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**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

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| **RICKY L. KIDD,** | ) | |
| | ) | |
| **Defendant,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 16CR9602137A** |
| | ) | **Division 1** |
| **STATE OF MISSOURI,** | ) | |
| | ) | |
| **Plaintiff.** | ) | |

**SUGGESTIONS IN SUPPORT OF DEFENDANT'S MOTION FOR POSTCONVICTION DNA TESTING**

Defendant Ricky Kidd files these Suggestions in Support of his Motion for Postconviction DNA Testing to clarify the record on the "reasonable availability" of DNA testing at the time of Mr. Kidd's trial, and further requests that the Court find that the State is prohibited from asserting that DNA testing was available at the time of trial under the doctrine of quasi estoppel. Defendant only recently became aware of prior statements made by the State (and indeed by the State's counsel in this case himself) to the Department of Justice ("DOJ") that "STR technology had only been available in our jurisdiction since 2000," Ex. 51 at 22. This and other statements directly contradict the State's assertion that "testing was available at the time of [Mr. Kidd's] trial" in 1996, State's Response at 23, 24, and equity requires that the State be precluded from changing its position on a factual matter simply because it would now benefit from that change. For these reasons, Defendant requests this court

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prohibit the State from asserting its new, inconsistent position and find that the Defendant has met § 547.035(3)(a) regarding the reasonable availability of DNA testing at the time of trial.

Missouri courts have long found such a reverse in position impermissible; "The doctrine of quasi estoppel prevents a party from taking a position directly contrary to or inconsistent with another position previously taken." *Sheppard v. East*, 192 S.W.3d 518, 524 (Mo.App.E.D. 2006); *Seifner v. Weller*, 171 S.W.2d 617, 623 (Mo. 1943) ("Generally, a party will not be permitted to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him. This rule is sometimes said not to be strictly one of estoppel in pais, but rather one of quasi estoppel by election."); *see also Lawson v. Cunningham*, 204 S.W. 1100, 1106 (Mo. 1918).

More recently, in *Sapp v. City of St. Louis*, 320 S.W.3d 159, 165-166, Mo.App.E.D. 2010, for example, the court found that quasi estoppel prevented the City from presenting a new argument inconsistent with its previous position. According to the facts set forth in *Sapp*, the City first took the position that Sapp was not entitled to a contested case hearing, arguing that suspensions such as Sapp's were handled through written review procedures. Later, when Sapp attempted to appeal his case under the statute for non-contested cases, the City changed its position and argued that Sapp was entitled to a contested case hearing, but that he

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waived it. The court found these positions to be directly contrary and "[a]s a result, we find the doctrine of quasi-estoppel applies to prevent the City from contending Sapp waived his contested case hearing after it led him to believe he was only entitled to a non-contested written review." *Id.* at 166.

The current case is no different. As Defendant has just discovered, the State has previously taken the position that STR DNA testing was only available in Jackson County since 2000 and relied on this assertion in its defense of its use of National Institute of Justice (NIJ) Grant funding for certain cases. In March 2014, the DOJ released an "Audit Of The National Institute Of Justice Cooperative Agreement Awards Under the Solving Cold Cases With DNA Program To The Jackson County, Missouri Prosecutor's Office." Ex. 51. In the audit, the DOJ found that the Jackson County Cold Case Unit had impermissibly used $923,353 of federal grant funding for the review of cases ineligible under the grant program. Notably, these funds were to be used for cases similar to those considered by § 547.035(3)(a):

> According to NIJ officials, the general concept behind the program was to take advantage of the advent of DNA technology and subsequent advances to solve cold cases ***that occurred at a time when the technology was not available or advanced enough to process the biological evidence.*** This statement is in line with the 2010 program solicitation, which stated that advances in DNA technology have increased the successful analysis of aged, degraded, limited, or otherwise compromised biological evidence. Biological samples once thought to be unsuitable for testing or that generated inconclusive results may now be analyzed. These statements point to

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> the fact that the funds are meant for cases where limits in DNA technology at the time the crime was committed prevented the investigation from moving forward.
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> ***NIJ officials also stated that the program was not meant to cover cases with biological evidence that was obtained during a time when the DNA technology was available but a decision was made by the agency to inactivate the case without processing the biological evidence.*** This corresponds to NIJ's definition of a cold case; that is any unsolved case for which all significant investigative leads have been exhausted. If suitable DNA technology was available at the time the crime was committed and biological evidence was collected, the biological evidence represents a significant investigative lead. If the biological evidence was not analyzed, all investigative leads have not been exhausted and the case does not qualify under this program. This stipulation underscores the fact that the review and investigation of certain cases cannot be funded using program funds.

Ex. 51 at 6 (emphasis added). According to the audit, the application for funds filed by the Jackson County Prosecutor's Office "proposed looking at 1,748 cases from 1981 to 2005," a period that too would cover Mr. Kidd's case.[1] Ex. 51 at 7. The audit concluded, however, that grant funds were misused to review cases from 2006 to 2011, a period during which "DNA technologies were not a limiting factor for processing biological evidence during investigation, since they occurred at a time when the technology was readily available." Ex. 51 at 6.

In response to the audit, the Jackson County Prosecuting Attorney's Office

[1] But for the conviction of Mr. Kidd and his co-defendant Marcus Merrill, one can only presume that the murder of Bryant and Bridges would fall squarely within the Cold Case Unit's purview as at least one perpetrator remains loose and the case is thus unsolved. The reasons behind the State's hesitation to continue the investigation and bring at least on other murderer to justice are unknown.

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sent a letter outlining its reasons for why it believed the funds had not been used outside the guidelines of the grant. Prominent in its reasons was the fact that its grant application had specifically included cases past 2000, and "STR technology had been available in our jurisdiction since 2000." Ex. 51 at 22. This refrain regarding the availability of tested since 2000 was repeated throughout, stating:

- "STR technology came online sometime in the late 1990s or early 2000s." Ex. 51at 26.
- "***Cold case investigation and prosecution with DNA technology has been ongoing in Kansas City, Jackson County, Missouri since 2000.*** This endeavor was largely facilitated by the ***implementation of STR DNA technology at the Kansas City Police Crime Laboratory (KCPD Crime Lab) that same year."*** Ex. 51 at 27.
- "Accordingly, NIJ was placed on explicit notice that STR DNA technology had been online and operational in our jurisdiction ***since the year 2000.***" Ex. 51 at 27.
- "Moreover, we were a successful applicant for NIJ's FY-2012 Solving Cold Cases with DNA. That application included identical documentation noted above regarding the fact that STR DNA technology had been available in our jurisdiction since

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2000." Ex. 51 at 27.

- "We specifically advised NIJ that prospective grant funding would be used to review cases that included then-identified offenses committed ***between 1979 and 2010—up to a full ten (10) years after STR testing had become available in our jurisdiction!"*** Ex. 51 at 27.

Having taken the clear position that testing only became available in 2000 under circumstances where it was beneficial to the State, it is disingenuous for the State to now assert that STR testing—the testing technology necessary to test the requested evidence in this case—was available at the time of Mr. Kidd's trial in 1996. When funding and resources to support the State's investigation for the truth were on the line, the State maintained that DNA testing became available in this jurisdiction in 2000. Yet, when Mr. Kidd also pursues such truth, the State changes course. The State cannot now assert that the necessary DNA testing technology was available before 2000 simply because an earlier availability date would limit Mr. Kidd's chances for freedom. This inconsistency falls squarely with the doctrine of quasi-estoppel and the State should be precluded from asserting such an argument.

Moreover, additional arguments in the State's letter only further support Mr. Kidd's request for testing. The State went on to engage an analysis of what "reasonable availability" of DNA technology means, the same term used in §

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547.035(3)(a). It wrote:

> Third, the new definition asks whether "DNA technology was available at the time the crime was committed." This prompts the question: *"available where"?* Does this mean nationally, regionally, or locally *available?* What if DNA technology was *available* at the FBI crime lab at the time the crime was committed, but not at the jurisdiction in question? What if DNA technology was *available* at a state lab at the time of the crime, but not the local lab of the jurisdiction in question? What if it was *available* at a lab in the neighboring county, but not at the lab of the investigating jurisdiction? What if "DNA technology" was *available* at certain private labs across the country at the time the crime was committed, but not at the jurisdiction in question? To further complicate matters, which generation of DNA technology is referred to as being *"available"?* RFLP? First generation PCR? Only autosomal STR testing?
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> OIG's new definition also prompts the question "available how"? "Available" meaning: the technology was in "existence" *somewhere* at the time of the crime? Does it mean *economically available to* the investigating agency at the time of the crime? Does it mean *logistically available* to police at the time the crime was committed? These examples demonstrate how utterly unworkable OIG's revised definition of a "cold case" will be for grantees. If this definition stands, confusion will be legion.

Ex. 51 at 26.

Despite the State's clarity of the date of availability of DNA testing in this jurisdiction to the DOJ, the State now tries to promote the aforementioned confusion here by asserting that because some form of DNA testing was available somewhere, at sometime in the country, it was must have been reasonably available to Mr. Kidd in 1996. State's Response at 23 (Arguing that DNA testing was available a primitive

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form of testing, DQAlpha was available at other labs in the country.) This is directly contrary to the State's previous assertions

No such confusion should result here, however, as the Missouri Supreme Court has already enunciated the relevant considerations for determining "reasonable availability." *Weeks v. State*, 140 S.W.3d 39, 47-48 (Mo. 2004). In *Weeks v. State*, the Court explained that "the statute does not state that the movant must prove that DNA testing was not technologically possible or was unavailable anywhere at the time of trial," but rather hinges on a review of what was reasonably available to the defendant in his circumstances at the time of his trial. *Id.* Here, it is clear—by the State's own previous admission—that DNA testing was not reasonably available to Mr. Kidd in 1996; STR DNA testing was not available in Jackson County until the KC Crime Lab began such testing in 2000. Indeed, the availability of DNA testing in 2000 is further supported by the fact that the Cold Case Unit also came online at that time. One can only believe that the State would not waste one moment in identifying formerly unknown perpetrators and removing them from the streets, the same inquiry Mr. Kidd so seeks.

Because the State has previously and consistently maintained that STR technology was not available in this jurisdiction before 2000, this Court should find the prosecution is estopped from asserting that DNA testing was "reasonably available" to Mr. Kidd in 1996 and thus find the Defendant has met § 547.035(3)(a).

Respectfully submitted,

/S/ TRICIA J. BUSHNELL

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for plaintiff in this matter 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 March 3, 2015 upon the filing of the foregoing document.

*/s/ Tricia J. Bushnell*
TRICIA J. BUSHNELL