 28. In *House v. Bell, supra*, at 549, the evidence of House's innocence included similar testimony that the alternate suspect in that case, the victim's husband, "had evidently been drinking heavily, began 'rambling off . . . [t]alking about what happened to his wife and how it happened and he didn't mean to do it.'" Ted Helmig testified that he has a history of drinking to excess and not remembering the next day things that had occurred. Hrg. Tr. Vol. 1, pp. 43-44. He had resumed drinking in 1993. *Id.*, 47. Ms. Rogers' testimony is credible, and it directly links Ted Helmig with an act

connected to the crime.

Evidence that Ted Helmig abused his wife, coupled with his financial gain from her death prior to the conclusion of dissolution of marriage proceedings, Hrg. Tr. Vol. 1, pp. 52-57, can be considered by this Court in addition to the other evidence connecting Ted Helmig to the murder. As the Supreme Court observed, “When identity is in question, motive is key.” *House v. Bell, supra*, at 540.

In addition to Ted Helmig’s financial motive for killing his wife, the history of domestic violence sheds light on who may have killed Norma Helmig. At Mr. Helmig’s Rule 29.15 hearing, Norma Helmig’s sister, Dorothy Bauer, testified that she knew of Norma’s problems with Ted, that Norma had told her of Ted’s abuse, and that Ted had abused Norma “off and on for many, many years, but not constantly.” Rule 29.15 Tr. 332 (emphasis added). Rich Helmig also testified at the Rule 19.15 hearing that Ted and Norma’s divorce was not friendly, and that there were arguments and allegations of abuse involved. 29.15 Tr. 28. Mrs. Helmig went to Rich Helmig’s house trailer on “a couple of occasions” to escape Ted’s abuse, and he was aware of other allegations of abuse, which included throwing hot coffee in Norma’s face. 29.15 Tr. 28-29

This Court received evidence of Norma Helmig's own statements describing her husband. On January 6, 1993, Mrs. Helmig wrote the following to her long-time friend, Geniveve Lenyo:

It's just so hard for me to get everything done with my darn back, and Ted is no help at all with anything. I think he drank so long to eat his brain up, if he was born with one. We get along like two mad dogs. If I don't get out of these swamps down here and get back to Jeff, he's going to have me just as buggy as he is. He's totally eat up.

Deposition of Geniveve Lenyo, p. 20, quoting Exhibit 89, Norma Helmig's January 6, 1993, letter. Three months after writing that letter, Norma Helmig filed for a legal separation from her husband. She simultaneously requested a protective order, alleging that "Respondent has continually physically and mentally abused petitioner." Exhibit 1, p. 13.

Sheriff Fowler testified in this Court that Norma Helmig contacted him to express concern for her safety, in person and on the phone, "at various times," including one call in which she inquired about a handgun for protection. Hrg. Tr. Vol. 3, 26. Sheriff Fowler did not document any of Mrs. Helmig's calls, which numbered anywhere from five to fifteen in the three or four months prior to her death. *Id.*, 27-28.

Norma Helmig's fearful state of mind was an important aspect of the State's case, and Paul and Tina Ridenhour shed light on the source of that fear. On July 7, 1993, they were driven out of their camp ground at Pointer's Creek by quickly rising flood water, and Mrs. Helmig gave them refuge in their home.⁹ While Mrs. Helmig was friendly to the Ridenhours and their two young children, she was "very nervous," pacing around a lot, sitting on the edge of her seat, and she "had a gun with her at all times." Deposition of Tina Ridenhour, 12. She looked out the window frequently, and she was always moving around the house. *Id.*, 13. Mrs. Helmig told Mrs. Ridenhour that she was in the process of getting a divorce, and that "he wasn't very nice and he liked to smack people around." *Id.*, 16, 28. As Mrs. Helmig was checking the windows, she said, "We're safe. We can't get out. He can't come in." *Id.*, 17.¹⁰ Three days later, just after midnight on the night of July 10, 1993, Ted Helmig confronted Norma Helmig at the Country Kitchen, threw hot coffee in her face, and said, "I'm going to end this!" Hrg. Tr. Vol. 3, p. 32.

A little more than two weeks after this threat, Mrs. Helmig was murdered. Ted Helmig was at the American Legion Hall, alone and drinking beer, as Norma

Helmig played Bingo and drank beer with a gentleman friend, Bud Becker on the last night of her life. Hrg. Tr. Vol. 1, 72-73. He left the Legion Hall alone, and claims that he went home to his Jefferson City Apartment the night that Norma Helmig was murdered. No one can verify his whereabouts that night, *Id.*, 75.

Another mysterious fact surrounding the murder is that it occurred during a power failure that affected Mrs. Helmig and all of her neighbors on the rural route on which she lived. The outage was reported at 4:10 a.m., and ended at 5:45 a.m. on July 29, 1993. Trial Tr. 853-54. Mrs. Helmig consumed her last meal, according to waitress Carol McKinney, between 11:30 p.m. July 28 and 12:30 a.m. July 29, 1993, Trial Tr. 909-910, and Dr. Dix testified that Mrs. Helmig was murdered not more than five or six hours after her last meal. Trial Tr. 391-93. Thus, the power failure coincided with Mrs. Helmig's death, which is a convenient coincidence for the killer, if indeed it was a coincidence. Ted Helmig testified that while in the National Guard, he worked with electricity, and was sent to school to learn how to work on high voltage lines along with basic circuitry. Hrg. Tr. Vol. 1, 36.

This Court finds that the evidence of Ted Helmig's motive and opportunity to kill his estranged wife is credible and persuasive, and supplements other

evidence of actions by Ted Helmig that directly connects him with the crime.

Based on the evidence as a whole implicating Ted Helmig in the murder, this

Court finds that the evidence supporting Dale Helmig's innocence is clear and

convincing.

f. Testimony of Velda Party negates inferences of incrimination from statements attributed to Dale Helmig.

In the absence of any evidence putting Dale Helmig at the scene of the crime, the State's case depended quite heavily on statements of Mr. Helmig from which it inferred guilty knowledge. The refrain of the prosecutor's closing argument was that Mr. Helmig "knew too much" because he told Deputy Backues on July 30, 1993, that his mother must be wearing her nightgown, two days before her body was found, Trial Tr. 1144, and because he suspected foul play before it was reasonable to do so, Trial Tr. 1148-49. New evidence, not known to the jury, negates the incriminating inferences that the prosecution derived from Mr. Helmig's statements.

Velda Party, a cousin and neighbor of Mrs. Helmig's, was a very believable witness. Although she testified at trial, she was not asked to provide important information that would have negated the State's argument about the nightgown

and Mr. Helmig's supposedly unreasonable suspicions. She testified that Mrs. Helmig's sister, Dorothy Bauer, called her Friday morning, upset that she had not seen Norma Helmig since Wednesday night—before anyone had been to the house and discovered the things that were out of order. Hrg. Tr. Vol. 2, pp. 86-87.

According to Mrs. Party, Mrs. Bauer “went back to the bedroom and she stood there and looked at it and she was very upset.” Hrg. Tr. Vol. 2, p. 90. Mrs. Party also acknowledges that Dale Helmig was worried about his mother from the very beginning, *id.*, 89, but the fact that Mrs. Bauer was also very upset diminishes the incriminating inference from Petitioner's supposedly premature concerns.

Perhaps more important about Mrs. Party's testimony—not elicited at the time of trial—is that her observations eliminate any incriminating inferences from Petitioner's alleged statements about his mother's nightgown. The state argued that Dale's statement on Friday, July 30, describing the nightgown that her mother was wearing when her body was found on Sunday, August 1, is conclusive evidence that he is the killer. Otherwise, “How could you possibly know what nightgown your mother would be found in?” Trial Tr. 1144. This was the most persuasive aspect of the State's “guilty knowledge” theory. However, the inference is unjustified because Velda Party's testimony establishes that it was

Dorothy Bauer, not Dale Helmig, who correctly deduced that Mrs. Helmig was in her nightgown:

A. ...she mentioned that when she looked around and saw her clothes, she said that “Wherever she was she was in her nightgown and barefooted.” And I thought that was pretty weird because she had a whole closet full of clothes there. And I said “Maybe she wore something else.” She said “No, Norma always folded her clothes, laid them in a certain position and had them ready to put on when she got up.” And they were all laid out and she said “No, she wouldn’t do that. She’s in a nightgown and she’s barefooted.”

Q. At that point, had anyone else in your presence said anything about a nightgown?

A. No.

Q. Who was the first person to say anything at all about a nightgown that day?

A. Dorothy was at that time.

Hrg. Tr. Vol. 2, pp. 90-91. Mr. Helmig was present and also heard Mrs. Bauer say that “[s]he must be in her nightgown and she must be barefoot.” Hrg. Tr. Vol. 3, p. 116. Mr. Helmig also recalled that his Aunt Dorothy mentioned that she still had Mrs. Helmig’s other pair of shoes in her basement, so the shoes on the floor were the only pair in Mrs. Helmig’s possession. *Id.*

This is consistent with the testimony of Dorothy Bauer at Mr. Helmig's Rule 29.15 hearing that it was she who first drew the conclusion that Norma Helmig was in her nightgown. When Mrs. Bauer walked into Norma Helmig's bedroom, she said, "My sister's clothes she wore the night before when she played Bingo" were lying there, as were her shoes. 29.15 Tr. 325. When Mrs. Bauer found the clothes her sister had worn to Bingo on Wednesday night lying crumpled on the floor, she then looked through Mrs. Helmig's closet and discovered that her nightgown was missing. 29.15 Tr. 332. In Mrs. Bauer's words, the fact that Norma was in her nightgown was "obvious." 29.15 Tr. 329-30.

Thus, there is credible evidence, unknown to the jury, that completely negates the inculpatory inference from any statements that Mr. Helmig may have made about his mother's nightgown. Mr. Helmig testified, very credibly, that before Mrs. Bauer mentioned his mother's nightgown, "It never crossed my mind." Hrg. Tr. 118.

g. Testimony of Stacey Medlock negates inferences of incrimination from statements attributed to Dale Helmig.

A key witness for the State, Stacey Finley, was used to establish that Mr.

Helmig's suspicions of foul play were premature, and that Mr. Helmig was too quick to suspect homicide. A full accounting of Mr. Helmig's statements to Stacey Medlock¹¹ neutralizes these incriminating inferences drawn by the prosecution. Mr. Helmig was the first to enter the house after his mother's abduction and murder and noticed that she was gone, but the air conditioner was on, her cigarette case and lighter were left behind, a fan was knocked over, and other things did not seem right to him.¹² From this, Mr. Hulshof created an inference of guilt, asking Ms. Medlock if she thought "Dale was making a fuss about nothing," to which she replied, "Yes." Trial. Tr. 552. Ms. Medlock then testified that as Dale Helmig was driving her back to Jefferson City Friday evening, he said that "someone must have got crazy drunk and killed her." Trial Tr. 554. No further details of that conversation were introduced by either side.

Mr. Hulshof argued in the second half of the State's closing:

Remember when they left on Friday and he was bringing [Stacey Medlock] back to Jefferson City to drop her off and he said, "You know, somebody got crazy drunk and killed my mother." I submit to you ladies and gentlemen, based on what you heard, that somebody was the defendant.

Trial Tr. 1188. Stacey Medlock testified in her deposition that it was clear that

Mr. Helmig was referring to his father, Ted Helmig, when he made this statement.

Deposition of Stacey Medlock, 34-35.

The state's argument that Dale Helmig's statements expressing suspicions of murder reflected guilty knowledge depends on the assumption that such suspicions were unreasonable. From the isolated portion of Mr. Helmig's conversation with Ms. Medlock, such suspicions certainly seem unreasonable. However, the jury did not hear important parts of that conversation which provide substance and context for Mr. Helmig's reasonable suspicions about his father.

Ms. Medlock's statement was tape-recorded, so that the full context of Mr. Helmig's statement was preserved. Mr. Helmig explained to Ms. Medlock why he thought his father may have killed his mother:

Q. (By Deputy Backues) So, we're driving back to Jeff and your main topic of conversation is Theresa's going to be mad.

A. (By Stacey Medlock) And something about someone got crazy and (inaudible).

Q. Someone got crazy?

A. Someone got crazy drunk and went in and killed her.

* * * *

Q. (By Sheriff Fowler) Carry on.

A. That, uh, he was just shaking his head saying, I should have been home. *If I just would've went home, I don't know. Tuesday or Wednesday, I don't remember which day it was, then I would have been there and none of this would have happened.* And—

Q. What's this about the drunk?

A. He said, someone just got crazy drunk and went in and killed her.

Q. Now, was that just an out of the blue statement, Stacey, or did we have some preliminary conversation that brought this up? Or how did this?

A. *He said I hope my dad didn't. I think my dad has something to do with this. I think my dad did it.*

Q. (By Deputy Backues) Okay, somebody got crazy drunk and did this is was prior to

A. That was after he said I think my dad did it.

Q. Okay. *I think my dad may have had something to do with it.*

A. He said, if I just would have went home, she was there Wednesday night, he said, *if I would have just went home, none of this would have happened, I should have been there.* I said, you can't do that to yourself. And he said, *I think my dad did it.*

- Q. (By Sheriff Fowler) He did what?
- A. He just said that. I guess, you know, kidnaped her or something. My dad did it, that's all he said. And I said, uh, --
- Q. He said I think my dad did it?
- A. Uh-huh.
- Q. Okay.
- A. I said, does your parents fight and he said, well, he said they have been, something about they didn't used to but *they both started drinking and fighting and I didn't know about it but my mother was sleeping on my brother's couch because my dad was beating her up or something. Because my dad was beating her up.* I didn't say anything. He just said someone just got crazy drunk and went in and did it, went in and killed her.

Ex. 56, Transcript of Statement of Stacey Medlock, pp. 35-37 (emphasis added).

Because the jury didn't hear the full statement, the prosecutor was able to use Dale Helmig's exculpatory statements to Stacey Medlock as evidence of his guilt.

Because the portion of Mr. Helmig's statement that was introduced by the prosecution was taken out of context, the balance of Mr. Helmig's statement would have been admissible under Missouri's long-standing Rule of

Completeness:

Although inadmissible on the question of Kemper's truthfulness, the polygraph evidence may be considered under what courts and lawyers refer to as the "rule of completeness." This "rule" holds that a party may introduce evidence of the circumstances of a writing, statement, conversation, or deposition so the jury can have a complete picture of the contested evidence introduced by the adversary. See William A. Schroeder, *Missouri Practice, Missouri Evidence*, § 106.1 (2nd Ed. 1999).

The "rule" is stated: "where either party introduces part of an act, occurrence, or transaction, the opposing party is entitled to introduce or to inquire into other parts of the whole thereof in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary - a rule that has been held to apply even though the evidence was in the first place illegal." *State v. Baldwin*, 808 S.W.2d 384, 390 (Mo. App. 1991).

State ex rel. Kemper v. Vincent, 191 S.W.3d 45, 49-50 (Mo. 2006) (en banc).

Ms. Medlock testified in her deposition for this Court that while at first she thought "the whole family...was overreacting," as "it progressed ...I started to believe that something was wrong..." Deposition of Stacey Medlock, 20. Ms. Medlock testified that by the time Mr. Helmig drove her home, "I *knew* something was wrong, yeah." *Id.*, 37. But nothing that Dale Helmig said or did that day aroused any suspicion in her that he may have hurt his mother. *Id.*, 38. As Mr.

Helmig drove Ms. Medlock to his mother's house, he was excited, looking forward to the barbecue with his mother and his children, and he encouraged Ms. Medlock to come because "it was going to be a good time." *Id.*, 14-15. As Mr. Helmig drove her back to Jefferson City, "it was just a very heavy mood. He didn't feel well, he was upset, he was worried, and he was just kind of spewing, you know, how your mind gets when you're under stress." *Id.*, 73.

The Court finds Ms. Medlock's account of her time with Mr. Helmig to be completely truthful and generally consistent with her audio-taped statement to Sheriff Fowler and Deputy Backues. *See*, Ex. 56, the transcript of Stacey Medlock's August 7, 1993, interview, and Exhibit 56 A, the audio-tape of that interview. Unfortunately, the jury heard only portions of Ms. Medlock's story, leaving them with the misleading impression that Mr. Helmig did and said suspicious things when he discovered that his mother was missing. The Court further finds that her testimony as a whole provides an account of Mr. Helmig's statements and conduct on Friday, July 30, 1993, that is completely consistent with his innocence. If the jury had heard Ms. Medlock's entire story, it would have rejected the State's argument that Mr. Helmig's statements to her were suspicious. The testimony of Stacey Medlock that the jury did not hear adds yet

more weigh to the case for Mr. Helmig's innocence.

h. Mr. Helmig has a credible alibi.

Dale Helmig testified in this Court, consistent with his handwritten statement of August 1, 1993, Ex. 53, that he was asleep in Room 49 at the Travelier Motel on the night his mother was murdered. Although Exhibit 53 was in evidence before the jury, there was very little corroborating evidence presented. It is true that when Mrs. Helmig was murdered in the wee hours of the morning of July 29, 1993, no one was with Mr. Helmig to verify that he was asleep in his hotel room. However, there were other witnesses available whose testimony increases the believability of Mr. Helmig's statement.

An important piece of information unknown to the jury is that Mr. Helmig and his mother had just learned from the Mr. Helmig's divorce attorney that his wife had just agreed to allow him visitation with his son, Dalton, and daughter, Kaleigh, for the weekend beginning July 30, 1993. Mr. Helmig had not seen his children in a couple of months, and he and his mother were planning a barbecue with guests for the occasion. Hrg. Tr. Vol. 3, pp. 121-22. The jury was not aware of this fact, but the Court believes it is significant because it bears on Mr. Helmig's frame of mind and his feelings toward his mother around the time of her

death and disappearance. Mr. Helmig cheerfully told all of his friends he encountered on the 28th and 29th of July that he was getting visitation with his children that weekend, and he and his mother were planning a barbecue with them. The whereabouts of Norma Helmig were still unknown on Friday afternoon. Further, as the time approached for Dale Helmig to pick up his children, he knew that “something was wrong.” Hrg. Tr. Vol. 3, 126.

The circumstances that caused Mr. Helmig to check into the Travelier Motel the night of July 28 and morning of July 29, 1993, are not in dispute. A leaking propane tank lodged against the Highway 63/54 bridge at Jefferson City in the morning of July 28, causing the bridge to be closed from 8:00 a.m. to 8:00 p.m. on that day. Trial Tr. 842. Mr. Helmig had spent the previous night in Holt’s Summit with friends, Steve and Linda Asher, and when he saw the traffic backed up on 54 Highway, he drove to Hermann to cross the river there. At Hermann, high water had closed the bridge, so he returned to Fulton to spend the night, stopping for beer along the way. Ex. 53, Hrg. Tr. Vol. 3, 142-44.

After arriving in Fulton, Mr. Helmig stopped in Walmart to purchase clothes and toiletries in preparation for spending the night there. He encountered

Mary McMullen and Tiffany Jones-Crowe, whose observations corroborate Mr. Helmig's happy state of mind and intent to stay in Fulton that night. Mrs. McMullen has been friends with Mr. Helmig since high school. On July 28, 1993, she was shopping with her daughter at the Walmart store in Fulton, Missouri, and ran into Dale Helmig in the men's clothing department, where they talked for fifteen to twenty minutes. Mr. Helmig was "in a very good mood," "happy" and "jubilant" because "he was going to have visitation with his children and it had been a while and he was looking extremely forward to it." Hrg. Tr. Vol. 1, 229-231. Dale told her that he was stranded in Fulton because the bridge was closed. He was at Walmart buying toiletries and clothing because he didn't have any with him, which is very consistent with Mr. Helmig's stated intent to spend the night. Hrg. Tr. Vol. 1, p. 130. Further, the trial record reflects that the bridge did not re-open until 8:00 p.m., Trial Tr. 842, so when Mr. Helmig was in Walmart, he did not know when or if the bridge would open that night. The Court finds that Mrs. McMullen is a truthful witness, and her testimony about Mr. Helmig's conduct and state of mind is persuasive corroboration of his stated intent to stay that night in Fulton, Missouri.

Similar to Ms. McMullen, Tiffany Jones-Crowe could have corroborated

Mr. Helmig's intention to spend the night in Fulton, Missouri. She was working at the Walmart store in Fulton on July 28, 1993, when Dale Helmig came to her department and asked for help in finding toiletries, tee shirts and shorts, as he was stranded in Fulton by the flood. Hrg. Tr. Vol. 2, pp. 121. She spent about an hour with him showing him where to find the items he needed and answering his questions about places to stay and eat in and around Fulton. She recommended several places to stay, including the Travelier Motel in Fulton. *Id.*, p. 122. He invited her to dinner, and she declined, explaining that her boyfriend was picking her up after work. She described his demeanor as

...happy. He was kind of charming. Had I not been acquainted with someone else, I probably would have joined him that evening. But he was nice and friendly and I certainly -- I didn't have any ill feelings for him at all.

Hrg. Tr. Vol. 2, p. 122. In fact, Mr. Helmig was "hitting on her," but not in a way that made her feel uncomfortable or that was at all offensive. Hrg. Tr. Vol. 2, p. 129. The Court finds that Ms. Jones-Crowe is a truthful witness. She did not know Mr. Helmig before her encounter, and she has not communicated with him since. *Id.*, 120. If a jury had heard her testimony, it would have grave doubts that Mr. Helmig formed any homicidal intent toward his mother later that

same night.

The state's trial evidence showed that Mr. Helmig checked into Room 49 at the Travelier Motel, which had been recommended by Ms. Jones-Crowe, on July 28, 1993. He was in Room 49 at 10:35 p.m. on July 28, 1993, Dennis Hazelwood, a Westminster College student working as a delivery man for Mazzio's Pizza, delivered a pizza to Mr. Helmig in his room at the Travelier. Trial Tr. 918-919, Exs. 78, 79. Mr. Hazelwood told Sheriff Fowler that his car was overheating and "steam was rolling from under the hood" when he arrived at Mr. Helmig's room. Mr. Helmig testified that he used the ice bucket from his room to put water in Mr. Hazelwood's radiator and got him on his way. Ex. 78, Hrg. Tr. Vol. 3, p. 146.¹³ Mr. Helmig said that after Mr. Hazelwood left, he ate his pizza, watched MASH on TV and went to bed. *Id.* He has always insisted that he was at the Travelier Motel in Fulton, Missouri, during the time frame in which his mother was murdered.

Mr. Helmig testified that the next morning he awoke between 9:00 and 9:15 a.m., got dressed, and went to La Casa Restaurant in Jefferson City, stopping for gas along the way. Hrg. Tr. Vol. 3, pp. 146-47. Tom Stout testified that Mr.

Helmig arrived at La Casa before it was open to the public, but because Mr. Helmig is a friend and former employee, he was welcome. Hrg. Tr. Vol. 1, pp. 150-51.¹⁴ Because La Casa opens at 11:00 a.m., Mr. Stout can testify with confidence that Mr. Helmig arrived prior to 11:00.¹⁵ He was dressed in his painter whites, as if he was getting ready to paint. Hrg. Tr. Vol. 1, p. 151. Mr. Stout said Petitioner's mood that day was "normal Dale," *Id.*, meaning he made "normal idle talk," and he was "dressed and ready to go to work." Hrg. Tr. Vol. 1, p. 152. His mood was "positive" as he was looking forward to visitation with his children and spending time with his mother that weekend. *Id.*, 153. Dale returned to the restaurant at a second time that day around 4:00 or 4:30, where he was seen by both Tom and his brother Jim Stout. *Id.*, 155, 173.

The issue, of course, is what Dale Helmig did after Dennis Hazelwood left the Travelier Motel. Under the State's theory, he left his hotel in the middle of the night, went to Pointer's Creek, smothered his mother to death, tied her to a concrete block, and threw her in the river. Mr. Helmig, however, insists that he went to sleep at the Travelier, awoke around 9:00 or 9:15 a.m., got dressed in his painter's whites, and drove to La Casa Restaurant, stopping for gas in Holt's

Summit along the way. Hrg. Tr. Vol. 3, pp. 146-47. No physical evidence and no witness contradict Mr. Helmig's account of his activities and his whereabouts.

The jury heard evidence from John Lilleston that he didn't see Petitioner's car at the Travelier Motel on July 29, 1993 at 5:00 a.m. For some inexplicable reason, Petitioner's counsel did not inform the jury by cross-examination that the witness testified at the preliminary hearing that he did not make a search for any specific car and that it was pitch dark when he left the motel. Additionally at the preliminary hearing the witness testified the lot had cars, pickups and big trucks.

Unexplained this testimony by witness Lilleston considerably weakens Petitioner's alibi of being in the motel at the time of his mother's murder. Further, the observations of Mary McMullen, Tiffany Jones-Crowe and Tom Stout are harmonious with Mr. Helmig's statement and testimony, and completely incongruous with the notion that Mr. Helmig spontaneously changed his frame of mind toward his mother from positive anticipation of a pleasant weekend to homicidal rage and back again in a few short hours. This Court finds that the complete evidence of Mr. Helmig's alibi, especially the portions that the jury did not hear, is persuasive evidence that he is innocent.

I. Many credible witnesses corroborate Mr. Helmig's close and loving relationship with his mother.

Finally, the Court is impressed with the number of people who came forward to attest to Mr. Helmig's close and loving relationship with his mother, and his history and reputation of non-violence. At trial, there was virtually no positive character evidence tendered, and even the defense attorney referred to Mr. Helmig as a "jerk" and a "bum," Trial Tr. 1156, 1169, when such epithets are contrary to the facts that were presented in this Court. While the State depended heavily on testimony that Mr. Helmig obtained financial assistance from his mother to put him in a negative light, and even to suggest a motive for murder, the testimony of Davy Boes shows that Dale and Norma Helmig had a mutually supportive relationship. The month that Mr. Helmig came up short on his child support, he bought tires for his mother's car because they were unsafe. Hrg. Tr. Vol. 3, pp. 13, 163, Ex. 134 (Boes Tire DNR records, 1993).

Gayla Neiman testified that Mr. Helmig occasionally made his mother's hairdressing appointments, and sometimes paid for them. Hrg. Tr. Vol. 1, p. 208. Mrs. Helmig told her that when Mr. Helmig moved in with her in the summer of 1993, "She was very happy that Dale was living there. She felt more safe and secure." *Id.*, 200. Jim Stout testified that Mr. Helmig "took care of his mom very

well. He worried about her a lot and he would tell me he had to go cut the grass for her and do different things for her. . . . I would say he was very close to his mother actually.” Hrg. Tr. Vol. 1, p. 167. Many witnesses found the notion of Dale Helmig killing his mother an unbelievable proposition because of their close and loving relationship and Dale Helmig’s history and reputation of avoiding violence. *See, e.g.*, Ted Helmig, Hrg. Tr. Vol. 1, pp. 83-85; Tom Stout, Hrg. Tr. Vol. 1, pp. 149-150; Jim Stout, Hrg. Tr. Vol. 1, pp. 168-89; Gayla Neiman, Hrg. Tr. Vol. 1, p. 197, 223; Mary McMullen, Hrg. Tr. Vol. 1, pp. 227-28, 233; Davy Boes, Hrg. Tr. Vol. 3, p. 9.

In conclusion, this Court finds that based upon all of the evidence, Dale Helmig has satisfied his burden of proving his actual innocence of the crime by clear and convincing evidence. Because so much of the State’s case has been shown to be false or misleading, Mr. Helmig’s proof comes very close to satisfying the high standard of proof set out in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), which commands judicial acquittal if, based on all the evidence, “[n]o rational trier of fact could have found proof of guilt beyond a reasonable doubt.” This Court finds the evidence of Mr. Helmig’s innocence of the murder of his mother to be clear and convincing, and that he is therefore entitled to habeas

corpus relief from his conviction and sentence. *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003). Further, he has also satisfied his lesser standard of showing a reasonable probability that no reasonable juror would find him guilty of this crime, and he is therefore entitled to review on the merits of his constitutional claims, even if his claims are otherwise subject to procedural default. Therefore, the Court will review the merits of Mr. Helmig's Claims 3, 5, 6 and 7.

Part III. Claims for Relief

The Court is aware that it's finding that Mr. Helmig has presented clear and convincing evidence of his innocence entitles him to habeas corpus relief. Nevertheless, the Court will discuss the merits of Mr. Helmig's individual claims for relief.

Claims 1, 2 & 4

This Court has found that Claims 1, 2 & 4 were previously adjudicated by the Eastern District Court of Appeals, and that this Court therefore has no jurisdiction to consider these claims. Petitioner objects to this conclusion, arguing with respect to Claims 1 and 2 that he is entitled to relief based on the retroactive Supreme Court decisions in *Holmes v. South Carolina*, 547 U.S. 319 (2006), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374,

377 (2005). Under Missouri Law, the remedy for seeking the benefit of a retroactive Supreme Court decision is a motion to recall the mandate in the appellate court which rendered the original opinion. *See, In re Parkus*, 219 S.W. 3d 250 (Mo. banc 2007). Therefore, this Court dismisses Claims 1 and 2 without prejudice to Mr. Helmig refiling those claims in the Missouri Court of Appeals.

Claim 4 asks this Court to reopen his claim of ineffective assistance of counsel because of recently developments which alerted Mr. Helmig's counsel to possible drug use on the part of Mr. Helmig's trial counsel, Christopher Jordan. Petitioner suggests, with some persuasive force, that evidence of trial counsel's impairment justifies revisiting previous determinations that trial counsel engaged in reasonable trial strategy. To the extent that this claim involves allegations of ineffective assistance of trial counsel that were previously resolved by the Court of Appeals, Eastern District, this Court will not revisit them for the same reasons that the Court will not revisit Claims 1 and 2. Therefore, this Court dismisses Claim 4 without prejudice to Mr. Helmig seeking appropriate relief in the Court of Appeals. This disposition should not be interpreted as this Court's approval or endorsement of Mr. Jordan's conduct of Mr. Helmig's trial.

Since the issue of Mr. Jordan's drug impairment was not before the Court

of Appeals, this Court granted Mr. Helmig leave to amend his petition to add Claim 7 alleging a deprivation of the right to effective assistance of counsel by reason of Mr. Jordan's drug impairment. The Court's decision on that claim is discussed below.

Claim No. 3. Prosecutorial Misconduct

This Court heard evidence on four distinct claims of prosecutorial misconduct, which the Court will address individually.

A. The State Withheld Exculpatory Evidence.

1. The State Failed to Disclose Norma Helmig's Request for Protection from her Husband.

Petitioner's evidence before this Court shows that Sheriff Carl Fowler had actual knowledge of evidence that Mrs. Helmig had contacted authorities for protection from her abusive husband which Sheriff Fowler neither documented nor disclosed. In the Rule 29.15 hearing testimony, Sheriff Fowler admitted:

Q. You told me she had come to your office with respect to a protective order of some kind, is that right?

A. She was having some domestic troubles with her ex-husband.

Q. And with respect to the time of her death, how long before her death had she come to you with problems regarding her husband?

A. Say within a matter of months. I don't know exactly how long, but it was not long prior to.

Q. And she had reported to you that she was being abused by her husband Ted, is that correct?

A. I don't recall our specific conversation. I knew that she – she expressed some concerns. I don't recall specific allegations of abuse, but there may have been. I know – I know she had some concerns, yes.

Q. All right. And those concerns were for her safety, correct? I mean, that's why she came to you as the sheriff?

A. I believe there were some safety concerns, yes.

29.15 Tr. 374-75. Sheriff Fowler made no written report of any kind about Norma's request for protection, never questioned Ted Helmig about it, and conducted no follow-up investigation whatsoever, even after Mrs. Helmig's body was found floating in the river.

Sheriff Fowler testified before this Court that Mrs. Helmig contacted him, in person and over the phone, between five and fifteen times in the three to four months prior to her death. Although unclear on whether she alleged that he was

beating her, Sheriff Fowler testified “I know they were having some problems and there may have been allegations of physical violence.” Hrg. Tr. III 25-28. Mrs. Helmig had also contacted the Sheriff expressing “safety concerns” and requesting assistance in acquiring a handgun. Hrg. Tr. III 26. Because Sheriff Fowler did not document any of the contacts, he could only say that Mrs. Helmig made between five and fifteen calls to him expressing concerns for her safety. Hrg. Tr. III 27. Sheriff Fowler testified that Mrs. Helmig’s calls began right after the separation in the spring, and continued through the month of her death, spanning three or four months. *Id.* None of the calls involved the July 11, 1993, incident at the Country Kitchen in which Ted Helmig threw hot coffee in his wife’s face. Hrg. Tr. III 29.

The evidence that Sheriff Fowler chose to keep to himself was material to Mr. Helmig’s defense. As noted in Part II, above, this evidence might have enabled a competent trial attorney to develop sufficient evidence implicating Ted Helmig to trigger Petitioner’s right to present such evidence in his defense under *State v. Chaney, supra*. Further, Mr. Helmig could have challenged the police investigation for failing to follow up on this evidence. As the Supreme Court noted in a similar case, with the benefit of such evidence, “The defense could have

further underscored the possibility that [Ted] was [Norma's] killer through cross-examination of the police on their failure to direct any investigation against [Ted].” *Kyles v. Whitley*, 514 U.S. 419, 442 n. 13 (1995). Petitioner could have used such information to attack “the thoroughness and even the good faith of the investigation.” *Id.*, 445.

The evidence is also material because of the State’s decision to elicit evidence that Mrs. Helmig was “nervous and upset a lot” in the months before her death, implying that Petitioner was the source of her fear, Trial Tr. 442-43, when in reality the State had substantial evidence indicating that she feared Ted Helmig, not Dale Helmig. This evidence not revealed by Sheriff Fowler would have been an effective rebuttal to the state’s allegation that Mrs. Helmig feared her son rather than her estranged husband. Therefore, the Court finds that the undisclosed contacts between Mrs. Helmig and Sheriff Fowler were material to Petitioner’s defense within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963).

Sheriff Fowler’s failure to document his conversation with Mrs. Helmig does not absolve the state of its duty to disclose; “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.” *Kyles v. Whitley*, 514 U.S.

419, 437 (1995).

Because the State was in possession of material, exculpatory evidence which it failed to disclose, Mr. Helmig is entitled to issuance of the writ of habeas corpus.

2. The State Failed to Disclose Tina Ridenhour's Report that Mrs. Helmig Was so Afraid of Her Husband That She Carried a Gun Everywhere She Went.

On July 7, 1993, Paul and Tina Ridenhour and their two little girls were run out of their campground at Pointer's Creek by rising flood water. Mrs. Helmig gave them refuge in her home. Mr. and Mrs. Ridenhour testified by video deposition, and the Court finds that they are credible witnesses. The events they witnessed in Mrs. Helmig's home are described above in more detail, and those findings apply to this claim as well. In summary, while the Ridenhours were in Mrs. Helmig's company, she was nervous and fidgety; she carried a gun with her everywhere she went, even to the bathroom; and she kept looking out the window, saying, "If we can't get out, he can't get in." She said she was getting a divorce from her husband, who likes to "smack people around." This was less than three days before Ted Helmig confronted Mrs. Helmig in the Country Kitchen Restaurant and threw hot coffee in her face. Thus the Ridenhours' observations

establish directly that Mrs. Helmig's fear was inspired by her husband, not by her son. This would have been helpful evidence to Mr. Helmig's defense.

The Ridenhours' observations also shed light on Dale Helmig's relationship with his mother. Conservation Agent Gary Howard testified that he met Mr. Helmig about a quarter mile from Mrs. Helmig's house, at the point where the flood waters of Pointer's Creek were blocking the road to her home. Hrg. Tr. II 54. "He was concerned about his mother's safety." *Id.*, 61. No one else was out there trying to assist Mrs. Helmig. *Id.* Mr. Helmig testified that he called his mother eight to ten times that evening to tell her what they were trying to do to get her out of the flood. Hrg. Tr. III 151. Mrs. Ridenhour testified that a person identified by Mrs. Helmig as her son called her "a lot" that night. (deposition of Tina Ridenhour, 15). "It seemed like the way she was talking she had a positive relationship with that person." *Id.*

The evidence shows, and the Court finds, that during the night of July 7, 1993, Mrs. Helmig had armed herself possibly in fear of her husband, Ted Helmig, and that she had no fear whatsoever of Petitioner. Further, it was only three days later, on July 11, 1993, that Ted Helmig argued with Norma Helmig in the Country Kitchen, threw hot coffee in her face, and said, "I'm going to end

this!” The Court finds that the testimony of the Ridenhours was material to the case within the meaning of *Brady v. Maryland, supra*, in that the defense could have used it to rebut allegations by the State that Mrs. Helmig was nervous and afraid of Petitioner during the time leading up to her murder.

The prosecution located the Ridenhours through Mrs. Helmig’s phone records. During their brief stay with Mrs. Helmig, they had used the phone to call Paul Ridenhour’s father, Don Ridenhour, to tell him they were safe. (deposition of Tina Ridenhour, 22-23). Don Ridenhour gave his son’s telephone number to Mr. Schollmeyer, who called Mr. and Mrs. Ridenhour and interviewed them about this incident. However, no disclosure of the Ridenhours was made to the defense. It is clear to the Court that the cumulative testimony and evidence that would have been available to the defense had proper disclosure been made counters the argument that Mrs. Helmig feared her son. This issue was an important aspect of the state’s case. *See Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

Mr. Helmig discovered the existence of the Ridenhours only by happenstance, subsequent to the time allowed for amending Mr. Helmig’s Rule 29.15 motion. *Helmig v. State, supra*, at 681. Although Mr. Helmig produced this evidence in his Rule 29.15 motion in support of a claim under *Brady v. Maryland*,

the Court of Appeals denied his claim because it was not included in his amended Rule 29.15 motion, stating, “In actions under Rule 29.15, any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal.” *Id.*

The Court finds that the prosecutor’s concealment of the Ridenhours existence, and the failure to document or disclose Mrs. Helmig’s request for protection, constitute cause for raising these issues in a petition for writ of habeas corpus. *Amadeo v. Zant*, 486 U.S. 214 (1988) (Finding that prosecutor’s concealment of evidence satisfied the cause-and-prejudice test to excuse the failure to raise claim in earlier proceeding); *Clay v. Dormire*, 37 S.W.3d 214, 217 (2000) (adopting the federal cause-and-prejudice test to justify habeas corpus review under Rule 91). Rule 91 is available to adjudicate a constitutional claim that was unknown to movant withing the time limits for filing a motion under Rule 29.15. *Brown v. Gammon*, 947 S.W.2d 437 (Mo. App.1997). The Court finds that the existence of the facts and evidence supporting this claim were not reasonably available to movant and unknown to him in time to include this claim in prior proceedings, and that therefore this issue is properly before this Court for the first time for a resolution on the merits.

The Court finds that the prosecutor’s failure to disclose material,

exculpatory evidence to the defense violated Mr. Helmig's right to due process of law. Therefore, this Court will issue the writ of habeas corpus directing the state to retry Mr. Helmig or discharge him.

B. The State Knowingly Misled the Jury by Presenting Unproven Evidence That Dale Helmig Assaulted his Mother.

The record before this Court establishes that the prosecution used unproven allegations as evidence that Dale Helmig assaulted his mother on July 25, 1993, the Sunday before her death, in the Country Kitchen during an argument over money. That the State did so deliberately is clear from the record. In anticipation of getting this incompetent evidence before the jury, Kenny Hulshof conducted voir dire about it, asking if any prospective jurors have "slammed the door on their mind to the proposition that domestic violence can occur between a parent and a child . . ." Trial Tr. 112-13. On the morning of trial, the State moved to endorse two new witnesses, Carol Miller McKinney and Darla Toebben Voss. According to the State's motion, Carol McKinney informed the prosecution that "Darla Toebben Voss may have knowledge about a certain incident wherein the defendant threw hot coffee in the face of the deceased shortly before her murder." Trial Tr. 16-17. Ms. Voss was never called to testify, and Petitioner has produced

her deposition establishing that she did not even work at the Country Kitchen in 1993, and therefore she had no knowledge of such an incident involving Dale Helmig and his mother. (deposition of Darla Voss, pp. 5-7).

Even though the prosecution could not find a witness to substantiate this allegation, that did not stop them from trying to put the unproven and very inflammatory fact before the jury. Carl Fowler testified, without objection by defense counsel, that he had received information of such an assault:

Q. Sir, have you become aware that – Mr. Jordan asked you some questions about altercations. Have you become aware that Dale Helmig had an altercation with his mother?

A. Yes

Q. Where?

A. Country Kitchen.

Q. When?

A. The Sunday before her death.

Trial Tr. 835. Fowler did not identify any source for this accusation. Sheriff Fowler conceded that the “information” could not be “substantiated,” *Id.*, 37, that it was completely undocumented, *Id.*, 52, and he could not name any witness as

the source of that information. *Id.*, 38. It is unusual that a trained and experienced investigator failed to document an event as important as an “altercation” between a suspect and a murder victim three days before her death. The lack of substantiation and no source of the alleged information was not heard by the jury.

After Sheriff Fowler testified, with no resistance from defense counsel, that there had been an “altercation,” the State built a much more specific and inflammatory allegation on that shaky foundation through Country Kitchen

waitress Carol McKinney:

Q. Mrs. Miller, are you aware of an incident a few days before Norma was murdered that the defendant threw coffee in Norma’s face?

A. Yeah, there was an incident at County Kitchen with that.

Q. *And the defendant threw coffee in her face after he asked her for money?*

* * *

Q. What do you know about this particular incident?

A. What I know about it is *one of the other waitresses that was waiting on Norma came back in the galley and said her son had just threw coffee in her face.”*

Trial Tr. 910-11 (emphasis added). At this point, Mr. Jordan finally made a hearsay objection, which was sustained, but the damage was done. The prosecutor's leading question had not only described the fictitious incident, but embellished it to dovetail with their theory of Dale's financial motive for killing his mother.

In the defense case, Mr. Jordan called Jefferson City police officers to testify about the incident in which Ted Helmig, not Dale, threw hot coffee in Norma's face. On cross-examination, Mr. Hulshof personally testified about Dale's alleged assault, falsely implying that there were yet additional witnesses who could verify the incident:

Q. Officer Shoemaker, did you have occasion to speak with – and to put this in time reference, we're talking about the week preceding – or the few days preceding July 30 of 1993. So the same month that you were at the Country Kitchen but a little later that month. That's the perspective. Did you ever talk to Osage County Sheriff Carl Fowler about a similar altercation between Dale Helmig and Norma Helmig at the Country Kitchen?

A. I don't recall.

Trial Tr. 1054. Thus, without any competent evidence, the prosecution planted a

scenario in the jury's mind that on the Sunday before Mrs. Helmig's death, Petitioner confronted her in the Country Kitchen, argued with her about money, and threw hot coffee in her face. This enabled the prosecution to argue false facts to the jury, "And also you heard the testimony about the altercation in Country Kitchen a few nights before her murder with the defendant." Trial Tr. 1151. This Court finds that there was no competent evidentiary or good-faith basis for such an allegation, and that the prosecution knew or should have known that there was no credible evidence to support this allegation.

The Court finds that Mr. Helmig was undoubtedly prejudiced by the introduction of unproven evidence that he physically assaulted his mother three days before she disappeared. Because evidence that the defendant committed other crimes "could have a dangerous and misleading force," Missouri law requires "that the admission of evidence of other crimes be subjected to rigid scrutiny." *State v. Sladek*, 835 S.W.2d 308 (Mo. App. 1992). Such evidence could "raise a legally spurious presumption of guilt in the minds of the jurors." *Id.*, quoting *State v. Reese*, 274 S.W.2d 304, 307 (Mo. banc 1954). The prejudicial effect of such evidence is so great that even a question, answered in the negative, suggesting that the defendant committed other crimes is prejudicial:

Furthermore, it is apparent that it is not the answer which prejudices the defendant, *it is the question that carries the poison*. A general question of whether the witness has ever committed a crime may have little effect on a jury. Where, *however, the question contains detailed information such as date, location, victim, or nature of the crime, the jury must, as reasonable persons, conclude that the question is based upon information known to the questioner*. A negative answer can have little or no effect on this basic conclusion, and a jury is inevitably left with a belief that the witness has committed the inquired of crime, and is a person of bad character. This is true whether the question has support in fact or not.

State v. Dunn, 577 S.W.2d 649, 651 (Mo. 1979). Reversing Dunn's conviction, the Court found that questions posing as fact the defendant's commission of another crime "lends itself to the creation of substantial prejudice even though the answers are in the negative." *Id.*, 653. Mr. Hulshof's questions went well beyond those found improper in *Dunn*, postulating the alleged altercation as though it were proven fact, and in great detail, effectively testifying himself that Mr. Helmig threw hot coffee in his mother's face in an argument over money three days before she was killed. The Court finds this tactic was highly improper and prejudicial to Mr. Helmig. Additionally Sheriff Carl Fowler testified at the hearing before this Court that he always said it was Ted Helmig who threw coffee

in the face of decedent, not Petitioner.

The Court finds that the conduct of the prosecution in this case violated Mr. Helmig's right to due process of law, and that he is therefore entitled to issuance of the writ of habeas corpus.

C. Kenny Hulshof Knew or Should Have Known That the Testimony Presented Was False That Dale Helmig Tacitly Admitted Killing his Mother.

This issue has been discussed in some detail in connection with Mr. Helmig's meritorious claim of actual innocence, and this Court's findings on that matter apply to this issue as well. On the night of Petitioner's arrest, Carl Fowler asked Missouri State Highway Patrolman Robert Westfall to interrogate him. Trooper Westfall told Mr. Helmig that his own mother also had died, and, using a Bible as a prop, said that he talked to his mother often. He asked Petitioner what he would say to his mother, and Petitioner began to cry, and said, "I'm sorry, I'm just sorry," before regaining his composure and declining to answer further questions. Trial Tr. 1030-33. At the very end of his direct examination of

Westfall, Hulshof asked:

Q. Sir, *at any time during these contacts and particularly during this conversation which you've just shared with us, did Dale Helmig ever deny killing Norma Helmig to you?*

A. *No sir, he did not.*

Trial Tr. 1033 (emphasis added). Trooper Westfall's testimony was utterly false; his report of March 6, 1993, written the same day as the questioning session, clearly states, "He [Dale Helmig] stated that he did not murder his mother and that

the Sheriff was after him.” Ex. 65. His testimony before this Court forthrightly admits that his report, not his trial testimony, is the truthful version of what occurred. Deposition of Robert Westfall, pp. 27-28, 49. Unfortunately, neither Kenny Hulshof nor defense counsel Christopher Jordan corrected the false testimony. This Court finds that the prosecution elicited testimony before the jury that it knew or should have known was false.

This Court further finds that the presentation of false testimony that Mr. Helmig tacitly admitted to killing his mother is prejudicial. “It is so instinctively natural for one, directly charged with some great crime, to repel the charge with an immediate and direct denial, that failure to do so *is regarded as a tacit confession* or admission of guilt, and as competent evidence thereof.” *State v. Walker*, 73 Mo. 380 (1883) (emphasis added). Missouri law considers a tacit admission to be direct evidence of guilt which, coupled with evidence that a crime has been committed, provides sufficient evidence to prove guilt beyond a reasonable doubt. *State v. Case*, 140 S.W.3d 180, 189 (Mo. App. 2004); *accord*, *State v. Criger*, 46 S.W.2d 537 (Mo. App. 1932) (holding that a circumstantial evidence instruction was not necessary where the state’s case included a tacit admission of guilt.) Because of this prejudicial violation of his constitutional

rights, this Court finds that Mr. Helmig is entitled to habeas corpus relief.

D. The Prosecutor Knew or Should Have Known of the False Inferences of Guilt from Dale's Compliance With Orders From Deputy Paul Backues.

Another allegedly "suspicious" fact heavily emphasized by the state was that Dale did not come to the crime scene Saturday to join in the search for his mother. The facts supporting this claim have been discussed in connection with Mr. Helmig's claim of actual innocence, and those findings apply to Mr. Helmig's claim of prosecutorial misconduct as well.

After eliciting that fact repeatedly from several witnesses Trial Tr. 493, 529, 576, 717, 730, the state argued:

Richard Helmig was down there, the defendant's brother, through the course of this. But where's the defendant on Saturday? He's worried about Mom, tells everybody on Friday, "Oh, my gosh. Something's happened to Mom. Something's happened to Mom." He's not down there all day on Saturday. Just a coincidence? Use your common sense, ladies and gentlemen. He never showed up on Saturday.

Trial Tr. 1149. The Court finds that this argument was unfair and misleading.

The prosecution knew or should have known from documents in its file that Dale Helmig was simply following instructions from Deputy Backues, who told him to keep his children away from the investigation. He documented his instructions in

his report, Ex. 40, p. 224, Report of Paul Backues, July 30, 1993, and he told Stacey Medlock in her tape-recorded interview, “I told him I didn’t think it was a good idea to bring his kids down there.” Ex. 38, p. 214. Petitioner’s brother, Rich, told Dale on Friday night, July 30, that it was important to visit with his children, whom Dale had not seen in months. Rich assured Dale that he would take care of things in Linn. 29.15 Tr. 50.¹⁶

This Court finds that the argument of the prosecutor seeking to draw an incriminating inference from Mr. Helmig’s compliance with the instructions of Deputy Backues is misleading and fundamentally unfair. This is yet another example in this case of the prosecution overreaching and drawing inferences of guilt from innocent conduct. The Court finds that the prosecutor’s conduct misled the jury, and violated Mr. Helmig’s right to due process of law. Therefore, he is entitled to the writ of habeas corpus.

The Court finds with respect to Mr. Helmig’s claim 3 that the conduct of the prosecution violated Mr. Helmig’s right to due process of law. Prosecutors must refrain from the use of methods calculated to produce wrongful convictions; although a prosecutor “may strike hard blows, he is not at liberty to strike foul

ones.” *United States v. Young*, 470 U.S. 1, 7 (1985). Therefore, the due process clause imposes an affirmative duty on the prosecution to promptly remedy any perjured testimony which surfaces in its case. *Napue v. Illinois*, 360 U.S. 264, 269, (1959). The State’s failure to do so requires a new trial if “the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.” *Id.*, at 271. *See also*, *United States v. Agurs*, 427 U.S. 97, 103 (1976).

In sum total the Court considers the following:

- (1) Mr. Helmig’s strong showing of actual innocence;
- (2) The prosecutor’s use of improper testimony that Dale Helmig assaulted his mother three days before her death;
- (3) The use of false evidence that Dale Helmig tacitly admitted killing his mother as testified by Trooper Westfall;
- (4) The absence of Dale Helmig from the crime scene investigation in compliance with Deputy Backhues’ instructions established his consciousness of guilty without explanation as to the reason for his absence.

Considering all the above, Mr. Helmig has amply demonstrated that he is the victim of a fundamental miscarriage of justice which justifies habeas corpus relief.

State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993). Therefore, this Court directs that the writ of habeas corpus will issue requiring that Mr. Helmig be granted a new trial or discharged from his conviction and sentence.

Claim No. 5 – Newly Discovered Evidence

Mr. Helmig alleges that new evidence supports his innocence of the crime and satisfies Missouri's clear and convincing evidence standard for entitlement to habeas corpus relief under *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003). This Court agrees, based upon its review of all the evidence presented at his trial, his Rule 29.15 proceedings, and evidence presented in this Court, that Mr. Helmig has met this burden. This Court thoroughly discussed the issue of Mr. Helmig's innocence as a threshold matter in Part II, above, and those findings and conclusions apply here as well and will not be repeated. Because this Court finds that Mr. Helmig is actually innocent of the murder of his mother, he is entitled to habeas corpus relief.

Claim No. 6 – Extraneous Materials in the Jury Room

The parties stipulated that this Court accept the record of the testimony in the transcript of proceedings in *Helmig v. Kemna*, No. 4:02-CV-574 DDN (E.D.Mo. Sept. 20, 2005), filed herein as Exhibit 57, as the facts supporting Mr.

Helmig's claim that his right to a fair trial was violated by the jury's consideration of a map which was not in evidence, but which nevertheless was provided to them during deliberations.

Based on its review of the record, this Court finds as follows: The state's circumstantial evidence case involved upon the geographic relationship of various locations and events, including Mrs. Helmig's remote rural home on Pointer's Creek; the American Legion Hall; the Country Kitchen Restaurant; Ted Helmig's apartment in Jefferson City; Dale Helmig's travels on July 28 and 29, 1993, which included the Missouri River bridges at Jefferson City and Hermann; the Walmart and the Travelier Motel in Fulton; Holt's Summit, Missouri; and La Casa Restaurant in Jefferson City. Further, Mrs. Helmig's body was found floating near the confluence of the Maries and Osage Rivers a few hundred yards south of Highway 50, and her purse was found in a field which had once been covered by flood water north of the Missouri River. A hydrologist, Robert Westphal, testified that based on his review of relevant data, Mrs. Helmig's purse must have been thrown off the Highway 54 bridge over the Missouri River at Jefferson City.

Trial Tr. 943-963.

The Court further finds that there was evidence presented by the state at Mr.

Helmig's trial supporting a defense of alibi. Dale Helmig's statement which was in evidence asserted that he was checked into a hotel in Fulton, Missouri the night his mother was killed. Documents of the Travelier Motel and the testimony of pizza delivery man Dennis Hazelwood substantiate that claim. The concrete block tied to Mrs. Helmig's body was believed to have been taken from her home next to Pointer's Creek. There was testimony that the rivers in question had overflowed their banks on the day of Mrs. Helmig's disappearance and murder, so that various bridges in the vicinity were closed for part or all of the critical time period. The state presented, then argued as consciousness of guilt, that Mr. Helmig fabricated his plausible alibi in advance of the murder.

The record before this Court shows that after the Missouri Court of Appeals affirmed the denial of Mr. Helmig's Rule 29.15 motion, counsel for Mr. Helmig learned that during deliberations at least one juror was having difficulty reaching a verdict of guilt based on such issues. To resolve the impasse, jurors asked someone outside the jury room for a map of the region showing the rivers and roads in question. No such map was introduced into evidence during the trial. Nevertheless, someone obtained such a map and gave it to the jury. The map was used to quell the doubts expressed during deliberations. Mr. Helmig's counsel

came upon this knowledge by happenstance, while investigating other unrelated issues.

Jurors Stanley Dahl and Judy Wright testified in support of Mr. Helmig's claim in federal habeas corpus proceedings that the jury's consideration of a map that was not in evidence violated his constitutional rights. Mr. Dahl testified that one juror in particular persisted in voting not guilty. Ex. 57, p. 514. The source of her disagreement, according to Mr. Dahl, had to do with the location of Mrs. Helmig and her purse and the scene of the crime. *Id.*, 516. To resolve the impasse during deliberations, the jurors knocked on the door of the jury room and requested a map which was provided. *Id.*, 516-17. After seeing the map, the juror in question changed her vote to guilty. *Id.*, 518.

The testimony of Ms. Wright is consistent with Mr. Dahl's in every material respect. The jury had not yet reached a unanimous verdict, Ex. 57, pp. 528-529, and the jury sent for a map for the purpose of resolving a factual issue. *Id.*, 529. They had previously attempted to bring this juror around using the exhibits in evidence at trial, but the photographs in evidence didn't satisfy her; "There was still doubt with this one juror." *Id.*, 530. As a result of obtaining the map, the hold-out juror changed her vote to guilty. *Id.*, 532.

Providing the jury with extrajudicial evidence not presented at trial deprives the defendant of notice of the evidence against him, and an opportunity to present contrary or explanatory evidence in response. Further, the potential influence on jurors deprives the defendant of his right to a fair and impartial jury reaching a verdict based on evidence received at trial. The Court finds that allowing the map into the jury room violated Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution.

Mr. Helmig petitioned for Habeas Corpus relief in the United States District Court for the Eastern District of Missouri, including a constitutional claim that the jurors' use of the map violated his right to a fair trial. United States Magistrate

Judge David Noce made the following findings of fact on this issue:

Petitioner alleges that, during jury deliberations, the jurors were supplied with a map, not otherwise introduced into evidence, of the relevant areas in question. A hearing on this ground was held on September 20, 2005. After considering the evidence adduced at this hearing, the court makes the following findings of fact and conclusions of law:

FACTS

1. At the close of petitioner's trial, the judge instructed the jury "It is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence." (Doc. 7, Ex. B at 103.)

2. During deliberations, one juror had doubts about petitioner's guilt; specifically, the juror had questions about the distances along the rivers, the directions they flowed, and highways in the area. The juror's questions were not answered by the evidence presented at trial.

3. Other jurors tried to persuade this juror that petitioner was guilty, and tried to supply answers to the questions about the rivers and highways. They were unsuccessful in their attempt to change the juror's mind.

4. At that point, one or more jurors asked for a map of the area, to answer the juror's questions about distances and river flow direction. Someone outside the jury room supplied a map to the jurors. It was a printed roadmap of the area that the juror had questions about.

5. The juror with doubts and some of the other jurors looked at the map. After looking at the map, the juror who had expressed doubts about petitioner's guilt voted with the rest of the jurors to find petitioner guilty.

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Based on his factual findings, Judge Noce concluded that the jury's

consideration of extrajudicial evidence violated Mr. Helmig's right to due process

of law and a fair and impartial jury:

“Jury exposure to facts not in evidence deprives a defendant of the rights to confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment.” *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). As the United States Supreme Court has noted:

The requirement that a jury's verdict “must be based on the evidence developed at the trial” goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.

. . . .

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the “evidence developed” against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); see also *Harold v. Corwin*, 846 F. 2d 1148, 1150 (8th Cir. 1988) (“[E]xhibits or materials neither in evidence nor used or exhibited before the jury during the conduct of the trial that reasonably can be said to improperly influence the verdict have no place in the jury room.”).

Add. 56. Judge Noce further observed that “the state has not shown that the

strength of its case in this matter was so strong that guilt was inevitable despite the use of the map. In fact, until the map was reviewed, one juror was *not* fully convinced of guilt by consideration of the state's evidence at trial." *Id.*, 58 (Court's emphasis). This Court agrees; the evidence establishes that the map was used to persuade a holdout juror who had a reasonable doubt of Petitioner's guilt to join a unanimous conviction.

The document in question was never marked as an exhibit, mentioned to the court or counsel, and its nature and whereabouts are unknown. The only things established with certainty about the map is that it showed areas and geographical features that were not covered by evidence or testimony at the trial, and it caused the holdout juror to change her vote where no other evidence could. Its content cannot be reconstructed. Juror Dahl testified that it was "like a highway map," Ex. 57, p. 515, in that it had roads and rivers that were named. *Id.*, 516. Juror Wright testified that she didn't know what kind of map it was. Although she did not get a close look at the map, she "could see that there was writing on it." Ex. 57, p. 533. Based on the foregoing, Judge Noce granted habeas corpus relief.

The State of Missouri appealed Judge Noce's order, and the Eighth Circuit Court of Appeals reversed because "the district court erred in applying the

presumption of prejudice without taking into account that this is a habeas case.”

Helmig v. Kemna, 461 F.3d 960, 963 (8th Cir. 2006). Because the Eighth Circuit concluded that the order granting relief rested upon a presumption of prejudice, the Court vacated Judge Noce’s order granting habeas corpus relief. *Id.*

The issues arising from the jury’s consideration of non-record evidence is properly before this Court, as the opinion of the Eighth Circuit Court of Appeals rejecting this claim is based on a higher burden of proof and other procedural limitations that do not exist in this Court. Missouri courts, unlike the Eighth Circuit Court of Appeals on habeas review of a state prisoner’s claim, presumes prejudice from improper contact with the jury during deliberations. *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984) (“there is a rebuttable legal presumption that [communications with jurors] were prejudicial to the moving party.) While the Eighth Circuit Court of Appeals placed the burden of proof on Petitioner, *Helmig v. Kemna, supra*, at 963, under Missouri law, “The State had the burden, under the circumstances, of affirmatively showing that the jurors were not improperly influenced.” *State v. Quinn*, 405 S.W.2d 895 (Mo. banc 1966). Thus, the decision of the Eighth Circuit Court of Appeals does not preclude

habeas corpus review in a Missouri court. *Shelton v. City of Springfield*, 130 S.W. 3d 30, 36 (Mo. App. SD 2004) (Collateral estoppel does not apply where the prior proceeding involves different issues and standards of proof.)

Mr. Helmig has already prevailed in a court of law after an evidentiary hearing on this very issue under the standards of proof that this Court must apply. This Court finds that during deliberations, jurors were given a map that was not in evidence, and the map persuaded at least one juror to vote guilty. Further, the State has not carried its burden to show that Mr. Helmig was not prejudiced by the extraneous evidence in the jury room. Therefore, Mr. Helmig is entitled to a writ of habeas corpus directing that he be discharged unless the State of Missouri retries him within a reasonable time.

Claim No. 7 – Impaired Trial Counsel

Petitioner contends that he was denied the effective assistance of counsel because his trial attorney Christopher Jordan was impaired by drug use at the time of his trial. Petitioner concedes that he has not produced an eye-witness who saw him ingest drugs during trial; however, Petitioner contends that there is nevertheless sufficient evidence of impairment for this Court to find that Mr. Jordan was impaired at the time of his trial. He points to the testimony of former

State Trooper Robert Westfall, who characterized Mr. Jordan's behavior during the trial as "disjointed," "lost," "incoherent," "shifty," and "fidgety." Deposition of Robert Westfall, 12, 16. The term "glassy-eyed, it would have been a proper description." *Id.*, 16. Jordan's thinking was "nonlinear," *Id.*, and based on Mr. Westfall's observations, if he had pulled over a motorist who presented in a similar fashion, he would have inquired further into possible intoxication. *Id.*, 15. While Mr. Westfall did not recall whether he said that it was his firm impression that Mr. Jordan was high on something, Mr. Westfall testified, "It would not have been an inaccurate description of my observations." *Id.*, 17. Mr. Jordan's presentation "could draw references to other individuals" Mr. Westfall had encountered who were intoxicated on "uppers" such as cocaine, crack cocaine or methamphetamine. *Id.*, 17-18.

Further, after Mr. Westfall testified at Mr. Helmig's trial, he was concerned that something was wrong with Mr. Jordan, and discussed his condition with several officers who were present in the courthouse and who observed Mr. Jordan's behavior at the trial. *Id.* at 47-48. In Mr. Westfall's words, "something was wrong." *Id.*, 47. In June of 2008, law student Brandon Hoerl had a conversation about Mr. Helmig's trial with Mr. Westfall. Mr. Hoerl recalls Mr.

Westfall stating that it was his “firm impression that Jordan was intoxicated at trial.” Hrg. Tr. Vol. 2, 175. Mr. Westfall suggested to Mr. Hoerl that Chris Jordan was possibly abusing cocaine, crack or methamphetamine at Mr. Helmig’s trial. Hrg. Tr. Vol. 2, 176. The Court lends considerable credence to this testimony in light of Mr. Westfall’s considerable training and experience as a law enforcement officer.

Randy Waltz was Christopher Jordan’s law partner at the time of Mr. Helmig’s trial. He testified that prior to Mr. Helmig’s trial, Chris Jordan was beginning to display forms of erratic behavior, such as coming in to the office in the morning and wonder what was going on. Hrg. Tr. Vol. 1, 111. Mr. Waltz also caught Mr. Jordan stealing a number of pain pills from the medicine cabinet in his office. *Id.* at 112. During Mr. Helmig’s trial, Waltz delivered a piece of evidence to Mr. Jordan, he observed:

My antenna and my radar was alerted that he didn’t seem normal. He seemed jittery but his eyes especially. I asked him if he was okay, if he was getting enough sleep.

Id. at 123. Shortly after Mr. Helmig’s trial, Mr. Jordan offered Waltz a marijuana cigarette. *Id.* at 114.

Patty Rogers also observed strange behavior from Mr. Jordan during Mr.

Helmig's trial. On one morning of trial, Mr. Jordan failed to show up:

Q. (By Mr. O'Brien) Were there things about the way Chris Jordan was behaving that caused you concerns?

A. Yes.

Q. Can you tell me what that was?

A. Either the second or third day of trial, I can't recall which day exactly it was but Court had begun. The Judge was ready and Chris was not there. So I hopped in the car, ran over to the hotel; he stayed I think just two rooms down from us, to awaken Mr. Jordan. He was still sleeping.

Q. Alright and did you observe -- what did you observe about Mr. Jordan?

A. After I knocked for several minutes he answered the door with -- he just -- he was a mess. He looked like he had not slept or had just fallen asleep. He just was not prepared.

Q. What did his clothes look like?

A. I actually believe he had on either the same clothes he had on the day before or close to the same attire.

Q. And what condition were they in?

A. A tattered mess.

Q. What was his hair like?

A. Standing on end.

Q. Alright, his personal hygiene?

A. Terrible.

Q. And generally what was his demeanor when you roused him that morning?

A. He was angry.

Q. When he got to court had he managed to clean up or did he look like he did at the hotel?

A. He didn't look much better. His clothes were changed but that was all.

Hrg. Tr. II 17-18. On several occasions during the trial, she observed Mr. Jordan give Petitioner pills similar in description to the pills taken from Mr. Waltz's cabinet, and she noticed that these pills affected Mr. Helmig's behavior, causing him to become tired and lazy eyed. Hrg. Tr. II 19, 22-23.

Petitioner tendered other evidence of witnesses who observed drug use or drug-related behavior before and after Mr. Helmig's trial, *See, e.g.*, Affidavit of Donna Schaal, Ex. 62,¹⁷ Affidavit of Probable Cause, *State v. Jordan*, Boone County Case No. C7BA-CR03608. This Court at the hearing limited the scope of

evidence to the time frame of Mr. Helmig's trial. The record of the trial itself is highly relevant to this issue, and the Court has found a number of passages suggesting that Mr. Jordan's judgment and acumen were indeed impaired.

1. Evidence of impairment – opening statement.

In his opening statement, Jordan babbled incoherently, giving the jury no coherent theory of defense. He described the case as “lies versus lies,” implying the his own client's statements were false. Trial Tr. 248. He spent an inordinate amount of time in his opening calling attention to the gory details of the recovery of Mrs. Helmig's “putrefied, decomposed body,” Trial Tr. 246, and the grisly process of decomposition, and accompanying insect activity. Trial Tr. 246-47.

After describing the process of the decomposition of Mrs. Helmig's body, he told the jury that authorities “squeezed her in” a body bag and “put her in the back of a pickup truck in the hot sun with flies buzzing around it.” Trial Tr. 246-47. He made a peculiar reference to “the lies, the cover-ups, weirdness after weirdness, satellite photos from outer space, Israeli secret service agents,” which was never subsequently explained. Trial Tr. 248. Jordan told the jury, without explaining what he meant, “that body floating in the river, that wasn't Norma Helmig.” Trial Tr. 251. He spoke in non-sequiturs, abruptly leaping from subject to subject.

2. Evidence of impairment – presentation of evidence.

During the evidence portion of the trial, Jordan's main area of cross-examination of many of the state's witnesses involved the nauseating details surrounding the recovery of Mrs. Helmig's bloated and decomposed body from the river. His obsession with those grisly facts consumes many pages of the trial record, even though they have no probative value whatsoever on any issue of his client's guilt or innocence. *See*, Trial Tr. 336-43, 433-40, 433-40, 776-79. It was not the prosecution but Christopher Jordan who insisted that the video-tape of the recovery of her body be played in its entirety for the jury.

Jordan completely overlooked crucial opportunities to elicit exculpatory evidence or impeach untruthful prosecution testimony. For example, when the state introduced false testimony of Trooper Westfall that Dale failed to deny murdering his mother, Trial Tr. 1033, any competent lawyer would have easily turned the table by confronting the officer with his report. Ex. 65, p. 588.¹⁸ Being caught red handed in such a blatant lie would have seriously damaged the integrity of the state case in the eyes of the jury, but Mr. Jordan apparently was not sufficiently alert to seize the opportunity.

Jordan's bad judgment is particularly evident in his inane choice of defense. In a case in which his client had a viable alibi defense, and the prosecution was based primarily on easily explained or refuted allegations of suspicious circumstances, Jordan put virtually all of his energy at trial and on appeal pursuing a theory that the government had not proved human agency in her death, notwithstanding the fact that she was found floating in a river fifteen miles from her home, barefoot, clad only in her nightgown, tied to a concrete block. The trial judge called the notion "ridiculous," Trial Tr. 1128, and the court of appeals said it was "unreasonable." *State v. Helmig*, No. 70611 at 6 (Mo. App. E.D. July 22, 1997). Indeed, it is irrational.¹⁹

Further, Jordan's failure to research or consider the implications of his pursuit of the frivolous defense of accident or suicide reveals a deficient reasoning process. He did not consider that his ridiculous choice of defense opened the door to statements allegedly made by Mrs. Helmig that would otherwise be inadmissible hearsay under Missouri law. In *State v. Revelle*, 957 S.W.2d 428, 431-32 (Mo. App. 1998), the court ruled that it was reversible error to admit into evidence a hearsay note from the victim, defendant's wife, containing statements

about their strained marriage. However, where an accused claims self-defense, suicide, or accidental death, hearsay statements made by the victim that illustrate his or her state of mind become relevant and admissible. *State v. Kennedy*, 842 S.W.2d 937, 942-43 (Mo. App. 1992). Thus, because of Jordan's totally meritless claim that Mrs. Helmig's death could have been an accident or suicide, Dorothy Bauer was allowed to testify that Mrs. Helmig was afraid of Dale and that they had argued over a phone bill. Trial Tr. 456-57. Lillian Wissman was allowed to testify that Mrs. Helmig was tired of being Dale's "meal ticket" Trial Tr. 1059. But for Jordan's hare-brained defense, testimony about Mrs. Helmig's statements would not have gone to the jury. The record exposes his ignorance of the damage that he would do in pursuit of his foolish defense. When the prosecution cited *State v. Kennedy* to the trial court, Jordan admitted, "I haven't read that case." Trial Tr. 455.

Jordan nevertheless doggedly pursued his bizarre theory by calling Arthur Newcomb, M.D., who reviewed Mrs. Helmig's medical records, and gave the jury his opinion that mixing Mrs. Helmig's prescribed medications with alcohol created a risk of fatal overdose. Trial Tr. 1083, 1086-89, 1109-10, 1123. However, in Jordan's words, Dr. Newcomb's testimony was "totally refuted,"

29.15 Trial Tr. 223, when the prosecution, on cross-examination, impeached him with S. Ex. 56, a toxicology report finding no trace of drugs in Mrs. Helmig's liver. Although the state had given Jordan the report prior to trial, Dr. Newcomb had never seen it before. Trial Tr. 1119-21. Thus, Jordan's "disruption" of "normal critical thinking," *In re Hein*, 104 N.J. 297, 304 (N.J. 1986), could not be more obvious. Not even his law partner of many years, a former judge himself, could dissuade him from the folly of his so-called "strategy."

Because of Mr. Jordan's impaired judgment, he did not know that he would need to refute false and misleading evidence of animosity between Dale and his mother, and he was unprepared to do so. Had he conducted a reasonable investigation, he could have exposed the absurdity of the State's theory that Dale Helmig killed his mother over a \$200 phone bill. Jordan himself admitted that the notion of antagonism between Dale and Norma "flew in the face of" everything he knew about them. 29.15 Tr., 233-34. Nevertheless, he didn't attempt to protect his client from the false accusations.

3. Evidence of impairment – Closing Argument.

Christopher Jordan's performance in closing argument was consistent with his performance on opening statement and during the presentation of evidence.

He did not present a coherent theory of defense, never used the word “innocent,” “not guilty” or its equivalent, and launched false and inappropriate attacks on his own client. He attacked his client’s claim of alibi, calling Dale’s hand-written statement “one of the more goofy things I’ve ever seen written by Dale,” and a “cockamamie, goofy, stupid statement.” Trial Tr. 1161. He told the jury that “by golly, he looks guilty, if you ask me.” Trial Tr. 1159. He called his own client a “jerk,” and said, “He’s a bum, I’ll admit that.” Trial Tr. 1165-66, 1167.²⁰

He centered his defense on the proposition, which the trial court called “ridiculous” Trial Tr. 1128, that Mrs. Helmig died of a drug overdose. Trial Tr. 1083, 1086-89, 1109-10, 1123. That defense was easily defeated by a crime lab report showing that there were no drugs in her system when she died. Trial Tr. 1119-21; 29.15 Tr. 223. Nevertheless, Jordan spent over a third of his closing arguments rambling about his cause-of-death theory, and a hefty portion of the balance of his argument denigrating his client. In the end, the only thing Jordan accomplished was to antagonize the court and the jury. More irrational, counter-productive conduct by a defense attorney is difficult to imagine.

In finding the Mr. Helmig is entitled to habeas corpus relief on this issue,

this Court is mindful that courts should take seriously the responsibility of protecting the public from substance-abusing lawyers. *In re Payne*, 494 N.E.2d 1283 (Ind. 1986). (disbarring attorney who possessed and used marijuana and cocaine while licensed to practice law; “attorney’s passion for drugs consumed his life and then destroyed his professionalism”). Because of the lawyer’s position of trust in the complex world of high-stakes criminal litigation, the risk of harm to clients such as Dale Helmig is high. *In re Stanback*, 913 A.2d 1270, 1277 (D.C. 2006) (attorney’s drug and alcohol abuse “substantially affected his performance as an attorney and altered his moral compass.”). Jordan’s behavior is similar to that described by the former partner of a lawyer who was disbarred for drug abuse:

By the end of the summer I couldn't even talk to him. [H]e became more and more distant and more erratic. And I would -- I would read some letters that he was doing, and it made no sense to me. And in conversations with people, and just the way he was . . . practicing to me, to me it wasn't based on logic or reason.

In re Steinhoff, 553 A.2d 1349, 1350. (N.J. 1989). (“Anyone who doubts the effect of cocaine on the health and well-being of the young person need only to read this record.”) Steinhoff’s long-standing drug abuse problem led to numerous

instances of ethical lapses and mental breakdown. *Id.* The New Jersey Supreme Court noted that “it cannot be doubted that respondent's judgment was impaired by cocaine” and described his behavior as “bizarre if not irrational.” *Id.* Drug dependency leads to “a disruption eventually of the normal critical thinking and in concern and judgment in his perception of daily living and in the accomplishment of skills in his particular profession.” *In re Hein*, 104 N.J. 297, 304 (N.J. 1986).

Missouri, too, has seen the devastating impact of attorney drug abuse. *See, In re Shunk*, 847 S.W.2d 789, 791 (Mo. 1993), cautioning that drug abuse “not only brings the lawyer's judgment and honesty into question but erodes public confidence in lawyers and the courts in general.” *See also In re Adams*, 737 S.W. 2d 714, 717 (1987) (calling cocaine a ‘scourge’ and finding that a cocaine abuse problem was not a mitigating factor for conduct which harmed client and “brought reproach to profession). In short, drug abuse “reflects adversely on [an attorney’s] honesty, trustworthiness, and his fitness to practice law.” *In re Nelson*, 255 Kan. 555, 562, 874 P.2d 1201 (1994).

Jordan’s conduct of the trial raises serious questions about his mental competence and moral fitness to conduct a complex, high-stakes jury trial in which his client’s life was on the line. Like the addicted lawyer in *Steinhoff*,

supra, Mr. Jordan's performance at Mr. Helmig's trial was "bizarre if not irrational," and there is clear evidence in the record at every stage of the trial of "a disruption ...of the normal critical thinking and...judgment ," as well as deficiency in the "skills in his particular profession." *In re Hein, supra*, at 304. Jordan's behavior was inexplicably bizarre throughout the trial.

Based on the witness testimony and the trial record as a whole, the Court finds that Mr. Helmig's evidence that Mr. Jordan was impaired is credible and persuasive. In the words of Mr. Westfall, something was wrong. Mr. Jordan's judgment and performance were clearly deficient, and Mr. Helmig was prejudiced by his deficient performance. A reasonably competent lawyer, exercising sound judgment, could have mounted a reasonable and successful adversarial challenge to the substantial disinformation on which the state's case rested.

For the foregoing reasons, this Court will issue the writ of habeas corpus directing that Mr. Helmig be discharged from his conviction and sentence if not retried within a reasonable time.

In conclusion, for all the foregoing reasons, this Court finds that Dale Helmig has established by clear and convincing evidence that he is innocent of the crime for which he was convicted and sentenced, and that his constitutional rights

were violated at his trial in the manner described above. As stated in *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), Petitioner having met his burden, the evidence supporting the conviction must be assessed in light of all the evidence now available. There was no physical evidence linking Petitioner to the murder. The thin circumstantial evidence has been substantially weakened by the newly discovered evidence previously discussed. This case presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. This Court determines based on the record that under these rare circumstances, there is clear and convincing evidence of Dale Helmig's innocence. As such his conviction and sentence cannot stand and must be set aside.

Therefore, it is ordered that the Writ of Habeas Corpus will issue directing Respondent and the State of Missouri to discharge Mr. Helmig unless he is brought to trial within 180 days of this order.

Dated this 3rd day of November, 2010

Warren L. McElwain, Judge