IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

RODNEY L. LINCOLN,	)	
	)	
Rodney,	)	
	)	
v.	)	**No.**
	)	**Div.**
JAY CASSADAY, Superintendent, Jefferson City Correctional Facility,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO RULE 91 AND SUGGESTIONS IN SUPPORT

Comes now Petitioner, Rodney L. Lincoln, by counsel, and petitions this Court for a Writ of Habeas Corpus pursuant to Mo. Rule 91, Section 532.430 RSMO, Article I, Section 12 of the Missouri Constitution and *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003), based upon clear and convincing evidence that he is innocent.

Mr. Lincoln's conviction was obtained by pressuring a traumatized seven-year-old girl to identify a photo of Rodney Lincoln, and bolstering the obviously suggestive identification by manipulating microscopic hair comparison beyond the limits of valid forensic science. Mr. Lincoln brings this Petition in response to new developments that undermine all of the evidence used to convict him, namely the

credible retraction by M.D.[1] of her identification of Rodney Lincoln as the man who attacked and stabbed her, her sister, R.T., and her mother, Joanne Tate. M.D.'s identification of Mr. Lincoln as the assailant "was the crux of [Mr. Lincoln's] convictions." *Lincoln v. State*, 457 S.W.3d 800, 801 (Mo. App. ED 2014). The only physical evidence corroborating M.D.'s identification at trial was a pubic hair that detectives found on a blanket at the scene of the crime: criminalist Harold Messer testified that the pubic hair matched hair samples taken from Rodney Lincoln. (T. 717-18.[2]) That testimony is now known to be false; "DNA testing showed that [the hair] did not belong to [Mr. Lincoln]." *Lincoln v. State*, 457 S.W.3d at 804. In Mr. Lincoln's motion for DNA testing to prove his innocence, "the parties agreed that the various police reports gave no results that could place Movant at the scene of the crime." *Id*. Thus, with the retraction of the identification testimony that was the "'lynchpin' of [Mr. Lincoln's] conviction," *id.*, and the elimination of the sole piece of physical evidence to support it, Mr. Lincoln's case is indistinguishable from Joseph Amrine's, in which the Missouri Supreme Court held:

> This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. This Court, sitting as an original habeas

[1] Out of respect for their privacy, the child victims/witnesses in this case are identified only by their initials, M.D. and R.T. Although R.T. survived the attack, she has since succumbed to cancer.

[2] Cites to the Trial Transcript, which is attached as Exhibit 24, are cited as "T." followed by the transcript page number.

> court, determines based on this record that under these rare circumstances, there is clear and convincing evidence of Amrine's innocence. As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside.

Amrine v. Roper, 102 S.W.3d at 548-49.

For the same reasons, the reliability of Mr. Lincoln's conviction and sentences are so undermined that they must be set aside. In addition to his Amrine claim that justifies relief based on his innocence, even if he had a fair trial, Mr. Lincoln's innocence also breaks down all procedural barriers to review of his claims that his trial was unfair. Because Mr. Lincoln supplements his claims with persuasive evidence that he is actually innocent of attacking Joanne Tate and her daughters, this Court may freely reach the merits of all of his constitutional claims:

> [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), and also recognize that clear and convincing evidence of innocence justifies habeas corpus relief even if the petitioner had a fair trial. *Amrine v. Roper,* 102 S.W.3d 541 (Mo. 2003). Determining whether Mr. Lincoln is actually innocent may require the court to revisit previous credibility

determinations, and may include evidence that someone else committed the crime, as in *Amrine*, 102 S.W.3d at 545, and *Schlup v. Delo*, 513 U.S. 298, 330 (1995) (noting that new evidence "may indeed call into question" previous credibility determinations); s*ee also House v. Bell*, 547 U.S. 518, 540 (2006). The evidence of Mr. Lincoln's innocence is clear and convincing; further, Mr. Lincoln can show a reasonable probability that no fully-informed juror would find him guilty, and that constitutional violations that rendered his trial fundamentally unfair.

In further support of his Petition, Mr. Lincoln states as follows.

FACTUAL AND PROCEDURAL HISTORY

On April 27, 1982, 35-year-old Joanne Tate was murdered in her apartment in St. Louis, Missouri. Her two daughters, seven-year-old M.D. and four-year-old R.T., were also attacked, but miraculously survived. Tate's brother, Nathaniel Clenney, arrived at the home and found Tate lying on the floor, and her daughters in their beds, blankets pulled up to their heads. (T. 293.) Tate was face-down in a pool of blood. (*Id.*) She had massive bruises on her chest, abrasions to her wrist, and a broom handle inserted into her rectum. (T. 297, 767.) A stab wound to the left side of her body was ultimately ruled the cause of death. (*Id.*) M.D. was found in bed, her body covered in blood. (T. 294, 471.) She had been stabbed approximately 10 times. (T. 295.) R.T. was also found in bed, with lacerations to

her neck where her right carotid artery had been cut. (T. 294-295, 489.) None of the evidence at the crime scene gave police any immediate leads.

M.D.'s Identification

Investigating officers turned to the surviving children for information. They focused on the statements of hospitalized seven-year-old M.D., which varied over time. Throughout her month-long stay at the hospital, investigators showed M.D. several photo line-ups, each including 10-13 photos. (T. 504-505; Ex. 27, State's Exhibits 113 a-j; T. 505-506; Ex. 28, State's Exhibits 114 a-l; T. 740-742; Ex. 29, State's Exhibits 115a-m; T. 508-509; T. 511.) She did not identify the perpetrator. (*Id.*)

When asked at the crime scene by Nathaniel Clenney "Who did this?" M.D. replied, "the man who worked on mama's car"—"Bill." (T. 402.) That same day, while still awaiting treatment in the E.R., M.D. described the crime to social worker Wayne Munkel and again identified the perpetrator as "Bill." (T. 512, 786-788.) Hours later, still in the emergency room, Melinda Parris, M.D.'s older sister, guessed, "Was it Gary?" (T. 786-7; Ex. 8, Police Reports at 23[3].) M.D. confirmed, "Yes."(*Id.*)

The next day, April 28, detectives questioned M.D. while she was recovering from surgery in the ICU. Armed only with the name "Bill," officers

[3] The page numbers in Exhibit citations refer to the PDF file page numbers.

showed M.D. several photos of men named Bill, William, Billy, and Will. (T. 504-505; Ex. 27.) M.D. did not see the perpetrator in any of the photos (T. 504), but identified Gary Larose and Tom Shultz as people she knew. (*Id.*) M.D. also told detectives that Bill had driven a yellow cab in 1981 but now drove a white Volkswagen and lived in Illinois with his drunk mother. (T. 355, 513-14; Ex. 8 at 33.) She also mentioned to her uncle that the perpetrator had recently moved or traveled to Hollywood, CA. (Ex. 8 at 26.) R.T. also viewed the photos and identified four of them as people she knew. (Ex. 28; Ex. 8 at 92.)

Two days later, on April 30, detectives again returned to M.D.'s hospital room with twelve more photos. (T. 505-506; Ex. 28.) M.D. again looked through the photos but did not identify the perpetrator or anyone named "Bill." (T. 506.)

On May 4, 1982, a week after the crime, M.D. was questioned yet again, this time by Detective Joseph Burgoon. (T. 508-509; 515.) Again, M.D. did not identify anyone as the man responsible for the crime. (T. 509.) This time she told detectives that she had first met Bill at a park (T. 515), but on another day he had taken them to his house. (T. 516.) Bill drove a yellow taxi and "had black hair all the way to his ears." (T. 515; Ex. 8 at 33.) Bill had also been to their apartment three days before to fix her mom's car. (T. 516, 402.)

Detectives showed M.D. yet more photos, including one of Steve Yancey, a neighbor, who she recognized and to which she reacted (T. 740-742; Ex. 29.) The

detectives reported she made no identification. (T. 740-1.) At the time, social worker Munkel noted: "Patient in much discomfort and interview stopped several times. Patient repeated many previous statements. Patient expressing anger toward [detectives] Burgoon and Munkel later. Patient also blocking painful experiences recalled earlier." (Ex. 12, M.D.'s medical records at 73.) R.T. did not look at the pictures. (Ex. 8 at 34.)

The next day, Detective Burgoon returned and continued his questioning of M.D. M.D. again recounted new facts, this time stating that Bill left his black striped coat on her bed after the attack.[4] (Ex 8 at 24.) She also identified McKinley Bridge as the bridge she, R.T., and Tate travelled over to go Bill's house, and that the house was by a park. (T. 514.)

A week later, on both May 11 and May 14, officers checked the children out of the hospital to search for the park and house. Although the children identified McKinley Bridge, they could not find the house. (Ex. 12 at 75-77.)

On May 18, 1982, the police asked the child to assist in the creation of a composite sketch. Instead of starting with a blank piece of paper, they began with a photo of Dennis Smith, a family friend who M.D. said resembled the killer. (T. 608-9.) M.D. made a couple of changes to the sketch of Smith. She said Bill had darker hair, and that his ears were slightly different. (*Id*.)

[4] Biological evidence was found on the bed. The fact that the perpetrator placed his clothing on the bed directly links the hair evidence found to the identity of the perpetrator.

Burgoon released the sketch to the news media, both print and television on May 21, 1982. (T. 746; Ex. 31, State's Exhibit 10, Composite Sketch; Ex. 32, State's Exhibit 13, photo of Dennis Smith.)

After the sketch was released, Daniel Clenney and his sister went to police, noting that the sketch looked familiar, but they could not place a name on it. (T. 613-14.) The police opened Tate's diary and read out names to Tate's brother and sister. When the name "Rod" was suggested, Clenney agreed that the sketch reminded him of that individual, later identified as Rodney Lincoln. (T. 614.)

On May 23, 1982, Detective Burgoon went to visit M.D. and R.T., who had recently been discharged from the hospital and were staying with their grandmother. (T. 431.) Before showing them any photos, he told them he had a magic door downtown and that the bad man was behind the magic door. (T. 432,

441.) He informed them it was very important that they pick out the right man so the bad man would not go free. (*Id.*) He then showed the children just two photos: One was a 5-year-old black and white mug shot of Rodney Lincoln and the other was a color photograph of Gary Parris (Ex. 26, State's Ex. 117 a,b Gary Parris polaroid, Rodney Lincoln Mugshot), a relative of their older half-sister. (T. 440, 751; Ex. 8 at 212.) The 7-year-old victim picked the picture of Rodney Lincoln. (T. 300, 752; Ex. 8 at 212.)

Within two hours of being shown Mr. Lincoln's picture, the children were taken to a live line-up, which included Mr. Lincoln and only three other men—all at least 16 years younger than him, heavier set, and with bushier hair. **(**T. 771-2; Ex. 8 at 213.) Only Rodney Lincoln's picture had been included in any previous photo line-up.

None of the men looked anything like Mr. Lincoln or the composite sketch. Police reports indicate M.D. identified Rodney Lincoln. (T. 754-5; Ex. 8 at 213.)

On May 26, 1982, three days after Mr. Lincoln's arrest, Wayne Munkel noted a call from Detective Burgoon: "Also informed by Detective Burgoon that there are problems in the investigation and that Cardinal Glennon staff may be asked to help work with the patient and sibling on identification of the picture." (Ex. 11, Deposition of Wayne Munkel at 15.)

M.D. testified to her identification at trial, stating that the man in the picture was Rodney Lincoln and she was sure it was him. (T. 332-3.) She also testified that she had never called Rodney "Bill," that her mom had never called Rodney "Bill," and that her mom had dated another man named "Bill." (T. 360.) Then eight-years-old and still recovering from her injuries and loss of her mother, M.D. was

extremely traumatized physically (T. 486-488), mentally, and emotionally. (Ex. 33, Ann Carberry Deposition at 5, 13-14.) During the competency hearing held before the first trial, M.D. had moments of clarity and understanding interspersed with confusion and the inability to comprehend the questions that were being asked. (Ex. 16, Transcript of Testimony and Competency Hearing, M.D. at 42.)

Also at this hearing, it was clear the child's recollections had changed. The only constant in M.D.'s version of events was that for the first three weeks of the investigation, she was certain the crime had been committed by a man she knew as "Bill." (*Id.* at 45.) After the arrest of Rodney Lincoln, her story changed to identify Mr. Lincoln.

Hair Evidence

Along with M.D.'s identification, the State also emphasized the testimony of Harold Messler, chief criminalist at the St. Louis City Metropolitan Police Department. In its opening statement, the State flagged this key issue for the jury:

> The evidence will also be that after his arrest, pubic hair samples were taken from the defendant, and that Harold Messler, the chief criminalist at the police department lab, compared his pubic hair to the one found on the blanket at the scene of this crime, and they were found to be identical or comparable, and his testimony will be that as an expert in the field, he will be able to say that that pubic hair could have come from the defendant. He will tell you that in his opinion, there are perhaps one in a hundred people that would share this type of pubic hair.

(T. 303-04.)

During the police investigation, Joseph Crow of the St. Louis Metropolitan Police Department examined a blue blanket submitted by Officer Logan after being collected from the crime scene. (T. 633.) Crow examined the blanket for hairs; in particular, he was looking for hairs that "did not look like those of Joanne Tate." (T. 634.) He found only one hair that he determined "did not appear" to be from Joanne Tate. (*Id.*) Crow admitted that there could have easily been 50 hairs collected from the blanket. He examined "most" of these hairs microscopically, but "a few due to their thickness were in [his] opinion Joanne Tate's hairs without doing any further testing." (T. 636.).[5] After his arrest, in a May 24, 1982 interview with Detective Scaggs, Mr. Lincoln consented to providing blood and pubic hair samples. Detective Scaggs brought Mr. Lincoln to the police department lab where Criminalist Donna Bechere took samples from him for comparison. (T. 631-2.)

Messler compared the pubic hair found on the blanket at the scene to a pubic hair from Rodney Lincoln and a pubic hair from Joanne Tate.[6] (T. 643-4.) He also noted that he compared the hair from the blanket to thirty-seven other pubic hairs and none of those additional pubic hairs were "comparable" to the hair at the

[5] Messler admitted on cross-examination that he had no personal knowledge of how many hairs Dr. Crow may have discarded from the blanket. He provided Messler with "one hair… that he indicated he felt might require further examination and comparison." (T. 724.)

[6] Messler explained that he first made a visual comparison with his "naked-eye" of the blanket hair and the pubic hair samples to find out if the hairs were "comparable in appearance or if they were definitely different and not the same." (T. 646.) If he determined the hairs were not comparable during the visual examination, no further testing was done. (*Id.*) If the hairs were found to be comparable, he then used a low-power stereo microscope to explore the color and appearance of the hairs. Again, if Messler determined the hairs appeared to be different, no further testing was done. (T. 647.) If the hairs were found to be comparable, he used a higher-power microscope as a final level of analysis. (T. 647-648.)

scene. (T. 649.) Out of the thirty-nine total hairs he compared to the blanket hair, Messler testified that only Rodney Lincoln's was a "match."[7] (T. 717-718.) His lab report indicated that an examination and comparison of the hair from the blanket, "revealed that it was comparable in microscopic appearance with the pubic hair of suspect Rodney Lincoln." (Ex. 7, Original Lab Reports at 8.) When asked by the prosecutor at trial whether Messler had ever, in the 200 cases he had been involved in, "run across a circumstance where [he] had a hair from a scene that was matched to more than one person", he replied, "No, sir." (T. 718.)

During closing arguments, the State argued that the blanket hair matched Mr. Lincoln. The prosecutor recalled that the pubic hair had been compared to thirty-nine people and, "[n]one, no hair that that other hair was compared with other than Rodney Lincoln's matched." (T. 957.) He continued, "Mr. Messler told you that in two hundred cases, he's never had more than two—more than one match. He's never had two people match one hair found at a scene." (*Id.*)

The hair and M.D.'s identification of Mr. Lincoln were the only pieces of evidence that connected Rodney Lincoln to the crime. (T. 925-930; T. 957.) Mr. Lincoln presented evidence of an alibi. (T. 811-815; T. 851-853; T. 875.) Diane Keenan testified that Mr. Lincoln picked her up at her home around 5:15pm and they had dinner at Mr. Lincoln's home with his mother. (T. 873.) They watched

[7] The prosecutor asked Messler, "And one out of those, which is Rodney Lincoln's hair, matched?", to which Messler responded, "That's correct." (T. 717-718.)

television and Keenan stayed the night. (T. 874.) Mr. Lincoln's mother also testified they had dinner that night. (T. 850.) Keenan testified that she would have noticed if he left and that he was with her all night. (*Id.*) On April 27, Keenan and Mr. Lincoln woke up at 6am and Mr. Lincoln left for work. (T. 875.) Mr. Lincoln's employer, Robert Salzman, testified that Mr. Lincoln worked on April 27 and arrived promptly at 8am. (T. 811-812.) Salzman noticed nothing odd about Mr. Lincoln's behavior during that day or that week. (T. 814.)

Procedural History

The case against Rodney Lincoln was tried twice. The first jury was unable to unanimously convict. The second jury to hear this case declined to convict Mr. Lincoln of capital murder, but convicted him of manslaughter in the death of Joanne Tate and first degree assault in the stabbings of M.D. and R.T. He was sentenced to fifteen years and two life sentences, and all sentences were ordered to run consecutively. He remains incarcerated on these sentences.

Mr. Lincoln's conviction was affirmed on appeal. *State v. Lincoln,* 705 S.W.2d 576 (Mo. App. ED 1986). His subsequent motion for a new trial pursuant to Rule 27.26 was denied without a hearing, and that judgment was affirmed on appeal. *Lincoln v. State,* 755 S.W.2d 706 (Mo. App. E.D. 1988).

DNA Testing

Rodney Lincoln continued to assert his innocence, and eventually his case was screened for DNA testing by both the St. Louis Circuit Attorney's Office and the Midwest Innocence Project. In March and August of 2005, the Midwest Innocence Project moved pursuant to § 547.035 RSMo for DNA testing of the blanket pubic hair; a hair found on the perineum of R.T.; the rectal, anal, and vaginal smears of the victims; fingernail scrapings from Joann Tate; and various items of blood evidence in search of proof to support Mr. Lincoln's claim of actual innocence. (Ex. 17, Motion for DNA Testing.)

Although the initial motion focused on the hair evidence, both parties agreed to test multiple items collected from the scene of the crime for possible traces of the perpetrator's DNA, including knives, pieces of tissue, and a bloody partial fingerprint. (*Id.*)

On November 3, 2010, the Serological Research Institute (SERI) prepared a report discussing the results of the DNA testing they conducted. The report indicated that Rodney and each of the victims were excluded as the source of the blanket pubic hair. (Ex. 19, SERI Analytical Report 11-03-10; Ex. 20, 2013 Stipulation to DNA Testing.) Further, the hair found on the perineum of Renee could not have originated from Rodney or the victims. (*Id.*) The mitochondrial sequence from the perineum hair was different from the sequence of the blanket pubic hair. (*Id.*) In February 2013, an additional round of DNA testing was

conducted by the Kansas City Police Crime Laboratory on additional evidence, including swabs collected from the knives, the sink, ridge detail on aluminum and bloody tissue paper. (Exhibit 21, KCPDL DNA Report.) No male DNA was developed or detected on any of the items. (*Id.*) On September 12, 2013, the State and counsel for Rodney Lincoln stipulated to these results. (Ex. 20.)

Based on the exclusion of Mr. Lincoln as the source of the hair found on the blanket at the scene of the crime, the Midwest Innocence Project moved for Rodney Lincoln's release pursuant to § 547.037 RSMo. The Circuit Attorney opposed the motion because M.D. stood by her identification of Rodney Lincoln.

In proceedings on Mr. Lincoln's motion for release, "the parties agreed that the various police reports gave no results that could place [Mr. Lincoln] at the scene of the crime." *Lincoln v. State*, 457 S.W.3d 800, 804 (Mo. App. ED 2014). Mr. Lincoln's Motion for Release was denied, and that ruling was affirmed on appeal. The court reasoned that M.D.'s identification of Mr. Lincoln as the assailant "was the crux of [Mr. Lincoln's] convictions." *Lincoln v. State*, 457 S.W.3d at 801. Because no other evidence linked Mr. Lincoln to the crime, M.D.'s testimony was "the 'lynchpin' of [Mr. Lincoln's] conviction," *id.*

M.D.'s Recantation

Recently, M.D., now an adult woman of forty, viewed a television program on November 23, 2015 featuring Mr. Lincoln's case that included images of

another suspect. M.D. explained that she experienced a "visceral reaction" to the image of another suspect and that she has "come to the realization that she has been mistaken all these years" in her belief that Rodney Lincoln was the man who attacked her and her family. (Ex. 1, Affidavit of M.D., Nov 30, 2015.) M.D. asserts that her identification of Mr. Lincoln was a "belief that had been planted," (*id.*), a statement that is borne out by the record. *See supra* Claim III and IV.

On the afternoon of November 30, 2015, M.D. called Assistant Circuit Attorney Ed Postawko and informed him that she believes Rodney Lincoln did not kill her mother, that he is innocent, and that she wants him released from prison. (*Id.* at 4.) On December 4, 2015, Mr. Postawko met M.D. in person, face-to-face, and she repeated her belief that Mr. Lincoln is innocent and her wishes that Mr. Lincoln go free.

M.D. is a responsible adult woman who is sincere in her belief that her previous identification of Mr. Lincoln was mistaken. Counsel for Mr. Lincoln is unaware of any evidence that her recently expressed beliefs are the result of any undue influence.

M.D.'s retraction of her identification of Mr. Lincoln as the perpetrator and the elimination of Mr. Lincoln as the source of any physical evidence at the scene of the crime leaves no remaining evidence implicating him in the murder of Joanne Tate and the stabbing of her daughters. This petition follows.

ARGUMENT

I. Rodney Lincoln Satisfies The *Amrine v. Roper* Actual Innocence Standard For Habeas Corpus Relief Because No Evidence Remains To Support his Conviction.

The State relied on just two pieces of evidence in convicting Rodney Lincoln: a hair it contended "matched" Mr. Lincoln and the identification of Mr. Lincoln by M.D. Both of those pieces of evidence have since been disproven. DNA testing has proven that none of the hair evidence—presented at trial or not—belonged to Rodney Lincoln. M.D. has similarly recanted her identification. As a result, "no credible evidence remains from the first trial to support the conviction" and Mr. Lincoln's conviction "must be set aside." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548-549 (Mo. 2003).

In *Amrine v. Roper*, the Missouri Supreme Court recognized a free-standing claim of actual innocence where no credible evidence remained to convict the defendant. 102 S.W.3d at 541. In *Amrine*, the defendant was convicted of murdering an inmate at Jefferson City Correctional based solely on the testimony of three fellow inmates: Terry Russell, Randy Ferguson, and Jerry Poe. At trial, Amrine presented evidence of his own innocence, including evidence that Terry Russell committed the crime and alibi evidence from six witnesses that Amrine was playing poker in a different part of the room at the time. The jury nonetheless found Amrine guilty, and he was sentenced to death.

In the course of Amrine's state and federal appeals, all three State's witnesses eventually recanted, though at different times. Ferguson and Russell recanted their identifications during Amrine's postconviction hearing. However, Poe did not appear, leaving his trial testimony intact. As a result, the court denied Amrine's petition for relief and the Missouri Supreme Court affirmed. *Amrine v. State*, 785 S.W.2d 531 (Mo. banc 1990).

During Amrine's federal habeas appeal, Poe offered an affidavit in which he recanted completely his trial testimony, stating that he did not see Amrine stab the victim and that he falsely implicated Amrine. As a result of that recantation, the Eighth Circuit Court of Appeals ordered a limited remand for the district court to conduct an evidentiary hearing, however, relief was again denied because the recantations of Russell and Ferguson was no longer "new" under the Eighth Circuit standard. *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001).

Amrine petitioned the Missouri Supreme Court for habeas corpus relief, which granted the petition, stating:

> This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. This Court, sitting as an original habeas court, determines based on this record that under these rare circumstances, there is clear and convincing evidence of Amrine's innocence. As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside.

Amrine v. Roper, 102 S.W.3d at 548-49.

Rodney Lincoln's case is indistinguishable and compels the same result. The Missouri Court of Appeals has found that M.D.'s identification of Mr. Lincoln as the assailant "was the crux of [Mr. Lincoln's] convictions." *Lincoln v. State*, 457 S.W.3d 800, 801 (Mo. Ct. App. E.D. 2014). "M.D.'s testimony was the key." *Id.* at 808. That identification no longer stands.

After viewing a television program featuring Mr. Lincoln's case, M.D. has recanted her identification. She states: "I have come to the realization that I have been mistaken all these years in a belief that was planted early on that Rodney Lincoln was the man responsible for attacking me, my sister [R.T.], and my mother." (Ex. 1 at 1.)[8] M.D. original identification occurred when she was just seven-years-old, included over three photo lineups, with ten to twelve photos each, and months of additional courtroom coaching. *See supra* pp. 4-11, *infra* Claims III and IV. In her account of the crime, M.D. also noted the perpetrator used his right hand to cut her. (*Id.* at 2.) Rodney Lincoln is left-handed. On November 30, 2015, M.D. spoke with Assistant Circuit Attorney Ed Postawko and informed him that "Rodney Lincoln did not kill my mother, and he was innocent." (*Id.* at 4.) M.D. has come to this realization on her own; no threats or promises have been made in exchange for her realization. (*Id.* at 1.)

[8] M.D.'s contention that her identification was "planted" or suggested is supported by numerous police and Division of Family Services reports. *See* Claims III and IV, *infra*.

Because M.D.'s identification was the only remaining evidence that could at all support Mr. Lincoln's conviction, justice requires his conviction be vacated. The only physical evidence corroborating M.D.'s identification at trial was the pubic hair detectives found on a blanket at the scene of the crime; criminalist Harold Messer testified that the pubic hair matched hair samples taken from Rodney Lincoln. (T. 717-18.) That testimony is also now known to be false; "DNA testing showed that [the hair] did not belong to [Mr. Lincoln]." *Lincoln v. State,* 457 S.W.3d at 804. Indeed, in Mr. Lincoln's motion for DNA testing to prove his innocence, "the parties agreed that the various police reports gave no results that could place Movant at the scene of the crime." *Id*. Thus, M.D.'s retraction of the identification testimony removes "the 'lynchpin' of [Mr. Lincoln's] conviction," *id.,* and there is no other physical evidence to support it.

Like in *Amrine*, the fact that the individual pieces of evidence were eliminated at different times makes no difference. As in *Amrine*, "this Court is the first forum in which all of the existing evidence of innocence will be considered." *Amrine v. Roper,* 102 S.W.3d at 545. And like in *Amrine,* other evidence also implicates someone other than the defendant as the perpetrator.

In *Amrine*, evidence presented at and after trial indicated that it was Terry Russell who committed the crime. Here, other evidence also points to at least two alternative suspects as the likely perpetrator: Steven Yancey or Tommy Lynn Sells.

Although no such evidence is necessary for this Court to find Mr. Lincoln innocent under *Amrine*, the strength of the evidence against other potential suspects in comparison to the complete lack of evidence tying Mr. Lincoln to the death of Joann Tate is notable.

A. Steven Yancey

New evidence suggests that Steven Yancey also could be the real perpetrator. In the early afternoon of April 27, 1982, police officers and investigators were still processing the scene of Tate's murder when a curious young by-stander approached them. His name was Stephen Yancey, and he told Sergeant Riley he was friendly with Tate and her daughters. (Ex. 8 at 9-10.) Yancey explained to Sergeant Riley that Tate's ex-boyfriend, Tom, had been threatening and aggressive lately. (*Id.*) According to Yancey, he had been staying with Tate off and on at her request so that she and her children would feel safe. (*Id.*) Yancey also interviewed with a reporter for the St. Louis Post-Dispatch, and in the resulting article, is quoted saying that he knew Joann Tate and that she was "perfect." (Ex. 3, St. Louis Post Dispatch article.)

At 17 years old, Stephen Yancey lived just a few doors down from Joanne Tate at 1411 Farrar, Apartment A. (*Id.*) Just two years later, Yancey would be arrested for the first of many child sex offenses. *State v. Yancey*, No. 21CCR-514750 (May 17, 1985, St. Louis Co., Mo.) (Guilty plea to Sodomy). The years

that followed would include more arrests and convictions for sexually assaulting minors. *See e.g.*, *State v. Yancey*, No. 2007CR000114 (May 28, 2008, Labette, Kan.) (Guilty Sexual Battery/Intentional Touching of Minor Under 16 and Kidnapping); *State v. Yancey*, No. 23CR192-1436 (Jan. 19, 1993 Jefferson Co., Mo.) (Guilty plea to 1st Degree Sexual Abuse and Forcible Sodomy). Yancey is currently housed with the Kansas Department of Corrections at Norton CF-Central, serving a sixteen year sentence for the kidnapping and rape of a child under the age of fourteen. *State v. Yancey*, No. 2007CR000114 (May 28, 2008, Labette, Kan.).

In 2011, Midwest Innocence Project Staff Investigator Nadia Pflumm went to see Yancey's wife, Tara Yancey, who is also in prison for being complicit in one of Yancey's crimes. *State v. Yancey*, No. 2007CR000113 (Feb. 20, 2008, Labette, Kan.). In an emotional conversation, Tara told Ms. Pflumm of Yancey's violent behavior. Tara was afraid of Yancey, especially after Yancey confessed to her that he had, years earlier, killed a woman. (Ex. 2, Affidavit of Nadia Pflumm at ¶7.) That woman had walked in on Yancey molesting two young children in her care. (*Id.*) Yancey told Tara that "he took his aggression out on her. He said it was a real bloody mess." (*Id.*) Tara also told Ms. Pflumm about Yancey's alleged history of raping his siblings. According to Tara, Yancey's mother called her and told her that was why she had kicked him out of her home as a teen. (*Id.* at ¶8.)

The St. Louis police did at one point suspect Yancey's involvement in Tate's murder. (Ex. 7 at 3.) A pubic hair sample was taken from him, (*Id*.) and a Polaroid photo was added to one of the many photo line-ups shown to M.D. (Ex. 8 at 34.) Notably, Yancey's photo was the only photo M.D. had reacted to at all up to this point. (*Id*.) However, no additional investigation was conducted in regards to Yancey's involvement.

The new evidence about Steven Yancey highlights the lack of evidence against Mr. Lincoln. Unlike Mr. Lincoln, Steven Yancey is a known rapist who has admitted to killing at least one woman who walked in on him abusing children in her care. And unlike Mr. Lincoln, Yancey had the opportunity, motive, and means to have killed Joanne Tate and violently abused M.D. and R.T. This new evidence only further highlights the absolute lack of evidence connecting Mr. Lincoln to this crime.

B. Tommy Lynn Sells

Similarly, more evidence connects the crime to Tommy Lynn Sells than Mr. Lincoln. In her recantation of her identification of Rodney Lincoln, M.D. points to Tommy Lynn Sells as the man she believes committed the crime. (Ex. 1 at 1, 2.) ("The more I learned about Tommy Lynn Sells the more convinced I was that he was the one who killed my mother."). Sells is a known serial murderer who was executed in Texas in 2014. *See* Roxanna Sherwood & Lauren Effron, *Convicted*

Serial Killer Tommy Lynn Sells Executed in Texas, ABC News (Apr. 3, 2014), http://abcnews.go.com/US/convicted-serial-killer-tommy-lynn-sells-executed-texas/story?id=23184667. He has been linked to at least 17 other killings and claims he has killed dozens more. *Id.*

Evidence suggests that Tommy Lynn Sells also could be responsible for the death of Joanne Tate and the assaults on her two children. Significant similarities exist between the methods used by Sells in his known crimes and the circumstances surrounding the death of Tate. Further, Sells lived in Missouri at the time of Tate's death and many of the facts provided by M.D. at the time of the crime coincide with facts in Sell's biography.

i. Similarities with other Sell's murders.

The murder of Joanne Tate mirrors murders known to have been committed by Sells in several respects, including the insertion of objects into a victim post-mortem, the time of night, and the use of knives. For example, Sell's murder of the Dardeen family that occurred on Nov.18, 1987 also involves the use of an inanimate object to sexually assault the victim post-mortem. In the Dardeen case, Ruby Dardeen was found with an aluminum baseball bat inserted in her vagina, much like the broom inserted into Joann Tate's anus. (Ex. 5, Texas Rangers Report re Tommy L Sells at 2.) Ruby was also killed with her three-year old son

and new born infant. (*Id.*) According to a report by Texas Rangers who investigated Tommy Sells:

> Ruby's nude body was discovered in the master bedroom lying on a water bed with foam rubber stuffed in her mouth. Ruby's legs were crossed and closer observation revealed the large end of an aluminum baseball bat that had been inserted into her vagina.

(*Id.*) Additionally, the young child's genitals had been removed (*id.)*, much like the cut to M.D.'s perineum. (T. 497-98.) In that case, Sells was able to provide sufficient details to convince the Rangers that only he could have been responsible for the Dardeen murders. (Ex. 5 at 3.)

Other Sell's murders are also similar. The murder of Kaylene Harris in Del Rio, Texas on Jan. 31, 1999, for which Sells was executed in April 2014, also had the same modis operandi. In that case, he entered that home in the early morning and used a knife to kill 13-year-old Harris. *Sells v. State*, 121 S.W.3d 748 (Tex. Crim. App. 2003) A second child was also in the house at the time. Like R.T., the young girl's throat was sliced. *Id.* She survived and ultimately identified Sells as the killer. *Id.*

The death of 10-year-old Kirkpatrick is also similar. In that case, Sells confessed that he entered into the home of Julie Rea and Kirkpatrick in the early morning hours on October 3, 1997. Center on Wrongful Convictions, *Julie Rea*, The National Registry of Exonerations,

http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3278. According to Sells, he had broken into the home, taken a knife from a butcher block in the kitchen, stabbed a little boy to death, and scuffled with a woman. *Id.* Those details were strikingly similar to Rea's account of the crime. Rea was later exonerated after the Illinois Appellate Court reversed Rea's conviction and she was found not guilty upon retrial. *Id.*

ii. Links to the Tate murder

While Sells has been investigated for murders across the county, he was living in Missouri at the time of Tate's death. On Nov. 15, 2014, a volunteer investigator for the Madison County Public Defender's office conducted an interview of Sell's brother Timothy Sells. (Ex. 6, Interview report of Timothy Sells.) Timothy stated that in late 1981, their mother Nina Jean Sells moved from Wolcott, Arkansas to St. Louis. (*Id.*) He and his siblings, including Tommy, moved to 8720 Shirley Ave Bel-Ridge St. Louis, MO, the home of their older half-brother Terry Joe Lovins. (*Id.*)

Timothy also stated that he and Tommy, along with Terry, all worked for their cousin Chester Woodall, who owned a Volkswagen repair shop in Berkley, MO, a suburb of St. Louis, in late 1981 and 1982. They ran parts to nearby locations and repaired Volkswagens. (*Id.*) Timothy stated he took over the shop in 1983. His brother Tommy continued to work there part-time throughout that time

period. (*Id.*) Timothy's ex-wife, Tracy, also placed Sells in St. Louis in 1982. She reported that Tommy Lynn Sells worked for Chester when he was 18 years old. (Ex. 4, Sells Psychological Reports.) According to Tracy, the Volkswagen repair shop was located on Hanley Road in St. Louis and that in addition to fixing cars, Chester sent Tommy out to perform repairs on apartments that he owned. (*Id.*)

Tommy's work as a mechanic and access to Volkswagens is relevant to the description of the perpetrator provided by M.D. During the investigation of Tate's murder, M.D. claimed that the man who worked on her mother's car was the one that hurt her. (T. 402.) She also told detectives that her mother had met the killer in Hyde Park near their home, and that he drove a white Volkswagen. (T. 355, 513-14; Ex. 8 at 33; Ex. 1 at 2.) In his deposition, social worker Wayne Munkel also read his notes and said the following, **"**Patient still saying assailant is named Bill, She also states she went to his place in 1981 in a Yellow Cab. The man now drives a white Volkswagen." (Ex. 11, Deposition of Wayne Munkel at 11.) This is significant because [M.D.] gave this account on April 28, 1982, the day after the assault, when her memory was the freshest. Police noted when they arrested Rodney Lincoln that he did not own a white Volkswagen. (Ex. 8 at 42-43.) ("Arrested Subject #1 stated that he does not have a white Volkswagen and has never had one.") Additionally, Tommy Lynn Sell's father was named "William"

and went by "Bill." *See* Diane Fanning, *Through The Window* 20 (St. Martin Press 2007).

All of this evidence easily connects either Yancey or Sells as the more likely perpetrators of the crime; no evidence connects Rodney Lincoln to the death of Joanne Tate or the attacks on her daughters. Because there is no evidence upon which Mr. Lincoln's conviction can stand, this Court should vacate the conviction and order Mr. Lincoln's release.

Should the Court grant relief on this claim, it need not review the claims below.

II. Mr. Lincoln's Fourteenth Amendment Right To Due Process Was Violated When The Prosecution Presented False Evidence That A Hair From The Crime Scene "Matched" Rodney Lincoln.

Although all the evidence against Mr. Lincoln has since been negated, the evidence as presented against Mr. Lincoln at the time of trial violated Mr. Lincoln's due process rights under the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 10 of the Missouri Constitution and also requires this Court vacate Mr. Lincoln's conviction. In particular, the State's presentation of false testimony that the hair found on the blanket "matched" Mr. Lincoln violated his Due Process rights under *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the

Fourteenth Amendment."); *see also Giglio v. United States,* 405 U.S. 150 (1972). Limitations on the ability of forensic analysts to connect a hair to a known individual were recognized at the time and, as such, Messler's testimony that the hair "matched" Rodney Lincoln violated Mr. Lincoln's right to Due Process. Moreover, recent developments in forensic science, specifically in the application of DNA to the area of microscopic hair examination, confirm that Messler's testimony exceeded the bounds of science and was false.

In order to violate Due Process, false testimony does not need to rise to the level of perjury; it is enough that it was misleading or created a false impression. *Alcorta v. Texas*, 355 U.S. 28 (1957). Additionally, *Giglio v. United States* explains, "[W]hether the nondisclosure [of the truth] was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 450 U.S. at 154.

Thus, a defendant's due process rights are violated when a prosecution expert, like the expert here, provides knowingly false or misleading "scientific" evidence. *Miller v. Pate,* 385 U.S. 1, 7, 87 S. Ct. 785, 788 (1967). It does not matter whether the defense knew about the false testimony and failed to object or to cross-examine the witness. Defendants "c[an] not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system." *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) (citing *N. Mariana Islands v.*

Bowier, 243 F.3d 1109, 1122 (9th Cir. 2001)). Here, the hair comparison evidence presented was false, the State knew the testimony was false, and the testimony was clearly material.

A. The evidence regarding hair comparison presented at Rodney's trial was false and misleading.

The limitations of forensic hair review were known at the time of Mr. Lincoln's trial. As early as 1974, researchers had acknowledged that visual hair comparisons are "so subjective that different analysts can reach different conclusions about the same hair." Spencer Hsu, *Convicted defendants left uninformed of forensic flaws found by Justice Dept*., Washington Post, Apr. 16, 2012, https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html. In 1982, the Federal Bureau of Investigation (FBI) training manual on *Microscopy- Hair and Fibers* also noted these limitations, stating:

> When the same characteristics that are present in the questioned hair are all present in the known sample, it is generally concluded that the questioned hair could have originated from the known hair sample. This conclusion is worded in this way because a hair comparison can never be the basis for a positive association between a hair and a person; hairs are not like fingerprints […]

(Ex. 23, US DOJ FBI Microscopy – Hairs and Fibers manual at 82.) Indeed, in 1984, "the FBI acknowledged that such analysis cannot positively determine that a hair found at a crime scene belongs to one particular person." Hsu, *supra* ("[In 1996], the FBI lab stopped declaring matches based on visual comparisons alone and began requiring DNA testing as well."). Nonetheless, Harold Messler testified on direct examination that the blanket hair could be associated with Mr. Lincoln to the exclusion of all others:

> Q: And totally you compared the hair found on the blanket to thirty-nine other people: the thirty-seven submitted to you, Rodney Lincoln's hair and Joann Tate's hair; is that right?
> A: That's correct.
> Q: And one of those, which is Rodney Lincoln's hair, matched.
> A: That's correct.

(T. 717-718.) The prosecutor reiterated this point during closing, arguing that the blanket pubic hair had been compared to thirty-nine people and, "[n]one, no hair that that other hair was compared with other than Rodney Lincoln's matched." (T. 957.) This misleading testimony exceeded the bounds of science known at the time and violated Mr. Lincoln's right to due process.

B. <u>New evidence supports the understandings available at the time of trial that a hair could not be matched to a particular individual to the exclusion of all others.</u>

As outlined above, new DNA testing has completely discredited Messler's testimony and underscores the false and misleading nature of his original

testimony. *See supra* pp. 14-16, 21. A November 3, 2010, report from Serological Research Institute (SERI) indicates that Mr. Lincoln was excluded as the source of the blanket pubic hair. (Ex. 19.) Mr. Lincoln was also excluded as the source of a hair found on the perineum of R.T. (*Id.*)[9]

Beyond DNA testing, the entire field of microscopic hair review has also been called into question. Recently, the FBI publicly conceded that the only appropriate conclusion by hair examiners concerning an association between a known and questioned hair is that "a contributor of a known sample *could* be included in a pool of people of unknown size, as a possible source of the hair evidence (without in any way giving probabilities, as an opinion to the likelihood or rareness of the positive association, or the size of the class)." *Microscopic Hair Comparison Analysis*, U.S. Dept. of Justice, FBI, Nov. 9, 2012, http://www.mtacdl.org/attachments/CPE/Nelson/FBI_Limits_of_Science__%20Microscopic_Hair_Comparison.pdf (emphasis added). Any testimony beyond a conclusion that the defendant could have been the source of the hair—i.e., that the hair was a "match"—is false.

Similarly, in 2009, the National Academy of Sciences (NAS) released a report concerning the state of forensic science testimony throughout the country. In regard to hair comparison testimony, they concluded, "There appear to be no

[9] The State and counsel for Rodney stipulated to these results. (Ex. 20.)

uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match'… The categorization of hair features depends heavily on examiner proficiency and practical experience." National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, August 2009, at 160, https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf. The report continued: "[T]estimony linking microscopic hair analysis with particular defendants is highly unreliable." *Id.*

This lack of reliability has become clear in the years since the report was issued. After the exonerations of three men who were convicted, at least in part, because of testimony by three different FBI hair examiners whose testimony was scientifically flawed, the FBI and the Department of Justice (DOJ) agreed to work together to conduct a review of criminal cases involving microscopic hair analysis. *FBI Testimony on Microscopic Hair Analysis Contained Errors in at least 90% of Cases in Ongoing Review*, Innocence Project (Apr. 20, 2015), http://www.innocenceproject.org/news-events-exonerations/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-of-cases-in-ongoing-review. The government identified almost 3,000 cases where "FBI examiners may have submitted reports or testified in trials using microscopic hair analysis." *Id.* As of March 2015, when the FBI had reviewed approximately 500 cases, 268 cases were identified in which examiners provided trial testimony to

inculpate a defendant. *Id.* In 96% of those cases, the analyst made erroneous statements. *Id.*

While the FBI and DOJ have committed to further working with the Innocence Project and the National Association of Criminal Defense Lawyers (NACDL) on this issue, states are also being encouraged to conduct their own independent reviews, especially where their state analysts were trained by FBI examiners. *Id.* "Over the course of 25 years, the FBI conducted multiple two-week training courses that reached several hundred state and local hair examiners throughout the country and that incorporated some of the same scientifically flawed language that the FBI's examiners had used in some lab reports and often in trial testimony." *Id.*; *see also* Spencer S. Hsu, *FBI Woes Casting a Growing Shadow*, Washington Post, Dec. 23, 2012, http://www.independent.co.uk/news/world/americas/fbi-labs-woes-cast-a-growing-shadow-8430348.html ("But about three dozen FBI agents trained 600 to 1,000 state and local examiners to apply the same standards that have proved problematic.").

Notably, the analysts who worked on the Tate murder received exactly such FBI training. Joseph Crow, the St. Louis Crime Lab criminalist who examined the blue blanket from the crime scene for hairs and performed the initial microscopic review of the recovered hairs, received training through the FBI academy "in the

identification of hair and fibers." (T. 633.) Additionally, Harold Messler, the chief criminalist at the St. Louis City Metropolitan Police Department, who compared the crime scene hair to the sample from Rodney Lincoln and concluded they were a match, received a "short-course" training on hair comparison, but did not further clarify the source of that short-course. (T. 643.)

It comes as no surprise then that these analysts made exactly the kinds of errors noted by the FBI in its joint review. In outlining their review, the FBI, Innocence Project, and NACDL agreed on three error types in hair comparison testimony where the testimony was inappropriate and exceed the limits of sciences. *Microscopic Hair Comparison Analysis*, U.S. Dept. of Justice, FBI, Nov. 9, 2012, http://www.mtacdl.org/attachments/CPE/Nelson/FBI_Limits_of_Science__%20Microscopic_Hair_Comparison.pdf.

Two of those error types are apparent in Mr. Lincoln's case. The first is Error Type 1, where "The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of science." *Id*. In Mr. Lincoln's case, Messler stated on direct examination that the blanket hair could be associated with Rodney to the exclusion of all others:

> Q: And totally you compared the hair found on the blanket to thirty-nine other people: the thirty-seven submitted to you, Rodney Lincoln's hair and Joann Tate's hair; is that right?

A: That's correct.
Q: And one of those, which is Rodney Lincoln's hair, matched.
A: That's correct.

(T. 717-718.)[10] The prosecutor reiterated this point during closing, arguing that the blanket pubic hair had been compared to thirty-nine people and, "[n]one, no hair that that other hair was compared with other than Rodney Lincoln's matched." (T. 957.) This misleading testimony was false and exceeded the bounds of science.

Similarly, the FBI's third error type was also present at trial. Error Type 3 states:

> The examiner cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual. This type of testimony exceeds the limits of the science.

Microscopic Hair Comparison Analysis, U.S. Dept. of Justice, FBI, Nov. 9, 2012. During direct examination, Messler was asked, "And in the other two hundred cases that you have dealt with, concerning yourself with the Caucasian hairs that you've dealt with in the past, have you ever run across a circumstance where you had a hair from a scene that was matched to more than one person?"; he replied,

[10] According to a 2008 law review article, using either the term "match" *or* the term "similar characteristics" leads to "high source probability estimates and to high estimates of the population rate of the crime scene evidence…. These traditional forms in which forensic identification testimony is expressed do not seem to differ in their impact on jurors or judges, presumably communicating a comfortingly simple and easily grasped (though not very informative and presumably misleading) understanding of the basis for the identification opinion." Dawn McQuiston-Surrett & Michael J. Saks, Communicating *Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, 1170 (2008).

"No, sir." (T. 718.) In stating this, Messler side-stepped the scientific limitations on hair comparison testimony by reaching to his own experience to bolster his claims.

This type of bolstering can sometimes be attributed to the fact that an analyst might believe he or she has never falsely matched a hair because "he or she has never undertaken to make a comparison where it would be possible to say there was a false match." Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 Colum. Hum. Rts. L. Rev. 227, 260 (1996) ("Unless it is conclusively proven by other means that the suspect is innocence—an unlikely occurrence if the hair analysis is being performed in a case where the police have already made a preliminary showing of probable cause to a magistrate in order to secure a hair sample—the false result may never be exposed."). Again, as with the Type 1 error, the prosecutor highlighted this portion of Messler's testimony during his closing argument: "Mr. Messler told you that in two hundred cases, he's never had more than two—more than one match. He's never had two people match one hair found at a scene." (T. 957.)

All of this testimony violated Mr. Lincoln's right to Due Process. The science available at the time also limited Messler from being able to "match" a hair to Mr. Lincoln. However, to the extent that new evidence is available, Messler's

false testimony is only further highlighted by the conclusive DNA proof and FBI error-typing.

c. The use of this false hair comparison testimony as scientific evidence of Rodney's guilt by the State violated his due process rights.

The introduction of the faulty scientific evidence at trial was fundamentally unfair and violated of Rodney's due process rights under *Napue v. Illinois*. 360 U.S. at 269. The trial testimony discussed above was crucial to the State's case. It was the only evidence available to corroborate the identification by M.D. The State emphasized this unvalidated hair comparison evidence in their opening statement (T. 303-304), during their case-in-chief (T. 717-18), and again in closing argument. (T. 957.)

Because the hair comparison testimony at trial was the only evidence connecting Rodney to the crime except for the questionable identification of M.D., it is reasonably likely "that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Lay jurors lack the ability to independently evaluate the accuracy of scientific evidence. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595, 113 S. Ct. 2786 (1993); *see also U.S. v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of

such evidence against its potential to mislead or confuse."); *U.S. v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think and give more credence to the testimony than it may deserve."). The type of testimony given by Crow and Messler is "precisely the type of scientific evidence that juries are likely to consider objective and infallible." Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 943 (2008).

In addition, the NAS report, FBI and DOJ findings, and the FBI agreement regarding error types also constitute newly discovered evidence, which reveals the improper nature of Crow's and Messler's testimony. "'[N]ew evidence' in the context of an actual innocence claim [is described as] 'new reliable evidence'—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. Ct. App. 2015). New evidence may be raised at any time: "[I]n *McQuiggin*, the United States Supreme Court held that 'new evidence' in connection with an actual innocence habeas claim is any evidence that was 'unavailable' at the time of trial without regard to whether the evidence could have been discovered with reasonable diligence at the time of trial." *See also Han Tak Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012) (finding that using discredited science to

support a conviction violates the Due Process Clause of the Fourteenth Amendment.). DNA testing has proved that it is indisputable that the testimony claiming Rodney's hair to be a match to the pubic hair found at the crime scene is false; this claim impacted the jury, as without it, they would only have been left with the unreliable eyewitness identification of the 7-year-old victim. The State's use of false and misleading hair comparison testimony violated Rodney's right to due process of law, and his conviction should be vacated.

III. The State's Failure To Turn Over Exculpatory Department of Family Services Records Violated *Brady v. Maryland.*

The identification of Rodney Lincoln by M.D. was the "key" piece of evidence at trial. *Lincoln v. State*, 457 S.W.3d 800, 808 (Mo. Ct. App. 2014). As a result, the manner, nature, and content of the interviews of the children leading up to M.D.'s investigation were vital to the defense. Nonetheless, the State failed to disclose hundreds of pages of Division of Family Services (DFS) records which would have provided information material to the defense. These DFS documents reveal that assistant prosecutor Joe Bauer, along with DFS workers, rehearsed M.D.'s testimony with her, and coaxed her testimony during several role-playing exercises in the courtroom before trial. (*See* Ex. 9, DFS Reports at 317-321.) Throughout these rehearsals and role-plays, M.D. provided additional conflicting statements about her recollection of the crime and expressed her fears about a "bad man" waiting outside of her school. In a case where an identification is key, this

information was vital to the defense, and the State's withholding of this information violates *Brady v. Maryland*, 373 U.S. 83 (1963).

Under *Brady*, the State is required to disclose favorable, material evidence irrespective of the good or bad faith motives of the prosecutor. 373 U.S. at 87 (1963); *United States v. Agurs*, 427 U.S. 97, 110 (1976). Favorable evidence is evidence that can be classified as exculpatory or impeaching. *See Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256 (2004). The DFS records are favorable to Mr. Lincoln as they allow for impeachment of M.D. regarding her identification, which was the crux of the trial. Because they were never disclosed by the State and because of their materiality, Mr. Lincoln was prejudiced by this non-disclosure.

Prior to trial, defense counsel requested treatment records for the children. During a July 5, 1982 pre-trial motions hearing, counsel asked the court to set a specific date for the discovery of counseling and psychiatric reports. (Ex. 34, Pretrial Motion Transcript at 657.) The Court ordered they be turned over by July 13. (*Id.*) Although the State did turn over a 14-page medical report, it did not turn over the more than 400 pages of DFS records available, including a tape recording of a court room re-enactment. Instead, post-conviction counsel only obtained these documents from the State during litigation for DNA testing. These records would have been critical to Mr. Lincoln's defense.

The DFS records provide an important window into the time period immediately following the death of Tate and its impact on M.D. and R.T. Notes from family counselor Shelia Marion document that she attended courtroom rehearsals with the children on December 28, 1982 (Ex. 9 at 317), February 9, 1983 (*Id*. at 319), and March 28, 1983 (*Id.* at 321). Additional courtroom preparation sessions took place throughout, and the children also re-enacted the crime on tape for their aunt Rachel. (*Id.* at 319). These rehearsals progressed with the children being given more and more information about what to say and what the implications of their testimony were for Mr. Lincoln. These sessions were also document by other social and case workers and are sprinkled throughout the DFS records.

Relevant notes from these sessions include:

- December 28, 1982: "Lunch and courtroom rehearsal. Joe Bauer introduced the courtroom itself and explained the way it was set up. He questioned both [R.T.] and [M.D.] briefly on the stand, but only about general info. not about the crime itself." (Ex. 9 at 317.)

- January 4, 1983: "Spoke with Shelia Marion who reported that the first role-playing session went well. Joe Bauer played games with the girls and gave them a Christmas gift. Joseph Burgoon was also there. The purpose of the meeting was to build rapport and help the girls become comfortable in the courtroom. Bauer reviewed who would be in the courtroom and asked the girls if they knew the meaning of truth." (*Id.* at 287.)

- February 9, 1983: "Courtroom session.[M.D.] sat in the witness stand first and Joe asked her to ~~specifically~~ tell about the crime itself in detail. She did very well. [R.T.], however, was listening to her

testimony and became agitated, saying her bottom hurt and her throat hurt and she wouldn't be able to testify. To calm her, Rachel was called down. Finally, [R.T.] say on Rachel's lap and told Rachel how respond to Joe Bauer's questions. In this way, she related the events surrounding her mother's death. Afterwards, she complained that her throat hurt." (*Id.* at 319.)

- February 25, 1983: "Rachel had had the children reenact their mother's death and recorded it on tape. On the tape, [M.D.] talked about what sounded like a sexual assault that I had been unaware of. Rachel, however, said that the circuit attorney was already aware of this sexual interaction. Worked with both [M.D.] and [R.T.] to prepare them for court…." (*Id.*)

- March 1, 1983: "Took the tape to the Circuit Attorney. Joe Bauer said they had not been aware of any sexual molestation and the tape would be very useful." (*Id.* at 320.)

- March 21, 1983: "[M.D.] no longer expresses fear that strange men will hurt her. She is able to handle the demands that court involvement entails very well. Following the courtroom rehearsal on 2/9/83, she was able to disclose to Rachel that a sexual assault accompanied the physical attack on her last April. This previously undisclosed information was related to the Circuit Attorney." (*Id.* at 304.)

- March 24, 1983: "Worked with girls, particularly [R.T.], to prepare for court. We role-played and [R.T.] asked me questions and told me how to answer them. She expressed some feelings of guilt surrounding her mother[']s death and I tried to alleviate those feelings." (*Id.* at 321.)

- March 28, 1983: "Courtroom rehearsal. Both [M.D.] and [R.T.] did very well. [R.T.] was able to sit on the witness stand by herself and describe the events surrounding her mother's death." (*Id.* at 321.)

- July 7, 1983: "[R.T] said she was afraid the 'bad man' would try to hurt her when he saw her [in court.] Reassured her by describing the precautions that would be taken as well as the 'bad man's' own need

> to look good in front of everybody. Also stressed the importance of [R.T.'s] testimony to counter Rodney's own protestations of innocence. She seemed to understand this and to have some investment in making sure Rodney was put in jail so he could not hurt anyone else." (*Id.* at 326.)

In total, the children were coached for trial nearly a dozen times, documented in over 400 pages of DFS records, none of which were provided to the defense prior to trial. Other DFS reports also indicate M.D.'s reluctance to be around men, often concerned they will be "the bad man." (Ex. 9 at 304) ("She no longer expresses her fear that strange men will hurt her.") At one point, M.D. would report to her teacher that a man was waiting for her at school even when no one was there: "[M.D.] uses her past to get attention …. Seems envious when she sees other students—responds by telling teacher a man is outside waiting to get her." (*Id.* at 335.) Had the counsel received these documents he could have also interviewed victim coordinator Mary Flotron, who would have stated that during her time with the children, M.D. referred to every man as "the bad man." (Ex. 10, Affidavit of David Miller at ¶18.) In fact, whenever any man entered the room, she would ask, "Is that the bad man?" (*Id.*)

These records show that the children were coached throughout the months leading up to Mr. Lincoln's trial. In a case where the "lynchpin" was M.D.'s identification, the withholding of this information from the defense violated Mr. Lincoln's right to due process. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v.*

Maryland, 373 U.S. 83 (1963). Had the jury heard about the months of coaching that went into M.D.'s testimony, it would have doubted the credibility of her identification.

Similarly, these materials could have been used to impeach the veracity of M.D.'s identification by highlighting additional inconsistencies in her description of the crime. For example, the description of the reenactment tape throughout the DFS records reveals statements made by M.D. during the reenactment substantially contradict her deposition and trial testimony. According to DFS notes, the reenactment tape would show that R.T. attacked the man right after M.D. saw him hurting Tate. (Ex. 9 at 290.) At trial, however, M.D. testified to being assaulted by the perpetrator before R.T. (T. 318, 321-322.) She also never indicated that R.T. got out of her bed while the assault was occurring. (T. 296, 321-322.)

M.D.'s ability to recall and describe the details of the crime directly impacted her credibility as the key eyewitness identifying Mr. Lincoln as the perpetrator. In reviewing a *Brady* claim, the United States Supreme Court has repeatedly looked to whether a witness is central to the prosecution's case in order to determine whether the credibility of the witness is material: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general [*Brady*] rule." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 269). M.D. was the sole

eyewitness in this case and the reliability of her testimony was determinative as to Mr. Lincoln's guilt or innocence. The more the defense could have impeached M.D.'s testimony, the more successful it could have been in breaking down this essential witness, since consistency in M.D.'s story would have been important to the jury.

The other records pertaining to courtroom rehearsals and the behavior of the children after the crime are also crucial. In assessing materiality, "additional evidence to which a skillful counsel would be led by careful investigation" must also be taken into account. *State v. Thompson*, 610 S.W.2d 629, 633 (Mo. 1981) (quoting *Lee v. State*, 573 S.W.2d 131, 134 (Mo. Ct. App. 1968)). Further, "the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense." *Kyles*, 514 U.S. at 420; *see also State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. 2010). Not only could defense counsel have utilized these records to undermine M.D.'s identification in various ways, but he also would have been prompted to conduct further investigation into M.D.'s credibility. Trial counsel might have interviewed M.D., Aunt Rachel, Shelia Marion, Connie Radvin, and Mary Flotron. These interviews, along with the substance contained in the records, would have allowed Mr. Lincoln to present powerful impeachment evidence against M.D. at trial. Mr. Lincoln's defense case could have focused in on the flaws in M.D.'s inconsistent version of events, as well

as the influence Mr. Bauer exercised over M.D. during their courtroom rehearsals leading up to her deposition and trial testimony. *Buchli v. State*, 242 S.W.3d 449, 454 (Mo. Ct. App. 2007) ("It appears to us… that the United States Supreme Court would have us ask whether or not the undisclosed evidence would have been significant to the defendant in the way that he tried his case: Would it have provided him with plausible and persuasive evidence to support his theory of innocence…?") (quoting *State v. Parker*, 198 S.W.3d 178, 180 (Mo. Ct. App. 2006)).

Ultimately, the rule in *Brady* and its progeny was designed to protect against wrongful convictions. "Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528 (1984). The DFS records containing key information about M.D. were withheld by the State. These records would have supplied significant impeachment evidence to be used against M.D. at trial and contained crucial evidence about M.D.'s psychological state and her relationship with prosecutor Bauer. The suppression of this exculpatory evidence undermines confidence in the outcome of Mr. Lincoln's trial. As a result, his conviction should be vacated.

IV. Mr. Lincoln's Sixth And Fourteenth Amendment Right To Effective Assistance Of Counsel Was Violated When Trial Counsel Failed To Investigate, Discover Or Present Evidence of 1) M.D.'s Insistence That It Was "Bill" Who Killed Her Mother, 2) M.D.'s Fragile Emotional State During The Investigation, And 3) The Coaching M.D. Received From The State.

No physical evidence substantively linked Mr. Lincoln to the death of Joanne Tate. In fact, the only physical evidence from the scene of the crime presented, a hair, was impermissibly linked to Mr. Lincoln, outside the bounds of science. *See Claim II, supra.* The State's case instead rested entirely on the coaxed identification by M.D. A reasonable investigation and competent performance by defense counsel would have produced substantial information and evidence to cast doubt upon the reliability of that identification.

Trial counsel breached his duty to conduct a reasonable investigation into Mr. Lincoln's defense. *Strickland v. Washington*, 466 U.S. 668 (1984). The duty of investigation specifically includes evidence of which counsel had actual notice. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). It also includes the duty to request discovery and investigate. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). The failure to investigate is not a matter of trial strategy; it is simply inept performance. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir.) (en banc), *cert. denied*, 111 S.Ct. 369 (1990). Such a failure violates counsel's "essential duty to make an adequate factual investigation [which can] only be viewed as an abdication – not an exercise – of his professional judgment." *McQueen v. Swenson*, 498 F.2d 207,

216 (8th Cir. 1974). The duty to investigate specifically embraces matters that would impeach a key state's witness, including prior inconsistent statements of the witness, *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989); *State v. Wells,* 804 S.W.2d 746 (Mo. banc 1991), or with testimony of others who would contradict the witness' testimony, *Hadley v. Groose*, 97 F.3d 1131 (8th Cir. 1996).

Mr. Lincoln's trial counsel failed to investigate and produce evidence to impeach or rebut the identification testimony of M.D. and to develop the many ways in which her testimony was coaxed. Although he knew her testimony was key to the State's case and that she was in State care, he did nothing to get information about her circumstances or statements that could have been used to impeach her identification. This failure constituted deficient performance and substantially prejudiced Mr. Lincoln, resulting in his conviction.

A. Evidence That The Perpetrator Was "Bill"

Specifically, trial counsel failed to investigate and impeach M.D. with her consistent statements that it was "Bill" and not Rodney Lincoln who committed the crime. From the moment she was found by Nathanial Clenney, M.D. identified the perpetrator as "Bill."(T. 402.) That same day, while still awaiting treatment in the E.R., M.D. described the crime to social worker Wayne Munkel and again identified the perpetrator as "Bill." (T. 512, 786-788.)

Indeed, investigators originally focused their pursuits exclusively on Bill: On April 28, detectives questioned M.D. while she was recovering from surgery in the ICU, bringing several photos of men named Bill, William, Billy, and Will. (T. 504-505; Ex. 27.) M.D. did not see the perpetrator in any of the photos. (T. 504). But M.D. again mentioned Bill, stating he had driven a yellow cab in 1981 but now drove a white Volkswagen and lived in Illinois with his drunk mother. (T. 355, 513-14; Ex. 8 at 33.) Two days later, on April 30, detectives returned to M.D.'s hospital room with twelve more photos. (T. 505-506; Ex. 28.) M.D. again looked through the photos but did not identify the perpetrator or anyone named Bill. (T. 506.)

At trial, M.D.'s story changed, and she disputed many of her prior statements about Bill (T. 352-357), including that she had said she met him at the park (T. 354). In closing, the prosecution jumped on this, asserting that M.D. made up the name "Bill" because of pressure: "Well, if you look at her reason, and you look at what she told you, she said to [defense counsel], 'I was so sick and hurt, and everybody's bugging me for a name. I gave them Bill.'" (T. 928.) They continued: "If she were older, the only difference would be that she wouldn't have just given the name Bill to shut up her inquisitors." (T. 956.) But M.D.'s identification of "Bill" was not a one-time event. An effective trial attorney would have investigated and produced the many prior statements in which M.D.

consistently referred to the perpetrator as Bill, and would have introduced those statements at trial.

Here, trial counsel could have called the nurses and doctors who heard these statements[11] as well as introducing these statements effectively through Detective Burgoon, psychologist Dr. Anne Carberry, and social worker Wayne Munkel. For example, in the emergency room, M.D. explained what happened to first responders. Several sources documented this conversation. Craig Novak's emergency room notes summarize the assault: "The assailant is identified as a man named Bill from Illinois, who formerly drove a yellow cab. Has visited the house on two to three occasions formerly." (Ex. 13, Melissa Davis' medical records pt II at 273-274.) Social worker Wayne Munkel noted M.D.'s comments in his emergency report[12] as follows:

> Patient was in pain from wounds but made several spontaneous statements and would answer questions when asked. She stated that she was stabbed by a man named Bill. He also stabbed her sister and mother. [M.D.] said Bill stomped on all 3 of them. When asked about the stabbing of herself she stated Bill came to her and took her clothes off. He told her to suck his penis. [M.D.] refused and Bill stabbed her. Patient has large cut through perineum. When asked about that [M.D.] stated he turned her over and stabbed her there. Patient states

[11] Trial counsel endorsed these witnesses for trial, but did not call them.

[12] As a mandatory reporter, Munkel made the hot line call to the Division of Family Services. They note the call in DFS records: "Hot line call received 4-27-82 at 12:25 p.m. Reporter was Wayne Munkel, SW, Cardinal Glennon Hospital. Suspected perpetrator is Bill (last name unknown), no address given." (Ex. 14, Investigation into Child Abuse Neglect Hotline Call at 3.)

> she knew Bill from before and later said her mother was calling out that name. Patient states Bill broke into house.

(Ex. 12 at 71.)

Dr. Webb, also in the emergency room, recorded his conversation with M.D.: "Child states 'Bill' did this to her about 4:30 this am. States he came to the family residence pounding on the door for her Mom to let him in, and when she wouldn't, he kicked the door in and started stabbing her mother. " (Ex. 13 at 270.)

Additional Intensive Care Unit (ICU) Notes later that evening also recorded statements from M.D. that "Bill" was the perpetrator:

> "It was all a bad dream." Stated she didn't like "that" man anymore. When asked who "that" man was, she replied, "Bill. He raped us." When asked to clarify what she meant by rape, [M.D.] responded, "He stabbed us all with a knife, and told me to "suck his lucky" (lucky meaning his genitals.) She stated "I wouldn't do that because my mom wouldn't want me to and he asked me if I would do it for my mommy and I said no I won't."

(*Id.* at 365.)

The following day, April 28, the ICU records continue to note references to Bill: "Aunt and grandma at bedside intermittently - patient talking about 'Bill' and asking where her Mom is." (*Id.* at 371.)

Munkel's notes reflected that M.D. continued to identify the perpetrator as Bill. "She also states she went to his place in 1981 in a yellow cab. The man now drives a white Volkswagen. She states he lives in Illinois and lives with his mother

who is always drunk. She stated knife was a butcher knife 'big as a cat's tail' and that the knife didn't come from their house." (Ex. 12 at 72.)

All of this evidence could have been presented to the jury. Trial counsel's failure to investigate and present this evidence was the result of no strategic reason and constituted deficient performance. Had counsel presented this evidence, the jury would have questioned the credibility of M.D.'s identification and found Mr. Lincoln not guilty. In a case like this, where the first trial resulted in a hung jury and the case hinged on M.D.'s identification, trial counsel's failure to present M.D.'s prior inconsistent statements constitutes ineffective assistance of counsel.

B. Evidence Of M.D.'s Fragile Emotional State

Throughout the investigation and in the time leading up to trial, M.D. suffered tremendous emotional and physical pain. As a result, she was in a particularly suggestive state.[13] Effective trial counsel would have investigated and

[13] Social science has revealed that eyewitness identifications are inherently unreliable, as high stress levels strongly affect the ability to accurately identify a person. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 51 (2011). Research has demonstrated that "perceptual abilities actually *decrease* significantly when the observer is in a fearful or anxiety-provoking situation." Frederic D. Woocher, *Did your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969 (1977); *See also* Charles A. Morgan III et al, *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 264, 274 (2004) (Data provides "robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful and realistic in nature may be subject to substantial error."). A witness in a high stress situation is thus more likely to be an unreliable witness. Garrett, *supra*, at 72. Accordingly, eyewitness identifications made by victims are especially unreliable and prone to error. *Id.*

The reliability of a victim eyewitness can be further compromised in a variety of ways. Studies demonstrate that subjects who are exposed to misleading suggestions may confuse those suggestions for their "real memories" of a witnessed event. They then come to believe that they remember seeing items or persons during the witnessed event, when in fact, those items or persons were merely suggested to them. Zaragoza and Lane, *Source Misattributions and the Suggestibility of Eyewitness Memory*, 20 J. of Experimental Psychol.: Learning, Memory, and Cognition 934, 942 (1994) ("[T]he tendency for people to believe that they remember seeing items that were in fact only suggested

presented this evidence to the jury to call into question M.D.'s identification. Trial counsel's failure to present evidence of M.D.'s mental and physical health was not the result of strategy: trial counsel in fact requested discovery of M.D.'s medical documents. Nonetheless, he presented no such information to the jury.

Ample evidence was available indicating M.D. was in a suggestive state throughout the identification process. ICU notes indicated that she continued to have nightmares throughout her stay, and appeared frightened. (*See e.g.*, Ex. 15, Cardinal Glennon Records at 7) ("Child stated, 'I can't sleep because I have nightmares."); *Id.* at 9 ("Crying frequently this evening and speaks of mom's death. States she is 'worried, lonely,' etc. and that she won't be going home. Often very distressed. Also voices frequently determination to 'get better' resting quietly in bed, grandmom at beside, policeman frequently at bedside on patient's request.") Additional notes from Dr. Carberry corroborate M.D.'s emotional state and her consistent nightmares: "[M.D.] is still having nightmares, last night she dreamed that a man came into the hospital and shot her, I reassured her that the policeman would stay close to her door to protect her." (Ex. 13 at 296); "[M.D]

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to them is at the core of what it means for memory to be suggestible."). Additionally, the presence of a weapon during the crime has been shown to distract witnesses, and make them even more unreliable. *Id*. *See also* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013, 1019 (1995) ([I]n self-preservation situations, "there is a tendency to ignore anything not necessary for survival."); Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 415-17, 421 (1992) (A meta-analysis showing a 10% decrease in accuracy when a weapon was present where "weapon absent conditions generated significantly more accurate descriptions of the perpetrator than did the weapon present conditions.").

continues to have nightmares" (*Id.* at 297); "still having nightmares… Dream that she was in a deserted ghost town and we talked about how she might be feeling deserted/abandoned since her mother died." (*Id.*). Dr. Boglorf's notes indicated these nightmares continued all the way up to trial: "[M.D.] continues to have bad dreams @ night wakes up screaming. Needs to be reassured." (*Id.* at 256.)

M.D.'s thinking was also impaired. Dr. Carberry noted:

> [M.D.] also appeared to be experiencing suicidal ideation for a brief period. She was very depressed, and prone to feel guilty regarding her own anger and aggression. She relived the trauma frequently and expressed a desire to punish her assailant. She wished for an omnipotent rescuer who would make all people good and destroy all the evil in the world. Her aunt, Rachel King, reported that [M.D.] was having memory difficulties, nightmares, crying and illogical thinking at home.

(Ex. 9 at 300.)

Additionally, M.D.'s physical pain was significant. On May 4, 1982, the day M.D. viewed several photographs, Munkel noted: "Patient in much discomfort and interview stopped several times. Patient repeated many previous statements. Patient expressing anger toward Det. Burgoon and myself later. Patient also blocking painful experiences recalled earlier." (Ex. 12 at 73.) It was on this day—a day filled with substantial physical and emotional pain—that M.D. was shown the photo of Yancey, and to which she had a reaction. These are the circumstances

surrounding M.D.'s identification and go the heart of the identification's credibility.

Trial counsel's complete failure to introduce this evidence constituted deficient performance. Had counsel clarified for the jury the extreme nature of the circumstances surrounding the purported identification of Mr. Lincoln, it would have discredited M.D.'s testimony and found Mr. Lincoln not guilty.

C. M.D.'s Coaching.

Trial counsel also failed to effectively investigate and obtain records from DFS regarding M.D.'s treatment. Although trial counsel asked for psychiatric and counseling reports, *supra* p.42, trial counsel made no effort to obtain the DFS reports in particular. Had counsel made those efforts, he would have discovered a wealth of information regarding the near dozen times M.D. had rehearsed the trial and was coached through her testimony. *See supra* Claim III. Trial counsel's failure to request these documents was not trial strategy, as he asked the State for related counseling records. Had counsel fully investigated and obtained these documents, he would have been able to impeach M.D.'s credibility with this information and cast doubt upon the identification. Because the jury did not hear this critical evidence, it was unable to question the key evidence against Mr. Lincoln. This prejudiced Mr. Lincoln.

Throughout the trial, the prosecution argued that M.D.'s identification was true and consistent. Trial counsel did little, if anything, to challenge that depiction. Had counsel effectively investigated and introduced evidence of M.D.'s original statements identifying "Bill," her fragile mental and physical health, and the true extent to which the State walked her through her testimony, the jury would have discredited her testimony and found Mr. Lincoln not guilty.

CONCLUSION

Because no evidence remains to support Mr. Lincoln's conviction, there is clear and convincing evidence of Mr. Lincoln's innocence. "As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside."*Amrine v. Roper*, 102 S.W.3d at 548-49.

WHEREFORE, for all of the foregoing reasons, Petitioner respectfully prays that this Court grant the Writ of Habeas Corpus, vacate the conviction and discharge Mr. Lincoln from custody forthwith.

Respectfully submitted,

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for Respondent, Jay Cassaday and Office of the Attorney General are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on December 17, 2015 upon the filing of the foregoing document.

/s/ *Tricia J. Bushnell*

TRICIA J. BUSHNELL