IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,
16TH JUDICIAL CIRCUIT AT KANSAS CITY

RICKY L. KIDD	)	
Petitioner,	)	
	)	
vs.	)	No. 1516-CV05073
	)	
KEN CONLEE	)	Division 1
Respondent.	)	
	)	

REPLY TO RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Mr. Kidd's Petition for Writ of Habeas Corpus cleanly presents multiple ways in which his trial violated the Constitution; all of these violations resulted in the conviction of an innocent person who is sentenced to die in prison for a crime committed not by him, but by Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill. Evidence, both old and new, points directly to the Goodspeeds and Merrill as the real perpetrators. Nonetheless, the Respondent contests Mr. Kidd's innocence, not based on the reliability of this evidence, but by relying on prior piecemeal adjudications decided under limited evidence and restrictive standards not applicable here. In doing so, the State attempts to distract this Court from what the State itself does not deny—the significant evidence supporting Mr. Kidd's innocence—and focus this Court instead on inapplicable standards of review applied

by other courts in different contexts. Such a distraction cannot and does not divest this Court of the power to grant Mr. Kidd, an innocent man, relief from his unconstitutional confinement under Rule 91. Mr. Kidd can demonstrate that the State's failure to provide minimally competent lawyers at his trial, appeal, and initial Rule 29.15 proceeding prevented him from proving that his trial violated the Constitution, *see Martinez v. Ryan,* 132 S. Ct. 1309 (2012); the prejudice he suffered by that failure is apparent from the totality of evidence demonstrating that an innocent person sits in prison while the known true perpetrators of this crime walk the public streets.

I. Ricky Kidd's Innocence Trumps Any Potential Procedural Bar.

A review of the nature and role of innocence in postconviction litigation exposes the unfounded nature of the State's assertion that this Court cannot reach the merits of Mr. Kidd's claims.

First, in terms of finality and procedural bar, cases that involve colorable claims of actual innocence are viewed by courts as fundamentally different. While repetitive litigation by guilty prisoners is burdensome to the courts, an innocent prisoner can never abuse the Writ because it is an equitable remedy, and innocence is "the ultimate equity on the prisoner's side" that trumps all barriers. *Schlup v. Delo,* 513 U.S. 298, 342 (1995), *citing Withrow v. Williams*, 507 U.S. 680, 700 (1994)

(O'Connor, J., concurring in part, dissenting in part).The doctrine of procedural bar is driven by concerns that a prisoner will "sandbag" the courts—withhold a claim or evidence in the hopes of raising it at a later time. However, the United States Supreme Court has rejected this notion: When then-Missouri Attorney General Jeremiah W. Nixon raised the issue of sandbagging in the oral argument in *Schlup*, Justice John Paul Stevens replied, "I thought . . . sandbagging referred to a tactical decision by a lawyer not to use evidence of innocence because he wants to use it later, and I just don't think it happens." Oral Argument, *Schlup v. Delo*, OYEZ, CHICAGO KENT COLLEGE OF LAW (Oct. 3, 1994), available online at https://www.oyez.org/cases/1994/93-7901. When pressed by the Court, Attorney General Nixon could not name a single case in which a prisoner withheld or concealed evidence of his own innocence. *Id.* Indeed, the fear of sandbagging by an innocent prisoner is absurd. Any lawyer who would knowingly withhold evidence that his client is innocent should be disbarred, and any prisoner who would purposefully leave out such evidence is arguably not in possession of his full mental faculties. For all these reasons, finality concerns are weaker and fairness principles are far stronger in cases like Mr. Kidd's, "where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Schlup v. Delo*, 513 U.S. at 347.

There is another practical concern unique to innocence cases, including Mr. Kidd's, that justifies thorough, unfettered habeas corpus review: evidence of true innocence grows over time. This is particularly true in Missouri, where a chronically underfunded public defender system provided Mr. Kidd only a pretext of representation, limiting his ability to investigate and present evidence of his innocence. These deficiencies are well-documented. The Missouri Supreme Court found that "The statewide public defender system . . . had the capacity [in fiscal year 2009] to spend only 7.7 hours per case, including trial, appellate and capital cases." *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 873 (Mo. 2009) (en banc); *see also Symposium: Anatomy of a Public Defender System: Missouri's Public Defender Crisis*, 75 Mo. L. Rev. 853 (2010) (collecting articles discussing the ongoing crisis in Missouri's Public Defender System).[1] The growing body of evidence in Mr. Kidd's case over time is consistent with the pattern of Missouri exonerations, including Ellen Reasonover,[2] Joe Amrine,[3] Mark Woodworth,[4] Ryan

[1] The correspondence between Mr. Kidd and his public defender reveal that things were no better when he was assigned a public defender for trial. Mr. Kidd's trial public defender responded to his polite but persistent pleas for attention with only a firm scolding. Most of the investigation into his defense consisted of depositions taken of the state's witnesses on the eve of trial. Trial in this case commenced March 17, 1997. Richard Harris and Kayla Bryant were not interviewed by the defense until their depositions on March 11, 1997, less than a week before trial. A721, 771.. Gary Goodspeed, Jr., and Gary Goodspeed, Sr., were deposed on March 14, 1997, the Friday before trial. A817, 831.

[2] *Compare* the body of evidence discussed in *State v. Reasonover*, 714 S.W.2d 706 (Mo. Ct. App. 1986), and *Reasonover v. Washington*, 60 F. Supp. 2d 937 (E.D.Mo. 1999).

Ferguson[5] and Dale Helmig[6], where each defendant was denied relief until evidence of innocence reached a critical tipping point in subsequent litigation. Like these defendants, new evidence of Mr. Kidd's innocence (in addition to the growth of evidence throughout his appeals) continues to be unearthed: Since the filing of Mr. Kidd's petition in this Court, UMKC law students working with the Midwest Innocence Project have located and interviewed Earl Ramsey, Jr., who was repairing the brakes on Damon Hollowell's car when the murder happened. Mr. Ramsey definitively states that he saw the killers and Ricky Kidd was not one of them.

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[3] *See State v. Amrine*, 741 S.W.2d 665 (Mo. 1987) (rejecting the recantation of one witness); *Amrine v. State*, 785 S.W.2d 531 (Mo. 1990) (rejecting the recantation of a second witness); *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001) (rejecting the recantation of a third witness);*State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (finding the three recantations together established Amrine's innocence by clear and convincing evidence.).

[4] *See State v. Woodworth*, 941 S.W.2d 679 (Mo. Ct. App. 1997) (granting a new trial when the trial court excluded evidence implicating another person in the crime); *State v. Woodworth*, 55 S.W.3d 865 (Mo. Ct. App. 2001) (affirming Woodworth's conviction on retrial after the state presented evidence of the alternative suspect's alibi); *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. 2013) (granting habeas corpus relief for misconduct by the State that included, but was not limited to, falsifying an alibi for the alternative suspect).

[5] *See State v. Ferguson*, 229 S.W.3d 612 (Mo. Ct. App. 2007) (affirming conviction for murder based on the testimony of his co-defendant); *Ferguson v. State*, 325 S.W.3d 400 (Mo. Ct. App. 2010) (rejecting on procedural grounds co-defendant's recantation); *Ferguson v. Dormire*, 413 S.W.3d 40 (Mo. Ct. App. 2013) (granting habeas corpus relief based on the State's failure to disclose evidence impeaching its only witness corroborating the co-defendant's confession).

[6] *See State v. Helmig*, 950 S.W.2d 649 (Mo. Ct. App. 1997) (rejecting Helmig's claim that the evidence was sufficient to convict); *Helmig v. State*, 42 S.W.3d 658 (Mo. Ct. App. 2001) (rejecting Helmig's evidence implicating another person in the crime and undermining the State's circumstantial case); *Helmig v. Kemna*, 461 F.3d 960 (8th Cir. 2006) (reversing based on procedural restrictions a federal district court order granting habeas corpus relief based on evidence of jury tampering); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. Ct. App. 2011) (granting habeas corpus relief due to the State's failure to disclose exculpatory evidence and use of perjured testimony to convict).

Appendix B, Affidavit of Earl Ramsey at 2. The common nexus of all these cases, including Mr. Kidd's, is that the State used false or unreliable evidence to convict, and the body of innocence evidence continued to grow in spite of Missouri's use of procedural artifice to obfuscate, delay, and mislead.

This case is most similar to Joseph Amrine's, in which various courts rejected the individual recantation of each prosecution witness until the moment when all had recanted. There, the Missouri Supreme Court reasoned that the growing body of evidence justified reconsideration of prior decisions rejecting Amrine's case, including decisions based on witness credibility:

> Because the recantations were made over the course of years and between rounds of federal court proceedings, no court has addressed, at once, all of the evidence of Amrine's innocence. This Court is the first forum in which all of the existing evidence of innocence will be considered.

State ex rel Amrine v. Roper, 102 S.W.3d 541, 545 (Mo. 2003) (en banc). Like Amrine, the evidence of Mr. Kidd's innocence has reached that tipping point. At trial, Mr. Kidd's innocence was supported mainly by his poorly investigated defense of alibi and a weak cross-examination of the State's sole identification witness, Richard Harris. Contrary to Respondent's assertion, Harris' identification testimony does not remain intact. Response at 5-6. Over time, the body of evidence supporting innocence has grown to include significant corroboration of Mr. Kidd's alibi,

powerful impeachment evidence of Mr. Harris (including admissions that he lied to police and gave descriptions of the shooter that rule out Mr. Kidd), a confession by one of the real killers, and now an eyewitness to the shooting of George Bryant whose testimony exonerates Mr. Kidd. The evidence in Mr. Kidd's case has reached that tipping point toward innocence, and Missouri law does not bar this Court from correcting the fundamental miscarriage of justice that has occurred in this case.

II. The Federal Habeas Court's Denial Of Relief Is Not Res Judicata Because The Federal Court Applied A Higher Standard Of Proof Than This Court Is Bound To Apply, And Was Prohibited From Considering Evidence That This Court Is Bound To Consider.

Mr. Kidd described to this Court in his petition the body of evidence that supports his innocence, Petition at 4-22, 27-63, and that evidence has now grown to include an exonerating eye witness. Respondent addresses virtually none of the evidence; instead, it merely alleges, incorrectly, that Mr. Kidd's actual innocence claim must be rejected because Richard Harris "has not wavered on the core of his testimony." Response at 6. *Schlup* does not require, however, that *all* prosecution witnesses credibly recant in order to establish actual innocence; Mr. Schlup prevailed even though two corrections officers who identified him as the perpetrator continued to stand by their testimony. *Schlup v. Delo*, 513 U.S at 331. Similarly, the United States Supreme Court freed Paul Gregory House using the *Schlup* standard even though the Court noted, "This is not a case of conclusive exoneration." *House*

v. Bell, 547 U.S. 518, 553 (2006). Mr. Kidd's innocence case is stronger than both *Schlup* and *House*, compelling the same result here.

Because it cannot attack the evidence, Respondent instead relies only on the prior denial of relief to Mr. Kidd under restrictive federal habeas corpus standards that do not apply here, as if the federal court's refusal to grant habeas relief in this case is *res judicata*. However, "[a]t common law the doctrine of *res judicata* did not extend to a decision on habeas corpus refusing to discharge the prisoner." *Salinger v. Loisel*, 265 U.S. 224, 230 (1924). Even if it did, the federal courts' decisions against Mr. Kidd were based on a higher burden of proof than this Court must apply in these current proceedings. *See Shelton v. City of Springfield*, 130 S.W.3d 30, 36 (Mo. Ct. App. 2004) (Collateral estoppel does not apply where the prior proceeding involves different issues and legal standards.).

Unquestionably, Judge Wright felt constrained from doing the right thing in this case by restrictive standards on federal habeas corpus review—primarily the Eighth Circuit's aberrant formulation of *Schlup v. Delo*'s actual innocence standard. During the hearing, Judge Wright noted that "one thing that really worries me about this case is that actually he, Kidd, he really had poor representation. God almighty." F. T. 3. He also observed, "what's another tragedy is that the Goodspeeds, and particularly of the Senior, . . . if he's getting off free, it would be terrible." F. T. 362.

Despite these impressions, the court perceived the Eighth Circuit's miscarriage of justice standard as virtually insurmountable. Even though "Marcus Merrill . . . impressed me as a pretty truthful witness," the court remarked, "an appellate court will look at this and say, hey, they had enough to convict him." F.T. 364.

In short, the district court's order denying relief is consistent with its perception that the Eighth Circuit's standard for reviewing claims of actual innocence is impossibly high and limited in scope, and is not determinative for this case. Rather, as the Respondent noted, the federal district court effectively applied the sufficiency of the evidence standard of *Jackson v. Virginia,* 443 U.S. 307 (1979), which authorizes relief only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. Put simply, the district court denied relief because "Kidd has not *eliminated* the possibility [of his guilt] with any of the testimony and evidence that he has presented to this Court." *Kidd v. McCondichie,* Resp. Ex. 4 at 11(emphasis added). This is a much more stringent standard than Mr. Kidd faces here. Under the district court's application of the Eighth Circuit standard, *Schlup* itself would have a different outcome because Schlup's conviction rested on the testimony of two identification witnesses who did not recant their testimony. 513 U.S. at 331. "If habeas relief were conditioned on a finding that no rational juror could convict the petitioner after introduction of the new evidence, it would be

impossible to obtain relief because exculpatory evidence cannot outweigh inculpatory evidence under that standard." *State ex rel Amrine v. Roper*, 102 S.W.3d at 548, citing *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. 1989) (en banc).

The federal court opinions on which Respondent relies so heavily applied a restrictive standard that required it to ignore *most* of the evidence supporting Mr. Kidd's innocence. Both Missouri law and federal law provide that a prisoner who can produce new evidence establishing a reasonable probability that no juror would convict him is entitled to habeas corpus review of his claims for relief. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000), citing *Schlup v. Delo*, 513 U.S. at 315-16. In the Eighth Circuit, however, *Amrine v. Bowersox* restricts the definition of "new" evidence to that which "was not available at trial and *could not have been discovered earlier through the exercise of due diligence*." 238 F.3d 1023, 1030 (8th Cir. 2001) (en banc) (emphasis added) (internal citations omitted). This approach is fundamentally flawed, and antagonistic to *Schlup*'s purpose to protect innocent prisoners from procedural technicalities, not to create new ones. It is doubtful that the Eighth Circuit's *Amrine* decision survives the Supreme Court's explicit admonition that "the *Schlup* inquiry, we repeat, requires a *holistic* judgment about 'all the evidence,' 513 U.S., at 328, and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. at 539. The *Schlup*

standard is intended to achieve justice, not avoid justice. This is why the Eighth Circuit stands alone in restricting the *Schlup* inquiry only to evidence undiscoverable by diligent trial counsel.[7]

The Missouri Court of Appeals for the Western District has since observed that the Missouri Supreme Court "has signaled a willingness to treat any evidence that was unknown or unavailable to a defendant at the time of trial as 'new evidence,' without regard to whether the evidence could have been discovered or developed with reasonable diligence at the time of trial." *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. Ct. App. 2015), citing *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. 2010) (en banc). As a result, the standard at issue for this Court does not preclude the evidence of innocence Mr. Kidd now presents. Indeed, *Schlup* defines a colorable claim of actual innocence as one supported by "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." 513 U.S. at 324.

Further, it is not surprising that Mr. Kidd was unable to prevail under the

[7] *See Perkins v. McQuiggin*, 670 F.3d 665, 673-74 (6th Cir. 2012); *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 962-63 (9th Cir. 2003); *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010) (rejecting *Amrine*'s reasoning). The Third Circuit accepts *Amrine*'s definition of new evidence in *Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004), but has carved out an exception for ineffective assistance of counsel claims in order to avoid the absurd result that an innocent person convicted because of the malpractice of his trial counsel could never avail himself of the actual innocence gateway, contrary to the intent of *Schlup* itself. *Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010).

Eighth Circuit standard because his trial lawyer performed so deficiently. United States District Judge Jean Hamilton explained that the fundamental flaw in the Eight Circuit's modified actual innocence standard is that it eviscerates actual innocence as a gateway to claims of ineffective assistance of counsel:

> The following hypothetical illustrates the Court's point: A habeas petitioner presents a claim of ineffective assistance of counsel which is procedurally barred. The petitioner is unable to establish cause and prejudice. The petitioner presents compelling evidence of actual innocence, but all the evidence was available at the time of trial and could have been discovered in the exercise of due diligence. Further, petitioner presents evidence that the available evidence was not utilized because of trial counsel's lack of diligence.
>
> Under the Eighth Circuit's definition of new evidence, the petitioner's *Schlup* claim must fail, notwithstanding the compelling evidence of actual innocence. Under *Amrine*, the evidence presented by the petitioner is not "new," and therefore may not be considered by the habeas court. *Amrine*, 128 F.3d at 1230. The petitioner's claim would be procedurally barred, and the habeas court would be precluded from ruling on the petitioner's ineffective assistance of counsel claim.
>
> In contrast, under *Schlup*, the evidence presented by the petitioner is "new" because it was "not presented at trial." *Schlup*, 513 U.S. at 324. Assuming that the new evidence is reliable and sufficient to sustain the petitioner's burden under *Schlup*, the habeas court must consider the merits of the petitioner's ineffective assistance of counsel claim because failure to do so would result in a "fundamental miscarriage of justice." *Id.* at 320-21.

Reasonover v. Washington, 60 F. Supp. 2d 937, 949, n. 8 (E.D. Mo. 1999).

Therefore, Judge Hamilton observed, "the Supreme Court did not limit 'new evidence' to evidence which was unavailable at the time of trial. Rather, the

Supreme Court directed the habeas court to consider 'all the evidence,' which includes, but is not limited to, evidence 'available only after trial.'" *Reasonover*, 60 F. Supp. 2d at 948, quoting *Schlup v. Delo*, 513 U.S. at 327-28. Mr. Kidd's federal habeas corpus decision exactly fits Judge Hamilton's hypothetical scenario epitomizing injustice.

Judge Hamilton pointed out that if *Amrine*'s "due diligence" gloss had been applied in *Schlup* itself, the prisoner would have lost because virtually all of Schlup's innocence evidence was accessible to a diligent trial attorney. 60 F. Supp. 2d at 948-49. Indeed, when *Schlup* satisfied the actual innocence standard, *Schlup v. Delo*, 912 F. Supp. 448 (E.D. Mo. 1995), relief was granted on his underlying claim that trial counsel failed to diligently investigate his innocence, *Schlup v. Bowersox*, No. 4:92CV443 JCH,1996 U.S. Dist. LEXIS 8887 (E.D. Mo. 1996). It is equally unsurprising that the Missouri Supreme Court rejected the Eighth Circuit's *Amrine* rule and granted habeas corpus relief to Joseph Amrine after the Eighth Circuit refused to consider all of the evidence in assessing Amrine's innocence. *State ex rel Amrine v. Roper*, 102 S.W.3d at 545. A federally recognized *Schlup* gateway claim of innocence requires evidence establishing a probability of innocence and a Missouri state *Amrine* free-standing claim of innocence requires clear and convincing proof of innocence. "Despite different burdens of proof, freestanding

and gateway actual innocence claims depend for their proof on the same 'new evidence' of innocence." *McKim v. Cassady*, 437 S.W.3d at 843. Notably, in *Amrine*, the Missouri Supreme Court found that the exact same body of evidence rejected by the Eighth Circuit's "due diligence" requirement proved Amrine innocent by clear and convincing evidence. *State ex rel Amrine v. Roper*, 102 S.W.3d at 548. The court did not even conduct a new hearing and granted relief based only on the evidentiary record developed at the federal evidentiary hearing.[8] *Id.*at 550.

This discussion is necessary to explain why Respondent's reliance on a federal judge's (Judge Wright's) rejection of Mr. Kidd's innocence evidence is irrelevant to this Court. The Eighth Circuit's decision in the federal *Amrine* case prohibited Judge Wright from considering all but a narrow sliver of Mr. Kidd's evidence. Bound by that mandate, the district court refused to weigh Deputy Jordan's testimony because "Kidd has not identified any new evidence supporting his alibi defense that was not available at the time of his jury trial." *Kidd v. McCondichie*, Resp. Ex. 4 at 9. Since the leads for locating and interviewing Kidd's new witnesses were apparent from the police reports, the district court was

[8] *Amrine* was divided 4-3 on the question of remedy; four justices granted Amrine a new trial because the transcripts of the federal hearing established his innocence by clear and convincing evidence, notwithstanding the federal court's finding that the only "new" witness presented by Amrine was not credible. The court was 7-0 on the question of whether Amrine should get relief based on his actual innocence. *State ex rel Amrine v. Roper*, 102 S.W.3d at 541.

compelled by *Amrine* to ignore almost all of the evidence because "The only evidence that Kidd has presented to this Court that was not available to him at the time of his trial is the testimony of Marcus Merrill." *Id.* at 11. Without considering the testimony of Eugene Williams, Merrill's truthful demeanor, and the physical evidence supporting Merrill's confession, the district court rejected Merrill's testimony solely because it projected that a jury, hearing that Merrill's confession was motivated by hopes of freedom, "would find Merrill to be lacking in credibility." *Id.* at 8. Conceding that "there is no doubt that Harris has given some inconsistent statements," *id.*, and that "Kidd has raised some serious concerns about how his trial counsel handled the case," the district court rejected Mr. Kidd's claim of actual innocence and dismissed his petition. *Id.* at 11.

Because this Court's decision is guided by a much different legal standard and a much larger body of evidence, Judge Wright's ruling has no bearing whatsoever on this Court's decision. As noted above, even a strict application of the doctrine of *res judicata* doctrine would not require this Court to defer to the federal habeas court's denial of relief because the federal court imposed a higher burden of proof on Mr. Kidd that the one that this Court is bound to apply. *Shelton v. City of Springfield*, 130 S.W.3d at 36. Habeas corpus jurisdiction can never be withheld over a claim that "would not be barred under any form of *res judicata*." *Stewart v. Martinez-Villareal*,

523 U.S. 637, 645 (1998). Contrary to Respondent's claims, *see* Response at 6, Richard Harris has not only wavered in his identification of Mr. Kidd, but also admitted to purposely lying to police to throw suspicion off of himself, and has described the shooter in a manner that excludes Ricky Kidd. Further, four-year-old Kayla Bryant did not identify Mr. Kidd as one of her father's assailants in court, and there are substantial questions about her alleged out-of-court identification. Finally, Mr. Kidd can establish with documents and the testimony of a deputy sheriff that the State used false testimony to rebut his truthful alibi. In addition, Mr. Kidd has discovered an eye-witness to the murder who excludes him as a perpetrator. Mr. Kidd is innocent and can prove it.

III. Respondent's Argument That Deficient Performance Of Mr. Kidd's Rule 29.15 Public Defender Is An Insurmountable Obstruction Of Justice Has No Merit. Instead, Postconviction Counsel's Deficiencies Establish Cause-And-Prejudice.

The State has never alleged that Mr. Kidd was competently represented in Missouri trial appellate and postconviction proceedings. Such a claim would be indefensible. Instead, Respondent simply contends that the abysmal representation Mr. Kidd received from Missouri public defenders does not matter because, in essence, the utter and complete incompetence of Mr. Kidd's public defender in Rule 29.15 proceedings whitewashes the constitutionally deficient performance of Mr. Kidd's trial and appellate counsel. *See* Response at 7-9, 9-12. In other words,

according to Respondent, this Court must ignore the fact that Mr. Kidd's trial and appeal lacked integrity because his postconviction proceedings also lacked integrity. This argument is at odds with the fact that while procedural doctrines are designed to respect finality, they also assure "the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012). The Supreme Court explained why effective representation by counsel is essential to the reliability of criminal judgments:

> As [*Coleman v. Thompson*, 501 U. S. 722 (1991)] recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. *See* 501 U. S., at 754; *Evitts v. Lucey*, 469 U. S. 387, 396 (1985); *Douglas* [*v. California*, 372 U. S. 353, 357-358 (1963)]. Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert* [*v. Michigan*, 545 U. S. 605, 619 (2005)]. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

Id. at 1317.

Thus, as a matter of equity and integrity, the ineffectiveness of postconviction

counsel should not obstruct this Court's ability to reach the merits of a claim that is defaulted because of inept representation in the first proceeding in which Mr. Kidd could have litigated his claim of ineffective assistance of trial and appellate counsel:

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U. S. 668 (1984).

Id. at 1318. Thus, ineffective assistance of postconviction counsel, while not an independent claim for relief from a conviction, will allow a reviewing court to reach the merits of a claim that was defaulted by postconviction counsel's deficient performance.

Missouri has incorporated the federal cause-and-prejudice and miscarriage of justice standards into its own dual system of postconviction review; even if a claim was omitted or defaulted in an initial Rule 29.15 proceeding, it can be adjudicated on the merits in habeas corpus proceedings under Rule 91 if the prisoner can satisfy these federal doctrines. *See, e.g.*, *State ex rel. Engel v. Dormire*, 304 S.W.3d at 120;

State ex rel. Koster v. McElwain, 340 S.W.3d 221 (Mo. Ct. App. 2011). The Missouri Supreme Court explained that incorporating federal cause-and-prejudice standards is appropriate because "Inasmuch as this Court has discretion to issue writs of habeas corpus and a duty to protect the rights afforded prisoners under the Constitution of the United States, it is at least arguable that this Court should not defer habeas corpus jurisdiction to the federal courts." *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo.1994) (en banc). Former Missouri Supreme Court Justice Elwood Thomas put it more bluntly: "It is often said that where there is a wrong, there is a remedy. This may be true, but sometimes we have to help it become true." *Id.*at 592 (Thomas, J., dissenting).

The rationale of following federal cause-and-prejudice and miscarriage of justice standards would be defeated by Respondent's suggestion that the Missouri standard consists only of federal doctrine "as it then existed" at the time of *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. 2001). Response at 7. While it is true that no Missouri appellate court has yet embraced the holding of *Martinez v. Ryan*, neither has it been expressly rejected under controlling circumstances. Respondent relies on two Rule 29.15 cases, *Linder v. State*, 404 S.W.3d 926, 929 n.5 (Mo. Ct. App. 2013), and *Martin v. State*, 386 S.W.3d 179, 185-86 (Mo. Ct. App. 2012),

which reject *Martinez v. Ryan* as a claim for relief under Rule 29.15. Response at 9.[9] Those cases are inapposite, as the deadlines under Rule 29.15 are jurisdictional, and Rule 29.15(l) explicitly provides that "The circuit court shall not entertain successive motions." Thus, *Martinez v. Ryan* would never allow a movant under Rule 29.15 to file a successive Rule 29.15 motion or enlarge the timelines.

The only context in which *Martinez v. Ryan* could or would excuse a prisoner's procedural default is in a habeas corpus proceeding under Missouri Rule 91, and the issue has not been decided in that context. Respondent incorrectly suggests that *Ewing v. Denney*, 360 S.W.3d 325 (Mo. Ct. App. 2012), is such a case. That decision cited, in dicta, two pre-*Martinez* decisions, *Gehrke v. State*, 280 S.W.3d 54, 58 (Mo. 2009) (en banc), and *Hutchison v. State*, 150 S.W.3d 292, 303 (Mo. 2004) (en banc), for the proposition that ineffective assistance of Rule 29.15 counsel is unreviewable in habeas corpus proceedings. *Ewing* itself was decided two weeks before *Martinez v. Ryan* was decided; since the habeas corpus petitioner in that case prevailed on the grounds that ineffective assistance of *trial* counsel provided cause to excuse his procedural default, *Martinez v. Ryan* had no bearing on

[9] A LexisNexis search for *Martinez v. Ryan* produces no Rule 91 cases; all appellate decisions that decline to follow *Martinez* are in the context of arguments seeking to enlarge the deadlines under Rule 29.15. *See Logan v. State*, 377 S.W.3d 623 (Mo. Ct. App. 2012); *Martin v. State*, 386 S.W.3d 179 (Mo. Ct. App. 2012); *Middleton v. State*, 437 S.W.3d 244 (Mo. Ct. App. 2014); *Bain v. State*, 407 S.W.3d 144 (Mo. Ct. App. 2013); *Yarberry v. State*, 372 S.W.3d 568 (Mo. Ct. App. 2012); *Jensen v. State*, 396 S.W.3d 369 (Mo. Ct. App. 2013); *Price v. State*, 422 S.W.3d 292 (Mo. 2014) (en banc); *Robinson v. State*, 423 S.W.3d 816 (Mo. Ct. App. 2014); *Sittner v. State*, 405 S.W.3d 635 (Mo. Ct. App. 2013).

the outcome of the case and would not have provided grounds for a motion for rehearing or transfer by either party. In short, the issue of whether the incompetence of Mr. Kidd's postconviction counsel will bar the claims presented in his petition for writ of habeas corpus remains a question of first impression in Missouri.

Mr. Kidd's ability to prove that he was prejudiced by the deficient performance of his Rule 29.15 counsel is a slam-dunk. Postconviction counsel conducted no investigation, in spite of Mr. Kidd's factually-grounded assertions of innocence, and abandoned every claim except one—the improper sentencing of Mr. Kidd as a prior offender. Further, the one claim pursued was deficiently investigated, argued, and presented. *See* Petition at 11-12, 17-18, 84-88. As *Martinez v. Ryan* makes clear, allowing a court to reach the merits of a claim defaulted by inept counsel does not create a new "claim" or impose new obligations on the State; it simply "permits a State to elect between appointing [competent] counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings." 132 S. Ct. at 1320. This would be a particularly just outcome in Missouri, where the legislature has been deaf to the courts' persistent expressions of concern about the chronic underfunding of the Missouri Public Defender System. *See State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 873 (Mo. 2009) (en banc); *State ex rel. Wolff v. Ruddy*,

617 S.W.2d 64, 65 (Mo. 1981) (en banc); *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971) (en banc).

Even in the absence of cause-and-prejudice, the law is clear that Mr. Kidd's colorable claim of actual innocence constitutes an exceptional circumstance that "allow[s] the opportunity to litigate claims after conviction *that had been previously litigated* or were defaulted and, thus, are procedurally barred." *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 280-81 (Mo. App. S.D. 2008), quoting *State ex rel. Nixon v. Jaynes*, 63 S.W.3d at 215 (emphasis added); *see also State ex rel. Engel v. Dormire*, 304 S.W.3d at 120 (where cumulative evidence withheld by the state justified revisiting Engel's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), even though portions of it had been rejected on the merits in Engel's Rule 19.15 proceedings). "There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim." *Cullen v. Pinholster*, 563 U.S. 170, 213, n.5 (2011) (Sotomayor, J., dissenting). Therefore, even if a prior court has reached the merits of a similar or related claim presented by Mr. Kidd, the law is clear that "procedurally defaulted claims can be resurrected in a habeas corpus proceeding under a gateway claim of cause and prejudice or a gateway claim of innocence." *State ex rel. Koster v. McElwain*, 340 S.W.3d at 229.

Mr. Kidd need not show *both* that there is cause-and-prejudice and a colorable

claim of actual innocence to overcome the failure of his public defender to investigate and present his claims; either will suffice. *Id.* at 232 ("Where, as here, several avenues permitting habeas corpus review and several Claims of constitutional infirmities were found to have merit, we need only determine that at least one avenue permits habeas review, and that at least one claim has merit.").

IV. Respondent Does Not Deny The Evidence Supporting Mr. Kidd's Innocence, Thus Admitting All The Evidence This Court Needs To Grant Mr. Kidd Relief.

Mr. Kidd has presented this Court with persuasive evidence demonstrating a disturbing likelihood that an innocent person has been convicted and sentenced to die in prison while the actual perpetrators of the crimes roam the streets. The Jackson County Prosecutor and Missouri Attorney General remain indifferent to these facts, and present no compelling justification for this Court to refrain from correcting the fundamental miscarriage of justice that Mr. Kidd has suffered. Other than the procedural arguments addressed above, Respondent does not deny or address the significant evidence of Mr. Kidd's innocence, all of which supports an order from this Court granting the writ.

Under *State ex rel. Amrine v. Roper*, *supra*, Mr. Kidd is entitled to a new trial based upon a clear and convincing showing that he is innocent, even if he had a fair trial. Of course, the notion that this trial was fair is patently absurd in light of

counsel's abysmal performance. As noted above at pp. __-__, the mere probability of Mr. Kidd's innocence sweeps away all of Respondents niggling little procedural technicality arguments, and this Court can freely remedy the numerous errors that resulted in his wrongful conviction. But all that aside, the overwhelming weight of the evidence at this point clearly and convincingly shows that an innocent man has been convicted, and by failing to deny it, Respondent admits virtually all of it.

Respondent's failure to engage the facts supporting Mr. Kidd's innocence is fatal to his position. It is well-established that "proceedings in habeas corpus shall be governed by and conform to the rules of civil procedure." Rule 91.01(a). "Moreover, writs filed pursuant to Rule 84.24 and Rule 91 are civil proceedings." *McKim v. Cassady*, 457 S.W.3d at 839, citing Rule 84.24; Rule 91.01(a); *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 216 (Mo. 2001) (en banc) ("Petitions for habeas corpus are civil proceedings and, as Rule 91 indicates, are governed by the rules of civil procedure."). A fundamental rule of civil procedure is that facts that are not denied in a response to a complaint are "deemed admitted." *Holzhausen v. Bi-State Dev. Agency*, 414 S.W.3d 488, 493 (Mo. Ct. App. 2013), citing *Glasgow v. Cole*, 88 S.W.3d 114, 117 (Mo.Ct. App. E.D. 2002). Because the State does not deny nearly all of the factual bases of the claims presented by Mr. Kidd, this Court may order Mr. Kidd's release based upon the admitted factual assertions before it.

Further, under R. 91.06, this Court is capable of releasing Mr. Kidd of its own accord: "Whenever any court of record, or any judge thereof, shall have evidence from any judicial proceedings had before such court or judge that any person is illegally confined or restrained of liberty within the jurisdiction of such court or judge, it shall be the duty of the court or judge to issue a writ of habeas corpus for the person's relief, although no petition be presented for such writ." Indeed, the federal district courts have similarly found that no evidentiary hearing is necessary to order a new trial and a defendant's release. *See Richardson v. Miller*, 716 F. Supp. 1246, 1254 (W.D. Mo. 1989) ("The Court has held in a substantial number of cases that a state prisoner may be entitled to federal Fourteenth Amendment habeas corpus relief without an evidentiary hearing being conducted in either a State or a federal court."); *Williams v. Kaiser*, 323 U.S. 471, 478 (1945) (Reversing the Missouri Supreme Court outright because "petition establishes on its face the deprivation of a federal right.")

Here, this Court has all of the facts necessary to release Mr. Kidd. Indeed, these facts have been presented and admitted on two separate occasions: First, through Mr. Kidd's hearing for DNA testing, CITE; and second, in the present proceeding, where the State does not deny the evidence critical to proving Mr. Kidd's innocence.

In regard to Claim Nine of Mr. Kidd's Petition—that Mr. Kidd is innocent—the State denies nothing. The factual assertions that Respondent has not denied include, but are not limited to the following:

Merrill and the Goodspeeds killed George Bryant and Oscar Bridges

Neighbors who heard the shots that killed George Bryant and Oscar Bridges saw three men flee the scene in a clean, new white Oldsmobile. Petition at 6; A1, 110, 157, 336, 639. Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr., were all close to one another, Petition at 7-8; A416, 640, and travelled to Kansas City from Atlanta just days before the murders. A158, 383. Upon arriving at Kansas City International Airport, Goodspeed, Sr., rented from Alamo car rental a white Oldsmobile believed to be the car used in the murders. T. 1268, 1363-64, 1375; A.370, 565. Less than an hour before the murders, Merrill and the Goodspeeds rendezvoused at Eugene Williams' house. Petition at 104; F.T. 25, 28. Merrill and the Goodspeeds discussed their plans to rob a drug house in front of Eugene Williams just before they left Williams' house to commit the crime. Petition at 102; F.T. 176. At the time, Goodspeed, Sr., had a beef with George Bryant over Bryant's affair with Goodspeed's ex-wife. Petition at 58, 103; F.T. 178; A566, 654, 1018. While they were at his home, Eugene Williams saw that Goodspeed, Sr., was armed with a gold .45 caliber automatic, Merrill was armed with a 9mm pistol, and

Goodspeed, Jr., was armed with a .38 caliber revolver that Williams knew was broken. Petition at 102-03;, F.T. 27, 175. Eugene Williams never saw Ricky Kidd that day. Petition at 103; F.T. 174, 177.

Enroute to Bryant's house, Goodspeed, Sr., stopped at a Stop 'n Go to purchase duct tape. Petition at 20; F.T. 28. Police found an empty Carmex package in the implicated rental car with Goodspeed, Sr.'s, fingerprint and a Stop 'n Go price tag. Petition at 20; A141, 158. When the three reached the house, Bryant let Merrill and the Goodspeeds into his home because he knew Goodspeed, Jr. Petition at 20, 96; T. 503-05; A202, 206-07. Bryant had even commonly referred to Goodspeed, Jr., as "Little Brother" because of their family-like resemblance to one another. Petition at 104; F.T. 18. After robbing Bryant's house of drugs and cash, and shooting Oscar Bridges and George Bryant to death, Goodspeed, Sr., ordered Marcus Merrill to "do something about" the little girl, meaning, "He wanted [Merrill] to kill her." Petition at 21; F.T. 35. Merrill went back into the house, told Kayla Bryant "it would be okay and I put her to the side I shot a bullet in the wall." *Id.*.

No physical evidence linked Ricky Kidd to the crime. Petition at 1, 26, 98. A footprint on a piece of bread found on Bryant's kitchen floor did not match any shoes owned by Ricky Kidd. Petition at 6; A30, 45, 50, 126, 513, 533. Ballistics

evidence showed that bullets recovered from Bryant and Bridges came from a .45 caliber weapon, spent .45 caliber shell casings were found near Bridges' body, a second bullet fragment recovered from the garage was fired by a second weapon of unknown caliber, and a 9mm shell casing was found at the scene. Petition at 6; A1, 204; T. 860. Crime scene analysts found an apparent bullet hole shot from within the kitchen through the wall into the garage. Petition at 105; T. 648-51.

As they drove away from the crime scene, Merrill and the Goodspeeds collaborated on an alibi: that they met at the Adams' Mark Hotel and later went to Jean Bynum's house. Petition at 10, 22; A551-3 (Merrill), 565-7 (Goodspeed, Jr.), 652-3 (Goodspeed, Sr.); F.T. 38. When arrested and questioned about the offense, Merrill and the Goodspeeds claimed that they were with one another at the Adams' Mark Hotel at the time of the shootings. Petition at 10; A551-3 (Merrill), A565-7 (Goodspeed, Jr.), 652-3 (Goodspeed, Sr.). The alibi of Merrill and the Goodspeeds is transparently false because Merrill has admitted his presence at the scene of the crime (F.T. 28), and there is no third party corroboration of the Goodspeeds' alibi. *Id.*Although Merrill endorsed the Goodspeeds as alibi witnesses, he did not call them at trial because he knew it would backfire on him. Petition at 59; *See* A817-30 (Deposition of Gary Goodspeed, Jr.), 831-42 (Deposition of Gary Goodspeed, Sr.), 565-67, 652-56, 821, 834.

Kayla did not identify Mr. Kidd as the shooter, but her statements implicate the Goodspeeds and Merrill as the real killers

When the police arrived at the scene, Kayla Bryant was still on the phone with the 911 operator. A120. She told police that "Daddy's brother shot Daddy," (although the killer was not her uncle) and that the man who shot her Daddy told her, "[It] will be alright." Petition at 6; A202-03. Kayla Bryant also told police that the men who killed her daddy had been at her house a few days earlier. *Id.* Goodspeed, Jr., admitted to the police that he and Marcus Merrill went to George Bryant's house the Saturday before the homicides, but Marcus Merrill denied it. Petition at 10; A553, 566.

Although Kayla Bryant is alleged to have reacted to Mr. Kidd when she viewed a video line-up, she was never asked about her alleged identification in the taped interview that followed. A462-72. She failed to identify Ricky Kidd from a photograph display, Petition at 7, 97; A209; T. 519-20, 994-95, but identified a photograph of Marcus Merrill as one of the men who killed her father. Petition at 7; A1043-44. Kayla Bryant's description of Merrill as the "fat one" and the other perpetrator as the "skinny one" is inconsistent with Ricky Kidd's guilt because he outweighs Merrill by 34 pounds. Petition at 51, 96; T. 506; A508, 550. Merrill, on the other hand, outweighs both Goodspeeds by a similar margin. Petition at 51-52; A550, 572.

At Mr. Kidd's trial, Kayla Bryant failed to identify Mr. Kidd when asked to do so twice. Petition at 13, 43-44; T. 518-19.Kayla Bryant has never viewed the video line-up that included Gary Goodspeed, Sr., and Gary Goodspeed, Jr. Petition at 7, 48; A209.

Richard Harris is a liar

Richard Harris is the only witness who testified at trial that he saw Ricky Kidd at the scene of the crime, Petition at 27-28, but he was never questioned or impeached by Mr. Kidd's defense counsel about the fact Harris was a known liar, Petition at 28; F.T. 430, 486-87, , that he gave inconsistent descriptions of what the shooter looked like, Petition at 29-30; F.T. 400-04, 406-09; A924-25, that he was involved in drug trafficking with George Bryant, Petition at 30; F.T. 432-33, 507, that his description of whether he (Harris) even saw the shooting was inconsistent, that there was conflicting evidence about whether Harris was even present at the time of the shooting, Petition at 35-36; A110; T. 548-55; F.T. 498-500, 523-25, and that Harris had numerous potential motives to lie, Petition at 30, 32, 40-42; F.T. 393, 469-70, 507-508. Harris claimed at trial that he saw the shooting, and even demonstrated how it happened, T. 570-71, but in prior statements told police he did NOT see the shooting. A430-1. On competent questioning by present counsel, he admitted he did not see the shooting. A. 948; Petition at 33-34. Further, Harris'

then-wife, Letha Jones, and his then-girlfriend, Sholanda Baily, stated that Harris told them he saw the shooting from his mother's driveway, F.T. 491, 514, a significantly inferior vantage point from which he could not have made and accurate identification. F.T. 525; Petition at 36-37.

Juanita Davenport saw Harris making a phone call at the Cleveland Health Center immediately after the crime; she saw blood on Harris' shoulder, and he was out of breath, saying, "Hide me. Hide me," and "I didn't do anything. I chickened out." Petition at 19, 38; F.T. 209. Trial counsel attempted to present Juanita Davenport's testimony, but had failed to lay a proper evidentiary foundation for it, so the jury never heard it. Petition at 28, n.4; T. 1142-43.

Ricky Kidd had an alibi

Ricky Kidd consistently denied his guilt and explained his activities on February 6, 1996, which included going to his sister's place of employment and to the Jackson County Sheriff's Office at Lake Jacomo. Petition at 67-71; T. 1089-1185; A666. Jackson County Deputy Susan Jordan, badge no. 937, would have testified that gun transfer application forms are available only in person at the Lake Jacomo Office, and that Mr. Kidd's gun transfer application would have to have arrived in the office on February 6, 1996, because of the time and manner in which it was processed. Petition at 16-17, 22, 73; A542-47, 988-89, 996-97.

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Based upon all of these admissions, this Court can and should find Mr. Kidd innocent and order his release. In addition to Claim Nine, Mr. Kidd will discuss the relevant admissions for each remaining claim below. To the extent that the State makes any additional legal arguments in their response to these claims, Mr. Kidd will also address them here.

CLAIM ONE: Trial Counsel's ineffectiveness for failing to investigate, cross-examine and impeach Harris and Bryant.

Respondent does not deny that trial counsel failed to investigate, cross-examine, or impeach Harris and Bryant, as outlined in Petitioner's Claim One. It does not deny that Harris was the only witness connecting Mr. Kidd to the crime. Petition at 27-30. As is the case with Claim Nine, it does not deny that Harris was a known liar, that he gave inconsistent descriptions of what the shooter looked like, that he was involved in drug trafficking with George Bryant, that his description of whether he (Harris) even saw the shooting was inconsistent, that there was conflicting evidence about whether Harris was even present at the time of the shooting, and that Harris had numerous potential motives to lie. Petition 27-41.

Respondent also does not deny or address the fact that Kayla Bryant did not identify Ricky Kidd as being present in her home on the day of the crime, Petition 43-44, nor does it address the many ways in which Bryant's alleged out-of-court

identification was coaxed through the use of known faulty eyewitness identification procedures. Petition at 43-53.

CLAIM 2: Trial Counsel's ineffectiveness for failing to investigate and present evidence tying Merrill and the Goodspeeds to the crimes.

Just as with Claim One, Respondent again does not deny the underlying facts that support Mr. Kidd's second claim; namely, that trial counsel failed to investigate and present evidence that it was Merrill and the Goodspeeds that committed the crime. This time, in addition to its reliance on the same procedural argument it presents in connection with Claim One, Respondent relies on an antiquated rule of evidence precluding the admission of defense evidence that another person is actually responsible for the crime. Response at 12-13, citing *State v. Nash,* 339 S.W.3d 512-15 (Mo. 2011). That principle is on a collision course with *Holmes v. South Carolina*, 547 U.S. 319 (2006), which struck down South Carolina's similar evidentiary rule as a violation of the defendant's due process right to present reliable, exculpatory evidence in his defense.

This Court need not reach the constitutional question because the evidence supporting Mr. Kidd's Claim Two meets even the strictest application of *Nash,* which Respondent claims requires "evidence directly linking the third person with the *corpus delicti* of the crime" as a threshold condition of admissibility. Response at 12. Respondent effectively concedes that Marcus Merrill's testimony during federal

habeas proceedings directly implicating himself, Gary Goodspeed, Jr., and Gary Goodspeed, Sr., in the crime satisfies the *Nash* standard, but alleges that the evidence available at trial was insufficient to meet the *Nash* standard. Response at 13. That is incorrect. Mr. Kidd pleaded significant evidence that would meet this standard, none of which the State opposed.

First, Richard Harris identified Gary Goodspeed, Jr., as the man who chased George Bryant out of his garage, which constitutes direct evidence linking him to the crime. A440. Second, there is substantial evidence tying Goodspeed, Jr., along with both Merrill and Goodspeed, Sr., to the crime, including: The joint-alibi of Merrill and the Goodspeeds that excludes Ricky Kidd, A652-653; Goodspeed, Jr.'s, statement admitting he and Merrill visited Bryant a few days before the crime, A566; Eugene Williams' testimony that Merrill and the Goodspeeds met at his house the morning of the crime, discussed robbing a drug house that morning, and left armed with pistols consistent with eyewitness accounts of the crime, and ballistics analysis of the fatal bullets, F.T. 174-177; Rental car records and fingerprint evidence connecting Goodspeed, Sr., with the guilty rental car, T. 969-78, 1013, 1039-40; Airline, hotel, and rental car records showing the Goodspeeds and Merrill lived together in Atlanta, traveled to Kansas City before the crime, rendezvoused the morning of the crime, and returned to Atlanta after the

crime was completed, A383-90, 416-17, 505-06, 553, 640. Respondent challenges none of this critical evidence in its opposition.

Indeed, evidence of the identification testimony, travel documents, fingerprints and fake alibi was available to trial counsel and was more than sufficient to tie Merrill and the Goodspeeds to the crime for purposes of *Nash*. Critically, the Court of Appeals previously rejected the very same argument from the Respondent in Dale Helmig's case, where new evidence tied an alternative suspect to a purse believed to have been taken by the perpetrator of the crime. Evidence of Ted Helmig's motive and opportunity was admissible in Dale Helmig's defense because "Ted Helmig has now been connected to [. . .] material evidence in Norma Helmig's murder case." *State ex rel. Koster v. McElwain*, 340 S.W.3d at 250. The link to Gary Goodspeed, Sr., and Gary Goodspeed, Jr., is sufficient to require the admission of evidence that Marcus Merrill committed the crime with both of them, and not with Mr. Kidd.

Respondent also ignores the other reason that admission of such evidence was imperative for a competent defense: Merrill's public defender argued that the Goodspeeds committed the crime with Mr. Kidd, and that Merrill was innocent. T. 1358-70. Thus, the Goodspeeds' involvement, and their link to Mr. Merrill were already part of the case, and it was incumbent upon Mr. Kidd's trial counsel to

counter Merrill's argument. Therefore Mr. Kidd's due process right to admit exculpatory evidence would have required admission of the evidence regardless of any other evidentiary doctrine. *See*, *e.g.*, *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999) (evidence that Paxton passed a polygraph test was admissible to refute argument that charges were dismissed for other reasons); *Lajoie v. Thompson*, 217 F.3d 663 (9th Cir. 2000) (evidence otherwise barred by Oregon's rape-shield statute admissible to refute argument that there was no alternative source of child-victim's knowledge of sexual matters).

The State does not oppose any of the evidence underlying Claim Two, and as a result, this Court should grant Mr. Kidd relief.

CLAIMS THREE & FOUR: The uncorrected false claim that Mr. Kidd's fingerprints were in the guilty car.

Respondent also does not deny the prosecutor's failure to correct the false claim that Mr. Kidd's fingerprints were in the implicated car. Instead, Respondent again alleges the same old procedural bar argument addressed in-depth above. In doing so, Respondent does not challenge any of the facts alleged by Mr. Kidd—that Merrill's counsel misstated the physical evidence, that the fingerprints recovered from the guilty car were not Mr. Kidd's, and that neither the court nor the prosecutor did anything to correct it. Petition at 62-67. Nor does Respondent grapple with the constitutional and ethical obligation of a prosecutor to never allow false evidence "to

go uncorrected when it appears." *Giglio v. United States*, 405 U.S. 150, 153 (1972), citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Here, the prosecutor failed to correct a material lie that was given to a jury—that Mr. Kidd's fingerprints were found in the car used in the crime—and that lie provided the only objective corroboration to Richard Harris' unreliable identification of Mr. Kidd. Instead of responding to this fact, Respondent concocts a "law of the case" argument based upon a Court of Appeals ruling on a different issue—severance—that never presented the proposition that the uncorrected fingerprint argument was false and misleading. Response at 16-18. Rather, the discussion of the codefendant's argument was limited to appellate counsel's claim that the defendants' trials should have been severed due to antagonistic defenses, and had nothing to do with the propriety of the argument itself. As explained above, the Respondent's procedural bar argument, including the bizarre "law of the case" argument has no merit. Mr. Kidd's claims are properly before this Court as part of Mr. Kidd's colorable claim of actual innocence.

CLAIM FIVE : Mr. Kidd's Sixth Amendment Right To Competent Counsel Was Violated When Trial Counsel Failed To Conduct A Reasonable Investigation To Corroborate Petitioner's Defense Of Alibi.

Respondent also does not effectively challenge all of the ways in which trial counsel failed to independently investigate Mr. Kidd's alibi as alleged in Petitioner's

Claim 5, nor does it deny the underlying facts. Petition at 67-75. Instead, Respondent's opposition to this claim again obfuscates the law and also the facts surrounding it. Here, Respondent frames the question in absolutes, e.g. that Mr. Kidd's new evidence must "definitely establish" his alibi, or he failed to show "that he could not have applied for the permit, either before or after committing the murders around 11:30 a.m." Response at 19-20.

Establishing Mr. Kidd's actual innocence and the prejudicial impact of counsel's deficient performance does not require "a case of conclusive exoneration." *House v. Bell*, 547 U.S. at 553. The question before this Court is whether counsel's performance was deficient for failing to investigate promptly Mr. Kidd's alibi, including the failure to interview the deputy who actually handled Mr. Kidd's application to purchase a gun whose identity was readily ascertainable by her badge number on the processed form, and whether Mr. Kidd was prejudiced by that failure. These questions do not require Mr. Kidd to show that it would violate the laws of physics for him to have been with Monica Gray at the time of the crime; he satisfies his burden by presenting relevant evidence, readily available to trial counsel, that "tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or [that] tends to corroborate evidence which itself is relevant and bears on the

principal issue of the case." *State v. Barriner*, 111 S.W.3d 396, 400-401 (Mo. 2003) (en banc), quoting *State v. Mathews*, 33 S.W.3d 658, 661 (Mo. Ct. App. 2000). Respondent's argument ignores the role that the application for gun transfer permit would have played in corroborating Mr. Kidd's truthful alibi defense.

Respondent's argument that Deputy Susan Jordan's testimony "did not definitely establish that Kidd had applied for a gun permit on February 6, the day of the murder, as opposed to February 5," Response at 19, is simply not true. The Eighth Circuit Court of Appeals got this fact correct, finding that "Susan Jordan, the dispatcher who processed his gun permit application, confirmed Kidd's application was received the same day as the shootings, refuting the state's claim at trial that Kidd may have delivered the application the day before the shootings." *Kidd v. Norman*, 651 F.3d 947, 951 (8th Cir. 2011). Unfortunately, as explained above, the Eighth Circuit's actual innocence standard, which has been rejected in Missouri, required the court to ignore this fact in deciding Mr. Kidd's case because Kidd could not show that this evidence was "not available *at trial* through the exercise of due diligence." *Id.* at 952 (emphasis added). Thus, the federal litigation did not find as Respondent suggests; federal courts were simply disabled from acting by the preclusive standards advocated by Respondent that required them to ignore probative evidence regardless of its truth. *See* Section II, *supra* at pp. 7-16.

Respondent never addresses the crux of the problem with counsel's deficient performance. It does not deny that the gun transfer application was obtained not by the defense investigation, but by detectives who were checking out the statement that Ricky Kidd gave them on February 14, 1996 and that plain on the face of the application is the date, February 6, 1996, with the time that the application was processed as 1:47 p.m. on the same day and the badge number of Susan Jordan, 937. A999-1003, T. 1160-62. Respondent does not deny that defense counsel never spoke to Susan Jordan, and instead simply subpoenaed Sergeant Tim Buffalow, from whom the detectives obtained Mr. Kidd's application, with zero independent investigation of the circumstances. This left Mr. Kidd vulnerable to the Big Lie that Respondent continues to tell: The application could have been received on a day other than February 6, 1996. Response at 19-20, T. 1164-65.Tracing the investigative to its source, Susan Jordan, establishes that the date the application was received "would have to be the 6th because of the Alert checks." A996-97. Contrary to the misleading testimony that the prosecutor elicited from Sgt. Buffalow, it was extremely rare to receive such applications by mail because the form must be picked up in person at the Sheriff's Office at Lake Jacomo. A976-77. Respondent ignores and does not address these important facts.

CLAIM SIX: The trial court's failure to inquire into Mr. Kidd's well-grounded pretrial objections to counsel's deficient performance.

Similarly, Respondent dramatically overstates the governing law and distorts the record in Mr. Kidd's case regarding Mr. Kidd's motion to discharge counsel. Respondent contends that the systemic failure by the public defender to address Mr. Kidd's motion constitutes a procedural default, but it is simply further evidence of the systemic problems that plague the Missouri Defender System. The fact that trial counsel did not even begin investigation until the week before trial exposes the absurdity of Respondent's attempt to paint Mr. Kidd as a "difficult client." Response at 22.

In attempting to oppose Mr. Kidd's claim, the State again does not dispute the facts, but inappropriately relies on *Mickens v. Taylor*, 535 U.S. 162 (2002), a case in which there was no pretrial objection to the client's representation by an attorney who had represented the victim of the homicide with which Mickens was charged. The controversy there was over the applicability of cases in which the possibility of a conflict imposes a duty of inquiry on the state- court judge, even when no objection was made. *Mickens v. Taylor*, 535 U.S. 162, 185 (Stevens, J., dissenting), citing *Wood v. Georgia*, 450 U.S. 261, 267 (1981). Justice Scalia, writing for the majority, distinguished that situation from one, such as Mr. Kidd's, in which an objection was made:

> Since this was not a case in which (as in *Holloway*) counsel protested his inability simultaneously to represent multiple defendants; and since the trial court's failure to make the *Sullivan*-mandated inquiry does not reduce the petitioner's burden of proof; it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest adversely affected his counsel's performance.

Mickens v. Taylor, 535 U.S. at 173-74. Mr. Kidd's specific protests regarding his counsel's incompetence—substantiated by counsel's actual hostility toward Mr. Kidd's justified concerns about her diligence—obligated the trial court to inquire before summarily denying Mr. Kidd's motion to dismiss counsel on the same day it was filed without awaiting a response from counsel for Mr. Kidd or counsel for the state. *See, e.g.*, *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999) (granting habeas corpus relief because an Iowa trial court refused to inquire into the defendant's objection to being represented by an attorney who had accepted employment with the prosecuting attorney.).

There are three standards at issue here. Under *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Wood v. Georgia*, 450 U.S. 261 (1981), a trial court that is on notice of a conflict of interest on the part of trial counsel but fails to conduct an inquiry commits automatic reversible error. *Mickens* may limit the rule of automatic reversal in the absence of an objection to cases in which the court is on notice of a conflict of interest based on the representation of co-defendants. In the absence of an objection,

to obtain post-trial relief the prisoner must show an actual conflict of interest that adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980). If there were no conflict of interest at all, then the prisoner must show that he was prejudiced by counsel's deficient performance under the *Strickland* standard. The issue in Mr. Kidd's case is academic since he would prevail under any standard that this Court could apply.

CLAIM SEVEN: Trial counsel's ineffectiveness deprived Mr. Kidd of his right to automatic severance of his trial from Marcus Merrill's.

Mr. Kidd has explained his entitlement to automatic severance from his co-defendant Marcus Merrill had trial counsel performed competently. *See* Petition at 84-88. Respondent denies none of Mr. Kidd's allegations of fact, and simply claims that "the Missouri Court of Appeals already found that Kidd was not prejudiced by the joint trial." Response at 23, citing *State v. Kidd*, 990 S.W.2d 175, 182-85 (Mo. Ct. App. 1999). Again, due to trial and appellate counsel's incompetence, the court was unaware the Mr. Kidd was not properly charged as a prior offender, and that he was therefore entitled to automatic severance pursuant to RSMo. § 545.880.2(1). As discussed above, the Court of Appeals has observed that it is not impermissible to revisit a previously rejected claim, particularly in cases where cumulating evidence reveals the prior rejection was ill-informed. *State ex rel. Koster v. McElwain*, 340 S.W.3d at 229, n. 6, citing *State ex rel. Engel v. Dormire*,

304 S.W.3d 120. Mr. Kidd's is certainly such a case; unquestionably the Court of Appeals would have ruled differently had it been fully informed by trial and appellate counsel. It is an undeniable fact that Mr. Kidd was improperly charged and sentenced as a prior offender, and that had that error been noticed and asserted his trial would have been severed from his codefendant's trial. Never were these two related legal propositions presented cogently to the courts. The only conceivable explanations for the failure of Mr. Kidd's public defenders to properly assert the prior offender/severance argument are "a startling ignorance of the law" or simply "inadequate preparation." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

CLAIM EIGHT: Appellate counsel was ineffective for failing to brief the court's failure to inquire into Mr. Kidd's motion to dismiss counsel (Claim 6), the prosecutor's failure to correct false evidence (Claims 3 & 4), and the botched prior offender/joinder issue (Claim 7).

Mr. Kidd has explained that Missouri has never rejected *Martinez v. Ryan* in a Rule 91, proceeding, and that there are sound jurisprudential and policy reasons to consider that holding within the scope of Missouri's incorporation of federal cause-and-prejudice doctrine into its own habeas corpus jurisprudence. *See* Claim III, *supra* at pp. 35-40; *Reuscher v. State*, 887 S.W.2d 588; *Clay v. Dormire*, 37 S.W.3d 214.

With respect to Mr. Kidd's claim that appellate and postconviction counsel should have briefed the trial court's failure to inquire into Mr. Kidd's complaints

about trial counsel's obvious neglect of his case, Respondent injects new, unsupported allegations that counsel's neglect was justified by the "rudeness" of Mr. Kidd's family. Response at 26. The response does nothing more than invite an evidentiary hearing on the issue, which should have taken place nineteen years ago in front of Judge Shinn. Again, Respondent fails to object to any of the underlying facts of these claims, as outlined in Claims Three, Six, Four, and Seven, *supra*.

Respondent also alleges that appellate counsel made the decision to present the "stronger claim that Kidd was erroneously found to be a prior offender." Response at 26. Respondent mistakenly refers to postconviction appellate counsel, not direct appeal counsel. Postconviction counsel also failed to brief the botched prior offender issue, which is how appellate counsel also botched the severance issue. Respondent's arguments rest entirely on the false assumption that each claim was adequately litigated in prior proceedings, and that Missouri law prohibits revisiting such issues. Neither assumption is correct. *See State ex rel. Koster v. McElwain*, 340 S.W.3d 221; *State ex rel. Engel v. Dormire*, 304 S.W.3d 120; *State ex rel. Ferguson v. Dormire*, 413 S.W.3d at 52, n. 20 ("The State's argument merely reinforces our conclusion that in the absence of statutory or constitutional constraint, a state habeas petitioner in Missouri is not prohibited from filing successive habeas corpus petitions in this court or in the Supreme Court asserting grounds previously

denied by a circuit court, whether or not on the merits.")

***

The State does not deny the mountain of evidence that supports Mr. Kidd's claim of innocence and his numerous supporting claims that his trial violated the Constitution. For all of these admitted reasons, this Court should grant the writ.

V. Evidence Of Mr. Kidd's Innocence Continues To Grow.

In addition to the substantial evidence of Mr. Kidd's innocence set out above and in his petition, new evidence has surfaced since the filing of Mr. Kidd's petition. An eye witness to the crime, known to police at the time, has since confirmed that Mr. Kidd was not at the scene of the crime and not one of the shooters. During the initial investigation, Kansas City police officers who responded to the homicide canvassed the neighborhood for witnesses. Within half an hour of the murders, officers interviewed Phyllis Davis on the scene, and she informed them that "Damon Hollowell and Eric [sic] Ramsey were in her driveway working on a car and they told her they heard the shots." A213. On February 12, 1996, Detective Jay Pruetting interviewed Maurice Givens, who said that "Eric [sic] 'Speed' Ramsey was outside working on his car when the shooting was to have occurred. Eric told [Givens] that someone was hollering and then the shooting occurred." A260. Givens was re-interviewed on February 24, and repeated his story, and this time officers

correctly recorded that it was Earl "Speedy" Ramsey who was out front working on his vehicle. A268. In the deposition of Richard Harris, taken March 11, 1997, Harris testified that there was a "guy up the street," Earl Ramsey, who told him that he saw the crime. A734; *see also* A766-68.

No police report has been provided in discovery that reflects any attempt to interview Mr. Ramsey; if such an interview was attempted or conducted, it has never been disclosed. There is also no evidence that Mr. Kidd's public defenders ever searched for Ramsey to find out what he saw. Mr. Kidd's present counsel have made numerous attempts to locate and interview him. Investigator Dan Grothaus spoke to Damon Hollowell, who confirmed that Earl Ramsey was outside on the driveway when the shooting occurred. A1008. Hollowell had brought his car to Earl Ramsey's house at 7020 Monroe so that Ramsey could work on it in his driveway, which was only about 100 feet from the scene of the shooting. *Id.* Ramsey was finally located by two volunteer law students from UMKC, Leslie Wine and Kennae Grigsby, and he told them what he saw that morning.

Ramsey confirms that "[o]n February 6, 1996, I saw George Bryant get murdered in his own front yard." Appendix B at 1. He recalls that he was in his own driveway doing a brake job on someone's car, though he could not remember that the car belonged to Damon Hollowell. *Id.* It was an unusually warm day in February,

and he was "not the only neighbor outside enjoying the weather." *Id.* He wasn't paying much attention when a white car pulled into Bryant's driveway, but he did see a man in a long black trench coat get out of the car. *Id.* Ramsey's attention was drawn by the sound of gunshots from inside George Bryant's house:

> As I was working on my car, I heard a whole bunch of gunshots from inside George's house. That must have been when they shot Oscar in the basement. The next thing I saw was George come running out of his garage the guy in the trench coat came out of the garage behind George. George bumped his head on the garage door and that slowed him down. I think maybe he might have got away if that hadn't happened. Instead, the dude in the trench coat caught George and he shot him. He finished him off right there in the yard. I saw the shooter and two other guys get in the white car and it backed up Monroe and sped away. Then I saw Kayla Bryant come out of her garage holding the telephone. It did not take the police long to get there.

Appendix B at 1.

From his vantage point, Earl Ramsey saw all three men who fled Bryant's house that day, and he is able to definitively say that Ricky Kidd was not one of them:

> I don't know Ricky Kidd personally, but I do know who he is. I know Vincent Kidd, who is Ricky's cousin or uncle, I'm not sure, but they are related and they even look like they are related to each other. I have been around the Kidd family a lot, so I am very familiar with what Ricky looks like. I know that Ricky was not one of the men who shot George because I would have recognized him. Ricky's skin is much lighter than the guy's who shot George. They were much darker than Ricky, especially the guy with the gun. Ricky was definitely not one of the men who was at George's that day. *I can say for a fact that Ricky Kidd is innocent because I saw the whole thing. I was outside and I saw*

> *the whole thing, and Ricky had nothing to do with it. He wasn't even there. They have the wrong guy*.

Id. at 2 (emphasis added.)

This direct evidence of Mr. Kidd's innocence further calls into question all prior decisions to reject Mr. Kidd's consistent attempts to prove his innocence. Viewed in isolation, Ramsey's account is persuasive evidence of innocence. However, "the *Schlup* inquiry, we repeat, requires a holistic judgment about 'all the evidence,' and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. at 539, citing *Schlup v. Delo*, 513 U.S. at 328. Further, previous credibility determinations must be reconsidered. New evidence "may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Schlup v. Delo*, 513 U.S. at 330. Earl Ramsey's eyewitness account of Mr. Kidd's innocence justifies another look at Marcus Merrill's confession, corroborated by Eugene Williams, that clears Mr. Kidd and identifies the Goodspeeds as his co-actors. Ramsey's observations raise questions about Richard Harris' credibility in addition to those already known, including Harris' admissions that he lied to the police to deflect suspicion from himself, that the shooter was not bald like Mr. Kidd, that he was high on drugs at the time of the shooting, that he frequently dealt drugs with the victim and had just consummated a dope deal with George Bryant minutes

before the shooting. Eyewitness evidence that Ricky Kidd was not at the scene of the crime justifies another look at his alibi defense, particularly Deputy Susan Jordan's sworn testimony which established that the State used false evidence to rebut it. Ramsey's account also justifies revisiting the State's strategic decision to let the Goodspeeds go free even though substantial evidence links them to this crime, including the false alibi concocted by Merrill and the Goodspeeds that makes no reference to Mr. Kidd.

Finally, the actual innocence standard "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup v. Delo*, 513 U.S. a 328. This is a moral and constitutional necessity in an American court:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, 397 U.S. 358, 364 (1970). Mr. Kidd's conviction for murder has lost all legal and moral integrity in the face of the growing evidence that he is innocent. Respondent's continued reliance on procedural technicalities while refusing to pursue the real killers is simply obstruction of justice.

CONCLUSION

The evidence supporting Mr. Kidd's innocence continues to grow. The State's reliance on procedural arguments to prevent this Court from reviewing his claims is without merit and disregards the holding of *Schlup v. Delo*. Because Mr. Kidd is innocent, this Court may hear each and every one of his claims—claims supported by significant facts the State does not deny. For all these reasons, this Court should grant the writ and order Mr. Kidd's immediate release from custody.

Respectfully submitted,

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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 January 4, 2016 upon the filing of the foregoing document.

/s/ Tricia J. Bushnell
TRICIA J. BUSHNELL